



Commission for  
**Communications Regulation**

# Competition for the provision of advice and assistance concerning an award of spectrum rights of use in the 2.6 GHz band and additional bands

**Invitation To Tender**

**Reference:** ComReg 13/111

**Date:** 27/11/2013

## Additional Information

All responses to this ITT should be clearly marked:	“Competition for the provision of advice and assistance concerning an award of spectrum rights of use in the 2.6 GHz band and additional bands”
<p>Applications must be submitted by hand or by pre-paid registered post.</p> <p>Applications must be submitted in two hard-copies (together with one electronic copy provided in unlocked PDF format on CD or USB key) to:</p> <p style="padding-left: 40px;">Fiachra O’Doherty Commission For Communications Regulation Abbey Court (Block D,E,F) Irish Life Centre Lower Abbey Street Dublin 1 Ireland</p> <p>Applications must be received by <b>7 January 2014 12:00</b> (Irish Time).</p> <p>Applications which are delivered late will not be considered, subject to the terms of the ITT.</p> <p>No Application may be withdrawn after its acceptance.</p>	

A word version of the ITT is offered by the Commission in good faith for Applicants' convenience. Applicants are advised, however, that in the event of any discrepancy between the PDF version and the word version of the ITT, the PDF version of the ITT shall at all times be the definitive and governing version.

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# 1 Definitions

In the Competition Documents, unless the context otherwise suggests, the following terms and expressions have the following meanings:

- “2.6 GHz band” means the 2500 MHz to 2690 MHz frequency band.
- “Additional Bands” means the radio frequency bands identified by the Commission for potential inclusion in the award process for the 2.6 GHz band including those set out in Appendix 1.<sup>1</sup>
- “Applicant” means a Person who is either a recipient of the ITT or submits an Application in response to the ITT and includes any, some or all the members (individually and/or collectively) of any consortium or group which submits an Application (but does not include any proposed sub-contractors of the Applicant).
- “Application” means the PQQ, Tender and certifications / declarations submitted by an Applicant in response to the ITT and any clarifications provided in respect of it.
- “Award Criteria” means the award criteria set out in Section 8.6.
- “Commission” or “ComReg” means the Commission for Communications Regulation and includes, if the context so admits or requires, its advisors, employees, officers, contractors, representatives, agents and/or the evaluation committee.
- “Competition” means this tender process to procure advice and assistance concerning an award of spectrum rights of use in the 2.6 GHz band and potentially other bands under the proposed Contract.
- “Competition Documents” means any or all of the contract notice, ITT (including all appendices) and/or any clarification documents issued by the Commission.
- “Contract” means the contract to be entered into between the Commission and the Service Provider for the Services which is set out in draft form in Appendix 10.
- “ITT” means this Invitation to Tender, together with the Appendices to this Invitation to Tender, and any clarifications issued by the Commission in respect of this Invitation to Tender.

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<sup>1</sup> Appendix 1 provides information on a number of spectrum bands that could be considered by the Commission for inclusion in 2.6 GHz award process. This information in Appendix 1 is non-exhaustive as over the course of the consultation process other spectrum bands could also require consideration, e.g. new bands are proposed by stakeholders, etc.

- “Lead Firm” means the member of the Applicant nominated by the Applicant as the Lead Firm in its PQQ and which will act as the Commission’s principal contact in respect of this process and subject to the terms of this ITT. The Lead Firm will be required to execute the Contract as the prime contractor if the Applicant is successful.
- “Minimum Requirements” means the pass / fail minimum requirements set out in Section 8.4.
- “Person” means, if the context so admits or requires, an individual, sole trader, company, joint venture, partnership, consortium or any other form of grouping.
- “PQQ” means the Pre-Qualification Questionnaire at Appendix 6 and which Applicants are required to complete and include in their Applications submitted to the Commission and any clarifications provided in respect of it.
- “Preferred Applicant” means the Applicant provisionally selected as the Service Provider in accordance with Section 8 of this ITT.
- “Selection Criteria” means the selection criteria set out in Section 8.5.
- “Services” means the services more particularly described in Section 3 of this ITT and any services which can reasonably be inferred from them.
- “Service Provider” means the Applicant who is awarded and enters into the Contract with the Commission.
- “Services Requirement” means the requirements more particularly described at Section 3.3 of this ITT and any requirements that can be reasonably inferred from them.
- “Tender” means the Applicant’s commercial offering as more particularly described in Appendix 8 and which Applicants are required to complete and include in their Applications submitted to the Commission and any clarifications provided in respect of it.
- “Tender Fee” means the fee tendered by the Applicant and calculated in accordance with Section 4.1 of Appendix 8 of the ITT.



## 2 General Overview

### 2.1 Process Overview

- 2.1.1 The purpose of this process is to award a contract for the provision of the Services by the Service Provider. The Services are described in Section 3.
- 2.1.2 This competition was advertised on [www.etenders.gov.ie](http://www.etenders.gov.ie) and the OJEU by publication of a contract notice.
- 2.1.3 The estimated value of this contract, including the option to extend its term, is above the threshold for application of Directive 2004/18/EC and the corresponding Irish Regulations, namely the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006). As a result, it is subject to this legislation.
- 2.1.4 This process will follow the open procedure as set out in the Award of Public Authorities' Contracts Regulations.

### 2.2 The Invitation to Tender

- 2.2.1 Applicants are invited, pursuant to this ITT, to participate in this process and to submit an Application to provide the Services. The Application should be in the format described in this ITT.
- 2.2.2 The Application should contain two distinct documents;
- the PQQ; and
  - the Tender.
- 2.2.3 These documents should be submitted together with the declarations identified in Appendix 7. The required contents of each of the documents are described further below. All documents should be submitted at the same time in a single Application.
- 2.2.4 The Commission requires Applicants to submit two hard copies, together with one electronic copy provided on CD or USB key, of their Application by hand or by pre-paid registered post to be received by the deadline set out in Section 2.4.
- 2.2.5 Applicants must submit an Application in respect of all of the Services. Variants are not permitted.
- 2.2.6 Applicants may submit one Application only.

## 2.3 The Competition Documents

This ITT document and its accompanying appendices comprise the Competition Documents. These may be supplemented by clarification documents issued by the Commission during the course of the competition which will automatically form part of the Competition Documents.

## 2.4 Process Timelines

2.4.1 The key timelines in relation to this process are as follows:

Deadline for receipt of queries (see section 5 of the ITT)	11 December 2013 16:00 (Irish time)
Deadline for comments on draft Contract (See Section 6.4 and Appendix 10 of the ITT)	11 December 2013 16:00 (Irish time)
Deadline for submission of Applications	7 January 2014 12:00 (Irish time)
Presentation by selected Applicants to evaluation committee (if required)	13 – 24 January 2014
Notification of outcome of evaluation of Applications	January/February 2014
Award of Contract	January/February 2014

2.4.2 The Commission has the right, at its absolute discretion and subject to applicable law, to extend or waive any of the timelines specified in the table above or any other timelines specified in the Competition Documents. The Commission may, at its absolute discretion, give (or not give) notice to Applicants of any such extensions or waivers as it considers appropriate, subject to applicable law.

## 2.5 Requirements

2.5.1 Applications must meet and address all the requirements and must be in the format required by the Competition Documents.

2.5.2 An Application which fails to meet and/or address any or all of the requirements of the Competition Documents and/or which is not in the specified format to the satisfaction of the Commission may be treated as

failing to comply with mandatory conditions of the Competition Documents and may, at the absolute discretion of the Commission and subject to applicable law, be accepted or rejected and eliminated from this process.

## **2.6 Acceptance of Competition Documents**

2.6.1 By receiving a copy of the Competition Documents and/or submitting an Application in response to the Competition Documents, each Applicant unconditionally and irrevocably accepts and agrees to the terms and conditions of the Competition Documents and will be legally bound by them.

## **2.7 Important Notice**

2.7.1 Applicants' attention is particularly drawn to Section 9 of this ITT which contains conditions, disclaimers, requirements and caveats that apply to, and govern, the Competition Documents and this process and which Applicants are legally bound by in accordance with Section 2.6.

# 3 The Services Requirement And Indicative Contract

## 3.1 Introduction

3.1.1 The Service Requirement in broad terms includes:

### 1. Award Strategy

- A. Analysis and recommendations concerning spectrum bands that should be awarded together with spectrum rights in the 2.6 GHz band
- B. Analysis and recommendations concerning the specifics of rights of use in the award bands for the purposes of award strategy and design
- C. Award strategy and spectrum fees/reserve prices)
- D. Deliverables in respect of items (A), (B), (C), including reports to be submitted

### 2. Award Rules / Procedures and Information Memorandum/Tender Document

- E. Deliverables in respect of items (14) and (15), including reports and other material to be submitted.

### 3. Award Implementation

### 4. General

3.1.2 The above categories are described in more detail in Section 3.3.

*Note: To the extent that the Services Requirement or other parts of this ITT (including the pricing formula) refer to or provide any details or information in relation to auctions, this has been done to enable Applicants to appropriately take this potential award strategy into account for the purposes of preparing proposals and costings (given, amongst other things, the potential additional requirements and costs (e.g. software etc.) commonly involved with auctions). For avoidance of doubt, nothing in this ITT means (or should be interpreted as meaning) that ComReg has, in any way, pre-determined the nature of the award strategy or anything else related to it.*

## 3.2 Background

3.2.1 The Commission requires advice and assistance concerning the award of spectrum rights of use in 2.6GHz band and the Additional Bands. This Section sets out some high level background information that is relevant to the Services. It is only intended as a high level overview and does not purport to be exhaustive.

3.2.2 The Commission documents referred to in this ITT are available on [www.comreg.ie](http://www.comreg.ie).

### **The Commission and spectrum management**

3.2.3 The Commission is the statutory body responsible for the regulation of the electronic communications sector (telecommunications, radiocommunications and broadcasting transmission) and the postal sector. We are the national regulatory authority for these sectors in accordance with EU law which is subsequently transposed into Irish legislation. The Commission was established pursuant to the Communication Regulation Act 2002. See the “About Us” section on our website for more information in this regard.

3.2.4 ComReg’s primary objectives in carrying out its statutory functions in the context of electronic communications are to:

- promote competition<sup>2</sup>;
- contribute to the development of the internal market<sup>3</sup>;
- promote the interests of users within the Community<sup>4</sup>;
- ensure the efficient management and use of the radio frequency spectrum in Ireland in accordance with a direction under Section 13 of the 2002 Act<sup>5</sup>; and

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<sup>2</sup> Section 12 (1)(a)(i) of the 2002 Act.

<sup>3</sup> Section 12 (1)(a)(ii) of the 2002 Act.

<sup>4</sup> Section 12(1)(a)(iii) of the 2002 Act.

<sup>5</sup> Section 12(1)(b) of the 2002 Act. Whilst this objective would appear to be a separate and distinct objective in the 2002 Act, it is noted that, for the purposes of ComReg’s activities in relation to ECS and ECN, Article 8 of the Framework Directive identifies “*encouraging efficient use and ensuring the effective management of radio frequencies (and numbering resources)*” as a sub-objective of the broader objective of the promotion of competition.

- unless otherwise provided for in Regulation 17 of the Framework Regulations, take the utmost account of the desirability of technological neutrality in complying with the requirements of the Specific Regulations<sup>6</sup> in particular those designed to ensure effective competition<sup>7</sup>.

For further information relating to the statutory functions in relation to spectrum awards, Applicants should consult the Legal Framework and Statutory Objectives Annex as included as Annex 1 of ComReg Document 13/88.

3.2.5 Applicants may be interested in examining the documents associated with the Commission's two most recent award processes:

1. the Multi-Band Spectrum Award ("MBSA"), completed in 2012 (see: [http://www.comreg.ie/radio\\_spectrum/multi-band\\_spectrum\\_award\\_2012.713.html](http://www.comreg.ie/radio_spectrum/multi-band_spectrum_award_2012.713.html)); and
2. the 1800 MHz Band Award, currently in progress (see: ComReg documents 13/88 and 13/89 available from <http://www.comreg.ie>).

3.2.6 There are potentially various other documents on [www.comreg.ie](http://www.comreg.ie) that may be of interest to Applicants in connection with this process.

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<sup>6</sup> The 'Specific Regulations' comprise collectively the Framework Regulations, the Authorisation Regulations, the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. 337 of 2011) and the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011).

<sup>7</sup> Regulation 16(1)(a) of the Framework Regulations.

## Relevant European decisions concerning the 2.6 GHz band

3.2.7 The Commission would draw attention to the following two European decisions concerning the 2.6 GHz band:

- European Commission (EC) Decision 2008/477/EC on “the harmonisation of the 2500 – 2690 MHz frequency band for terrestrial systems capable of providing electronic communications services in the Community”. Applicants should note, amongst other provisions, article 2(1) which provides:

*“Member States shall designate and subsequently make available, on a non-exclusive basis, the 2 500-2 690 MHz band for terrestrial systems capable of providing electronic communications services, in compliance with the parameters set out in the Annex to this Decision.”*

and recital (2) which provides:

*“The designation of the 2500-2690 MHz band for systems capable of providing electronic communications services is an important element addressing the convergence of the mobile, fixed and broadcasting sectors and reflecting technical innovation. The services provided in this frequency band should mainly target end-user access to broadband communications.”;*  
and

- Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme (the “RSPP Decision”). Applicants should note, amongst other provisions, article 6.2 which provides:

*“In order to promote wider availability of wireless broadband services for the benefit of citizens and consumers in the Union, member states shall make the bands covered by Decisions ....2008/477/EC .... available under terms and conditions described in those decisions. Subject to market demand, Member States shall carry out the authorisation process by 31 December 2012 without prejudice to the existing deployment of services, and under conditions that allow consumers easy access to wireless broadband services.”.*

## 2.6 GHz band in Ireland

3.2.8 The 2.6 GHz (2500 to 2690 MHz) band is currently licensed in Ireland for the provision of pay-television services re-transmitted and distributed using apparatus for Multi-point Microwave Distribution System (MMDS).<sup>8</sup>

3.2.9 In accordance with the Commission's Document 13/31 and Decision 06/13 (which are available at [www.comreg.ie](http://www.comreg.ie)), all MMDS licences currently in force, and all associated spectrum rights of use, will expire on 18 April 2016.

3.2.10 In those documents, the Commission is referred to the potential award of spectrum rights in the 2.6 GHz band following the expiration of MMDS licences as follows:

*"ComReg will undertake a competitive award process for the 2.6 GHz band, so that when the existing MMDS licences expire new rights of use can issue on a service and technology neutral basis (by means of new licences). As a result, holders of the new rights of use may choose to provide any service capable of being delivered using 2.6 GHz spectrum. For instance, they could distribute television programming content, subject to complying with the relevant technical conditions and with any necessary broadcasting content authorisations, or they could adopt some other use"*<sup>9</sup>

3.2.11 The Commission also indicated in Document 12/132 that:

*"...In the present circumstances, ComReg intends to have regard to the following factors prior to issuing any consultation on the nature of such an award:*

- *The possibility of jointly making rights of use to spectrum in other bands available with any new rights of use to 2.6 GHz spectrum. For example, ComReg is currently looking at the potential of including rights of use to 2.3 GHz spectrum, however, there may be other appropriate spectrum bands which should be considered, and ComReg intends to seek views on same prior to finalisation;*
- *Potential spectrum efficiency measures including any functional/technical and economic considerations that might need to form part of a service and technology neutral competitive process for rights of use to 2.6 GHz spectrum; and*

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<sup>8</sup> These existing rights of use attached to MMDS wireless telegraphy licences ("MMDS licences") which were granted under the Wireless Telegraphy (Multipoint Microwave Distribution System) Regulations 2003 (S.I. 529/2003) ("MMDS Regulations").

<sup>9</sup> Page 6 of Document 13/31.



- *Types of conditions attaching to the rights of use to 2.6 GHz spectrum, or on other potential spectrum rights in the future award ....*<sup>10</sup>

### **Other spectrum bands which could be released with 2.6 GHz award process**

3.2.12 At Appendix 1 to this document, the Commission provides some brief information on a number of other spectrum bands which might be suitable for award together with rights of use to the 2.6 GHz band (“Additional Bands”).

### **Summary of the Commission’s statutory framework in context of radio spectrum**

3.2.13 Applicants are referred to a summary of the legal framework in Ireland in relation to radio spectrum as set out in Annex 1 of the Commission’s Document 13/88.

## **3.3 Services Requirement**

3.3.1 The Service Requirement is as follows:

### **1. AWARD STRATEGY**

#### **A. ANALYSIS AND RECOMMENDATIONS CONCERNING SPECTRUM BANDS THAT SHOULD BE AWARDED TOGETHER WITH SPECTRUM RIGHTS IN THE 2.6 GHZ BAND**

1. Recommend an appropriate analytical framework for assessing which of the Additional Bands, if any, together with any others which, in the Service Provider’s opinion should be included in the same award process for 2.6 GHz rights of use, having regard to the Commission’s statutory functions, objectives and duties (including duties in relation to each of the Additional Bands arising from European legislation), and factors including but not limited to:
  - timeframe for availability for rights of use in the Additional Bands;
  - level of harmonisation at European level of each of the Additional Bands;
  - timeframe for consumer equipment availability for each of the Additional Bands;
  - the relationship between rights of use in each of the Additional Bands and the 2.6 GHz band in terms of substitutability and/or complementarity;

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<sup>10</sup> Page 73 of Document 12/132.

- the potential efficiency gains of including any of the Additional Bands (such as arising from the simultaneous award of substitutable and/or complementary spectrum bands) versus the potential complexities with adding any of the Additional Bands; and
  - any other factors relevant to this issue.
2. Assess the suitability of each of the Additional Bands (and any others which, in the Service Provider's opinion, ought to be included for consideration) in light of the above analytical framework.
  3. For those bands not recommended to be awarded together with the 2.6 GHz band, please provide high level advice as to how these bands may ideally be released by the Commission in separate and future award process/es<sup>11</sup>. Such advice shall include:
    - whether one or more of these bands should be awarded in the same award process; and
    - the ideal timing of the award of these bands,

having regard to, amongst other things, the factors set out in paragraph 1 above.

## **B. ANALYSIS AND RECOMMENDATIONS CONCERNING THE SPECIFICS OF RIGHTS OF USE IN THE AWARD BANDS FOR THE PURPOSES OF AWARD STRATEGY AND DESIGN**

4. For each of the bands recommended as being suitable for inclusion for release with rights of use in the 2.6 GHz band and the 2.6 GHz band itself (together "the Award Bands"), consider such aspects of each of the Award Bands as are relevant for the purposes of analysing and recommending the ideal competitive award format for the release of spectrum rights in the Award Bands including, but not limited to:
  - a. the appropriate block/lot size for individual rights of use in each of the Award Bands, noting that EC Decision 2008/477/EC specifies a block size of multiples of 5MHz for the 2.6 GHz band;

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<sup>11</sup> For the avoidance of doubt, any awards recommended under this paragraph are not the subject of the Award Strategy, Award Rules/Procedures and Award Implementation requirements of this ITT. That is, advice and assistance concerning the strategy (sections 1 and 2 of the Service Requirements) and implementation (section 3 of the Service Requirements) of the award of spectrum rights of use in bands not released alongside the 2.6 GHz band will be the subject of separate consultation and procurement process/es.

- b. in relation to each of the Award Bands, conduct analysis and provide recommendations as to whether the Commission should make an administrative decision on the allocation of spectrum to FDD and TDD or devolve this to the market having regard to, amongst other things:
- i. the requirements and recommendations in relevant EC Decisions;
  - ii. whether the potential benefits of a market-based approach would outweigh the potential disadvantages of same (including any increased complexity of the award process); and
  - iii. benchmarking with international best practice and all similar awards conducted in other relevant jurisdictions (e.g. CEPT Administrations and European Member States)<sup>12</sup>.
- c. potential competition-based spectrum caps having regard to, amongst other things, the Commission's objective to promote competition and to encourage the efficient use of spectrum and;
- d. appropriate conditions for rights of use in each of the Award Bands, having regard to the Commission's functions, objectives and duties, including but not limited to:
- i. the duration of any existing rights of use each of in the Award Bands;
  - ii. duration of new rights of use in each of the Award Bands to be awarded;
  - iii. technology- and service-neutrality (including having regard to any relevant European requirements in relation to each of the Award Bands);
  - iv. technical conditions, including conditions relating to co-existence with users within each band and in adjacent spectrum bands for the purposes of award strategy and design;
  - v. coverage and roll-out coverage conditions;
  - vi. quality of service conditions;
  - vii. "use it or lose it" conditions and/or other conditions to avoid spectrum hoarding and ensure efficient spectrum use; and

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<sup>12</sup> Of particular interest would be the factors informing the decisions taken by those countries which implemented:

- the CEPT preferred 2.6 GHz bandplan (fixed usage-mode between FDD and TDD), e.g. Austria, Belgium, Denmark, Finland, Germany, Sweden and United Kingdom; and
- "flexible" 2.6 GHz bandplans (i.e. market led choice between level of FDD and TDD usage), e.g. Netherlands and Norway. Applicants may wish to provide additional insight on this context.

- viii. any other licence conditions considered by the Service Provider as appropriate for inclusion.
5. The above analysis should consider the potential costs and benefits of including various potential licence conditions, in the context of the Commission's statutory functions, objectives and duties, and should be informed by a review of best practice elsewhere in Europe (and other relevant jurisdictions).

### **C. AWARD STRATEGY AND SPECTRUM FEES/RESERVE PRICES)**

6. Based on the analysis and recommendations in (A) and (B), to provide analysis and recommendations in relation to:
  - a. competitive award strategy for the release of rights in the Award Bands; and
  - b. spectrum fees and, if relevant, reserve price/s for spectrum rights in each of the Award Bands.

#### **Competitive award strategy**

7. Analyse the various competitive award types that could be used for the award of rights in the Award Bands, including analysis of all similar awards conducted in other relevant jurisdictions (e.g. CEPT administration or European Member State), and provide recommendations on the most appropriate competitive award format for achieving the Commission's functions, objectives and duties.
8. To the extent that auctions are examined, the Service Provider should consider auction formats including, but not limited to:
  - simultaneous multi-round auctions (SMRA) and variants thereof;
  - combinatorial clock auction;
  - sealed-bid combinatorial; and
  - other innovative auction formats such as reserve auctions, incentive auctions, etc.

### **Spectrum fees and, if relevant, reserve price/s**

9. The Service Provider will be required to analyse and recommend the structure and appropriate level of spectrum fees for rights of use in each of the Award Bands. This analysis must include but is not limited to:
  - review and analysis of fee structures of other relevant spectrum bands in Ireland;
  - benchmarking and international best practice comparison with similar awards conducted in other relevant jurisdictions (e.g. CEPT Administrations or European Member States); and
  - in-depth analysis of different options for determining the structure and level of spectrum fees followed by a recommendation towards the most appropriate approach for Ireland.
  
10. If the Commission decides to adopt an auction as the ideal award format, the Service Provider will also be required to analyse and recommend the optimal level of the reserve price/s that should apply to rights of use in each of the Award Bands. This analysis must include but is not limited to:
  - an assessment of the advantages and disadvantages of using reserve prices for each of the Award Bands;
  - a review of appropriate methodologies for establishing reserve prices in spectrum auctions (such as modelling costs and revenues, benchmarking, and low but non-trivial price-setting);
  - a review of reserve prices used in other countries for each of the Award Bands; and
  - benchmarking the recommended approach to reserve prices with international best practice and all similar awards conducted in other relevant jurisdictions (e.g. CEPT Administrations and European Member States).

### **D. DELIVERABLES IN RESPECT OF ITEMS (A), (B), (C), INCLUDING REPORTS TO BE SUBMITTED**

The deliverables in respect of items (A), (B) and (C) will primarily include the following (and any ancillary services required by the Commission in accordance with Section 4 (“General”) of this Services Requirement).

11. The Service Provider shall submit a report (or a number of separate preliminary reports if reasonably required) setting out its analysis and recommendations in respect of items (A), (B) and (C) above and any ancillary matters identified by the Commission (“First Report”). This First Report will inform the Commission’s consideration of these matters, including its consultation document/s in respect of the proposed award. As such, the Service Provider will prepare and provide the First Report (or reports as the case may be) in a manner that enables publication by the Commission (subject to protection of any properly confidential

information), alongside the Commission's consultation document/s in respect of the proposed award. More general requirements relating to the form of reports and other written material to be provided by the Service Provider is set out later in this Services Requirement.

12. The Service Provider shall review the Commission's consultation document/s and any other expert reports or advice obtained by the Commission, as required, to ensure that material relating to the Service Provider's analysis and recommendations is accurate.
13. The Service Provider shall consider and take account of submissions received from interested parties on the matters addressed in and related to its First Report (and the Commission's consultation document/s more generally) with a view to:
  - refining its analysis and recommendations as set out in its First Report;
  - assisting the Commission's consideration of said submissions both in the context of the matters addressed in the First Report and, if required, more generally; and
  - preparing and submitting a Second Report on the matters set out in (A), (B) and (C) above and any other relevant issues, taking into account submissions received from interested parties and other relevant material. This Second Report will inform the Commission's consideration of these matters, including its response to consultation and further consultation document/s in respect of the proposed award; and
  - depending on the nature of submissions received and other relevant material prepare and submit additional reports and other material as required by the Commission to enable it to conclude its substantive decision-making process in relation to the matters set out in (A), (B) and (C) above. For pricing purposes, Applicants may assume that the number of reports will be as set out in section 3.4 (though, as stated in in Section 4 of this Service Requirement, there may be more than one draft of a particular report before it is finalised). Anything beyond this will fall outside the fixed fee and be subject to a fee to be agreed based upon rates no higher than the tendered hourly rates.

## **2. AWARD RULES/PROCEDURES AND INFORMATION MEMORANDUM/TENDER DOCUMENT**

14. Based on the Commission's preliminary/final substantive decisions in respect of the above matters, the Service Provider will analyse and provide recommendations on the detailed rules and procedures that would give effect to the comparative or competitive award type decided upon by the Commission This analysis might include but is not limited to:

- detailed selection criteria, algorithms and/or other means of determining winners and winning prices and explanatory material;
- conditions for participation;
- description of award/auction stages;
- reducing the potential for collusion and other strategic abuse;
- payment rules and deposit requirements; and
- in the context of an auction being decided upon by the Commission, additional matters such as:
  - round prices and bid increments;
  - scheduling of auction rounds;
  - activity rules in the case of an open auction format;
  - transparency (including anonymity of bidders); and
  - the role and requirement for software for the submission of bids and computation of winners and winning prices.

15. Work undertaken in (14) above should:

- include benchmarking with international best practice and similar awards conducted in other relevant jurisdictions (e.g. CEPT Administrations and European Member States);
- include a review of the practicality of the recommended award rules and procedures, including the availability and potential supply (as provided for by paragraph 20(a) below) of software that could may facilitate the implementation of the recommended award; and
- be set out and documented in a detailed, clear and logical manner suitable for inclusion in the Commission's information memorandum/tender documents.

#### **E. DELIVERABLES IN RESPECT OF ITEMS (14) and (15), INCLUDING REPORTS AND OTHER MATERIAL TO BE SUBMITTED**

The deliverables in respect of items (14) and (15) will primarily include the following (and any ancillary services required by the Commission in accordance with Section 4 of this Services Requirement).

16. The Service Provider shall submit a report (or a number of separate reports if reasonably required) setting out its analysis and recommendations in respect of items 14 and 15 above and any ancillary matters identified by the Commission ("Preliminary Award Rules Report"). This report will inform the Commission's consideration of these matters and, in particular, its draft Information Memorandum document and/or draft Tender Document (as the case may be) ("Draft Information Memorandum") and consultation document/s on same. The Service

Provider will prepare and provide the Preliminary Award Rules Report (or reports as the case may be) in a manner that enables publication by the Commission (subject to protection of any properly confidential information), alongside the Commission's consultation document/s in respect of the Draft Information Memorandum. More general requirements relating to the form of reports and other written material to be provided by the Service Provider is set out later in this Services Requirement.

17. The Service Provider shall also assist the Commission with its preparation and finalisation of the Draft Information Memorandum and consultation document/s on same to ensure that material relating to the Service Provider's analysis and recommendations in the Preliminary Award Rules Report is accurate.
18. The Service Provide shall consider and take account of submissions received from interested parties on the matters addressed in and related to its Preliminary Award Rules Report, the Draft Information Memorandum and the Commission's consultation document/s with a view to:
  - refining its analysis and recommendations as set out in its Preliminary Award Rules Report;
  - preparing and submitting a "Final Award Rules Report" (or "Further Award Rules Report" if required). This Final Award Rules Report (or Further Award Rules Report if required) will inform the Commission's consideration of these matters, including its "Final Information Memorandum" (or further draft Information Memorandum if required) and response to consultation (or further consultation document/s if required);
  - assisting the Commission's consideration of said submissions, including its preparation of the Final Information Memorandum (or further draft Information Memorandum if required) and response to consultation document/s on same (and further consultation document/s if required) to ensure that material relating to the Service Provider's analysis and recommendations in the Final Award Rules Report (or Further Award Rules Report if required) is accurate; and
  - depending on the nature of submissions received and other relevant material prepare and submit additional reports and other material as required by the Commission to enable it to conclude its decision-making process in relation to the matters set out in (13) and (14).

### 3. AWARD IMPLEMENTATION

19. To the extent that the award process decided upon by the Commission is a **comparative evaluation procedure** (or variant), the Service Provide shall provide such assistance as required by the Commission to enable it to complete the procedure. Such steps would include, but not be limited to:



- providing input and assistance for any question and answer (Q&A) or other clarification process/es conducted by the Commission;
  - participation in the evaluation process or otherwise providing assistance in connection with same; and
  - providing assistance in any audit of the evaluation process.
20. To the extent that award process decided upon by the Commission is an **auction**, the provision of such assistance as required by the Commission to implement an auction would include but not be limited to the provision of:

### **Pre-auction requirements**

- a. computer software<sup>13</sup> (and any necessary computer hardware or other equipment) for auction implementation and verification (based on the winner and price determination algorithms described in Section 2 above). Such software should have the facility to produce an accurate audit trail report that is suitable for publication by the Commission and capable of being independently verified (the “Auction Software”);
- b. input and assistance for any question and answer (Q&A) or other clarification process/es conducted by the Commission in respect of auction implementation;
- c. an auction logistics plan which should:
  - i. ensure that all computer software and hardware to be used in auction implementation is suitable and secure in terms of its reliability, the physical robustness of the Information Technology (IT) system, its redundancy and back-up systems;
  - ii. ensure that the method chosen for bidders to communicate bids is secure, efficient and is not subject to tampering or other interference;
  - iii. seek to ensure that the potential for anti-competitive behaviour (such as collusion and gaming) is minimised before and during the auction; and
  - iv. ensure that the computer software to be used in auction implementation has an accurate audit process and that such data reports, if required by the Commission, is suitable for publication.
- d. assistance to the Commission in its validation of the auction implementation algorithms, computer software, auction rules and auction logistics plans;

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<sup>13</sup> This includes the Service Provider’s and third parties’ software.

- e. assistance to the Commission in its conduct of one or more pre-auction stakeholder workshop/s and live mock auction/s for the benefit of prospective bidders and other interested stakeholders;
- f. assistance to the Commission throughout the auction implementation process (including but not limited to addressing any queries raised in relation to same);

#### **Conduct of auction - requirements**

- g. assistance to the Commission in the conduct of the auction which would include, but is not limited to, the following:
  - i. carrying out a secure analysis of bids received to determine the results of each stage of the auction;
  - ii. at the conclusion of each relevant stage of the auction, securely notifying the results to the Commission and providing an audit trail report by which the Commission can verify the results of each stage of the auction. The audit trail report should be produced in such a form that it can be made publicly available and be independently verifiable; and
  - iii. reporting any suspected breaches of the auction rules to the Commission in a prompt and detailed manner and providing assistance to the Commission in any actions which may be taken by it in relation to such breaches; and

#### **Post-Auction requirements**

- h. assistance in relation to any post-auction review and verification process determined by the Commission.

### **4. GENERAL**

The following requirements apply for all work and deliverables identified above and generally.

#### **Ancillary Services**

- 21. The Service Requirement includes the provision of assistance or advice in relation to any tasks or work that is ancillary or related to the Service Requirement as set out above, as may be determined by the Commission acting reasonably. Any such assistance or advice is included within the fixed fee for the Service Requirement.

## **Assumptions and referencing**

22. In carrying out the above tasks, the Service Provider must:

- clearly identify all assumptions made and relied upon by the Service Provider, including consideration of the reasonableness of same (and which assumptions may be interrogated and, if appropriate, rejected by the Commission); and
- provide full references to third party material and ComReg material relied upon in its analysis.

## **Form of Reports**

23. The Service Provider shall submit reports and other written material to the Commission during the term of the Agreement at times and in a format which will be notified to it by the Commission.

24. All reports, analysis and deliverables provided as part of the Services must be in sufficient detail to meet the Commission's requirement and maybe made subject to the approval of the Commission.

25. The Service Provider will be required to clearly identify, in each report, any other written material submitted or relied upon and any confidential information which it believes should be redacted prior to publication (should the Commission decide to publish same).

26. The Service Provider shall engage with and provide appropriate briefings and assistance to, the staff of the Commission (and consider any comments of the Commission) in respect of any or all reports (or any iterations of it prior to its finalisation) provided as part of the Services. The Service Provider shall provide such draft or drafts of its reports to the Commission, as required by the Commission, prior to the finalisation of the report. The Service Provider shall also provide such assistance as is required by the Commission to enable it to prepare and complete the Commission's consultation documents in a timely manner and to ensure that material relating to the Commission's analysis and decisions reflected therein is accurate.

27. The Service Provider shall submit all reports in a secure electronic form only, in both Microsoft Word and Adobe PDF formats using a template as agreed in advance with the Commission.

28. The provision of the Services must be in English and all deliverables must be submitted in English.

## **Reliance on reports**

29. The Commission may decide, at its sole discretion, to adopt, or not to adopt any recommendations in one or more of the reports. Where the Commission adopts such recommendations it may elect to place reliance

on the content of same as the expert opinion of the Service Provider, including in any court proceedings that may ensue. Accordingly, the Service Provider should seek to ensure that all opinions expressed in the reports are within its area of expertise, or are appropriately qualified.

### **Location**

30. The Service Provider will be required to work alongside the Commission's staff and advisors from time to time. Where face to face meetings are required, or onsite work is required, these will be done at the Commission's premises in Dublin.

### **Duration of the Assignment**

31. It is intended that the contract will be continue until the Service Requirement has been completed and the Commission is satisfied that the subject matter of the Service Requirement will not be subject to any legal challenge by way of litigation or otherwise. The Commission will notify the Service Provider in writing when it believes this to be the case, at which point the contract will terminate.
32. The Commission will review the Services being provided periodically and reserves the sole discretion to terminate the contract in accordance with its terms.

## **5. ANCILLARY SERVICES**

33. The Commission has the right to require the Service Provider to provide additional services that are ancillary or related to the Service Requirement as may be determined by the Commission, including assistance in any litigation involving the Commission in relation to the subject matter of the Services Requirement.
34. Work performed under this Section 5 is outside the scope of the fixed fee. It will be required to be carried out at rates no higher than the daily rate specified in the Service Provider's agreement with the Commission, subject to any cap or fixed fee agreed at the time.

### 3.4 Indicative Timetable

Phase	Description	Date
Tender Process to procure consultancy services	Issue of Invitation to Tender	November 2013
Provision of Service Provider's Draft First report	The release of the 2.6 GHz band and suitable additional bands	February/March 2014
Publication of Commission's initial consultation documents, including the Service Provider's First report	The release of the 2.6 GHz band and additional bands	March 2014
Provision of the Service Provider's Draft Second report	<ul style="list-style-type: none"> <li>• Consideration of responses received to initial consultation and other relevant material</li> <li>• Address other relevant issues raised</li> <li>• Update of First report</li> </ul>	April 2014
Publication of Commission's First Response to Consultation (and if necessary additional consultation/s), including publication of the Service Provider's Second report	Preliminary conclusions on, <i>inter alia</i> : <ul style="list-style-type: none"> <li>• bands for inclusion;</li> <li>• award mechanism(s);</li> <li>• methodology for determining spectrum fees and quantum based on same;</li> <li>• other issues raised.</li> </ul>	May 2014
Provision to the Commission of the Service Provider's Draft Third report	<ul style="list-style-type: none"> <li>• Consideration of responses received to Response to Consultation (and any additional consultation/s) and other relevant material</li> <li>• Address other relevant issues raised</li> <li>• Update of Second report.</li> </ul>	July 2014

Phase	Description	Date
Publication of Commission's Response to Consultation and Draft Decision, including publication of the Service Provider's Third report	Draft decision on: <ul style="list-style-type: none"> <li>• bands for inclusion;</li> <li>• award mechanism(s);</li> <li>• methodology for determining spectrum fees and quantum based on same (including any updates to the latter); and</li> <li>• Other issues raised.</li> </ul>	August 2014
Provision of the Service Provider's Draft Fourth report	<ul style="list-style-type: none"> <li>• Consideration of responses received to Response to Consultation and Draft Decision and other relevant material</li> <li>• Address other relevant issues raised</li> <li>• Update of Third report.</li> </ul>	October/November 2014
Publication of Commission's Final Decision, including publication of the Service Provider's Fourth report	Final decision on: <ul style="list-style-type: none"> <li>• bands for inclusion;</li> <li>• award mechanism(s);</li> <li>• methodology for determining spectrum fees and quantum based on same (including any updates to the latter); and</li> <li>• Other issues raised.</li> </ul>	December 2014
Provision of the Service Provider's report on draft award rules and procedures, and assistance to Commission in its preparation of draft Information Memorandum/Tender Document	Based on the Commission's preliminary/final substantive decisions, analysis and recommendations on detailed rules and procedures that would give effect to the competitive award mechanism decided upon	Q4/2014-Q1/2015 (or earlier if award rules based on Commission's preliminary substantive decisions)

Phase	Description	Date
Publication of Commission's consultation on Draft Information Memorandum/Tender Document, including publication of Service Provider's report on same	Specifics of the award process rules and procedures	March 2015
Provision of the Service Provider's updated report on award rules and procedures, and assistance to Commission in its preparation of Final Information Memorandum/Tender Document	<ul style="list-style-type: none"> <li>• Consideration of responses received to Consultation on Draft Information Memorandum and other relevant material</li> <li>• Address other relevant issues raised</li> <li>• Update of report on award rules and procedures</li> </ul>	May 2015
Publication of the Commission's Response to Consultation and Final Information Memorandum, including publication of Service Provider's updated report on award rules and procedures	Finalisation of award process rules	June 2015
Commission's Q&A and Application Process, including provision of Service Provider's assistance in relation to same	Q&A on Award Process and Application Process	June 2015-July 2015
Award process training for participants (if required)	Training of interested parties	September 2015
Award Process	Conduct of actual award process	December 2015 onwards
Preferred Applicant's draft report on outcome of the Award Process	<ul style="list-style-type: none"> <li>• Critical analysis of the award process</li> <li>• Learnings / recommendations for future awards</li> </ul>	February 2016

Phase	Description	Date
Project Meeting Review	Meeting between the Commission and the Preferred Applicant to review project	February 2016
Preferred Applicant's final report to the Commission on the outcome of the Award Process	<ul style="list-style-type: none"> <li>• Critical analysis of the award process</li> <li>• Learnings / recommendations for future awards</li> </ul>	March 2016

**Table 1 Indicative Project Timelines**

## 3.5 Conditions for Performance of Contract

3.5.1 It is the obligation of Applicants to ensure that they are fully aware, appraised of and comply with all the associated responsibilities and legal obligations arising out of and/or in connection with the provision of the Services and hold any required consents etc. This will be a condition of the Contract. This Section provides some general information in relation to particular conditions for performance of the Contract. Relevant websites include:

- [www.revenue.ie](http://www.revenue.ie)
- [www.entemp.ie](http://www.entemp.ie)
- [www.employmentrights.ie](http://www.employmentrights.ie)
- [www.epa.ie](http://www.epa.ie)
- [www.environ.ie](http://www.environ.ie)
- [www.hsa.ie](http://www.hsa.ie)
- [www.hse.ie](http://www.hse.ie)

### Employment and Working Conditions

3.5.2 Applicants are required to acknowledge in their Applications that they have taken account of their obligations relating to employment protection and working conditions that are in force where the Services are to be provided and which are applicable to the Services when drawing up their Applications.

3.5.3 The Service Provider will be required to comply with the obligations relating to employment protection and working conditions that are in force where the Services are to be provided and which are applicable to the Services.

### Tax

3.5.4 It will be a condition of the Contract that the Service Provider must comply with the terms of Department of Finance Circular 43/2006: Tax Clearance



Procedures: Public Sector Contracts, or any replacement.

- 3.5.5 The Service Provider and any sub-contractors (domestic or otherwise) appointed by the Service Provider may be required, as a pre-condition to entry into the Contract, to produce for inspection by the Commission a current Tax Clearance Certificate within one (1) week of request by the Commission or such other period as may be stipulated by the Commission. However, a Tax Clearance Certificate is not required in order to be eligible to submit an Application.
- 3.5.6 The Service Provider and any sub-contractors must continue to hold the current versions of such certificate until the termination of the Contract, and no payment falling due under the Contract will be made by the Commission unless it has in its possession at the time of such payment a current issue of the relevant certificate.
- 3.5.7 Applicants may give the Commission permission to check their tax clearance status by quoting their (Revenue) customer number and tax clearance certificate number. Applicants which provide such numbers are deemed to have agreed to the Commission checking their status in this way.

### **Health and Safety**

- 3.5.8 The Service Provider will be required in providing the Services to comply with, and to allocate adequate resources to enable it to comply with, its obligations under the Safety, Health and Welfare at Work Act 2005, any regulations and statutory codes under it, and any subsequent Safety, Health and Welfare legislation.

## **3.6 Indicative Contract**

- 3.6.1 The Preferred Applicant will be required to enter into the Contract with the Commission. An indicative Contract is enclosed at Appendix 10. Applicants may submit comments or queries in relation to the Contract, in accordance with Section 6.4, by the deadline set out in Section 2.4.1 above and in accordance with the procedure set out in Section 5 below.
- 3.6.2 It is intended that the current tender process will give rise to a Contract between the Commission and the Service Provider for the provision of the Services to the Commission. The Contract will include such clauses relating to early termination which the Commission considers appropriate.

## **3.7 Key Personnel**

- 3.7.1 Applicants are required to identify the names and addresses of the personnel which they propose (presently or in the future) will provide Services under the Contract. It will be a condition of the Contract that such key personnel provide the Services.

## 3.8 Payment for Services

- 3.8.1 There is a fixed fee for the Service Requirement based upon the different scenarios outlined in Appendix 8. The fixed fee must include the provision of any required software (whether third party or not) and all costs expenses associated with the Services.
- 3.8.2 Any additional Services required outside the scope of the fixed fee, based upon the different scenarios outlined in Appendix 8, will, at the Commission's discretion, either be charged based upon rates (no high than) the tendered rates or, using such rates on a fixed or capped fee basis. The Service Provider may be required to justify and substantiate any such fee having regard to the fixed fee for the original Service Requirement.
- 3.8.3 The Service Provider will be paid for the Services in euro on a monthly in arrears basis unless otherwise agreed by the Commission and the Preferred Applicant.
- 3.8.4 The Service Provider will be required to provide a detailed breakdown of the time and work done.

# 4 Applicant Composition

## 4.1 Consortia / Groupings

- 4.1.1 In order to offer the resources and the range and depth of skills required, organisations may wish to collaborate to form a consortium which will then apply as a single Applicant for the purposes of the Competition.
- 4.1.2 If the Applicant is a consortium or grouping of members, the Commission reserves the right to request copies of any agreements between the members and to comment upon them. However, this information should not be provided without being specifically asked to do so.
- 4.1.3 An Applicant will be required under the Contract to use any consortium members identified in its Application for the role specified in it.
- 4.1.4 If an Applicant is a consortium, a single member of the Applicant will be required to enter into the Contract as the prime contractor with all other members of the Applicant assuming the role of sub-contractors. The Commission may, at its absolute discretion, require the latter members to provide collateral warranties or guarantees to the Commission on terms satisfactory to the Commission. The Lead Firm will be required to execute the Contract as the prime contractor if the Applicant is successful.

## 4.2 Lead Firm

- 4.2.1 Applicants must have and nominate a lead firm which will act as the Commission's principal contact in respect of this process and, if applicable, the Contract. In the case of an Applicant comprising a single member, the single member is the Lead Firm. Otherwise, the Applicant must nominate the member of the Applicant which is the Lead Firm where provided for in the PQQ.
- 4.2.2 The Lead Firm is responsible for providing all relevant information to all members and sub-contractors of the Applicant and any other relevant Persons.
- 4.2.3 The Lead Firm will be required to execute the Contract as the prime contractor if the Applicant is successful.

## 4.3 Subcontractors

- 4.3.1 Applicants are required to identify any subcontractors which they propose to use (presently or in the future) in the performance of the Contract.

- 4.3.2 An Applicant will be required under the Contract to use any subcontractors identified in its Application for the role specified in it.
- 4.3.3 An Applicant will remain solely liable under the Contract to the Commission for its and any of its subcontractors' acts, errors or omissions despite the use of any subcontractor.

## **4.4 Conflicts, Collusion and Participation in other Applications**

### **Conflicts between Applicants**

- 4.4.1 An Applicant must disclose in its Application if it, or any of its members, subcontractors or other parties identified in its Application, has any economic, legal, commercial or financial relationship with another Applicant (or part of another Applicant's team) submitting a separate response to the Competition Documents.
- 4.4.2 The Applicant is required in such event to identify the economic, legal commercial or financial relationship in question and provide an accompanying statement stating that it is aware of the matter and that it has been brought to the attention of all persons identified in its Application whilst, at the same time, maintaining the integrity of this competition and confidentiality. The Applicant is also required in such an event to propose suitable protections and procedures to be put in place by the Applicant to protect against or minimise any actual, potential or perceived conflict, collusion or distortion of competition arising. It is recommended that Applicants do this in good time before submitting an Application so that the Commission can determine whether the Applicant is permitted to proceed based on its proposed composition before the Applicant submits its Application as such is at the Applicant's risk.
- 4.4.3 The Commission may investigate the circumstances to determine if the notified matter may result in a conflict of interest, collusion and/or a distortion of competition or perception or risk of such. If it is felt by the Commission that adequate protections and procedures are in place to ensure that competition will not be distorted and any actual, potential or perceived conflicts of interest or collusion will be avoided, the Applicant may be permitted to proceed. On the other hand, if it is felt by the Commission that there is a risk that competition may be distorted or there is an actual, potential or perceived conflict of interest or possibility of collusion, the Applicant will be informed of this and may be instructed that if it still wishes to participate in this process it must go forward as a single Applicant or number of Applicants or without the party concerned or to take any other steps, as considered appropriate by the Commission at its absolute discretion. The Commission also reserves the right acting reasonably, to reject the Application of an Applicant and eliminate it from the process and the Competition if it considers this appropriate or necessary.

## Conflict of interest / bias in the provision of the Services

4.4.4 It cannot be ruled out that the deliverables, advice and assistance resulting from Services provided may potentially, in some shape or form, become the subject of administrative or legal review in connection with this project. If an Applicant has a conflict of interest or bias or there is a perception of such, this may be raised in any such review. It is accordingly critical that an Applicant does not have a conflict of interest or bias, and that there is no potential for a perception of a conflict of interest or bias to be raised, with respect to any Services to be provided and the Applicant concerned.

4.4.5 Bias, for these purposes, includes an inclination, leaning, tendency, bent, a preponderating disposition or propensity, predisposition, predilection and/or prejudice. Bias can include subjective or objective bias. Objective bias, for these purposes, includes where there is a reasonable apprehension or suspicion that the decision-maker might have been biased (ie where, although there was no actual bias, there is an appearance of bias).

4.4.6 The Service Provider will be required, when executing the Contract, to:

- provide a clear statement that it and its relevant personnel have no conflicts of interest or bias with respect to the Services (and any organisation which is the subject of the Services); and that, to the best of their knowledge and belief and having undertaken internal due diligence, there are no circumstances that may potentially give rise to a perception of a conflict of interest or bias; or
- if such a statement cannot be given, a statement of its proposals and measures for adequately and appropriately addressing the risks and issues arising in such respect.

4.4.7 A disclosable conflict of interest or bias or, as the case may be, disclosable perception of a conflict of interest or bias, includes for the above purposes:

- An interest which would or could compromise the independence of the Applicant in its performance of the Services.
- An interest which would or could (in the opinion of the Commission) create the perception that the independence of the Applicant in its performance of the Services might be so compromised.
- A contract (whether oral or written) with any organisation which is the subject of the Services or conceivably may bid for the 2.6 GHz band or the Additional Bands.
- A position of employment, directorship (whether executive or non-executive) or any position of emolument with any organisation which is the subject of the Services or conceivably may bid for the 2.6 GHz band or the Additional Bands.
- Where an Applicant has in the past undertaken work for an organisation

(or a subsidiary or an associated company of an organisation) that might be affected by decisions to be taken by the Commission which are in any way connected with the Services, in circumstances where the firm was privy to confidential information that would give, or might reasonably be perceived to give, the Applicant (and by extension the Commission) an unfair advantage in relation to an organisation that might be affected by any future decisions to be taken by the Commission.

4.4.8 If, with respect to the Contract, an Applicant:

- in the opinion of the Commission, has a conflict of interest or bias, or potentially may be perceived to have a conflict of interest or bias; and
- the Applicant has not proposed suitable proposals and measures to address by appropriate and adequate measures the risks and issues arising in such respect to the satisfaction of the Commission,

the Commission will inform the Applicant that the Commission, in principle, considers the Applicant unsuitable for the Contract and will give it the reasons why. In such case, the Applicant will be entitled to comment upon the Commission's decision in principle and to suggest further means by which to address the risks and issues arising to the satisfaction of the Commission.

4.4.9 The Commission may also unilaterally engage with the Applicant concerned with a view to agreeing, where possible, suitable proposals and measures to address by appropriate and adequate measures the risks and issues arising in such respect to the satisfaction of the Commission.

4.4.10 If agreement is reached to the satisfaction of the Commission, the Applicant will be eligible to be awarded the Contract. If agreement is not reached and the matter not addressed to the satisfaction of the Commission, the Commission will notify the Applicant that it has been deemed unsuitable for the Contract. In that case, the Applicant will not be eligible for the Contract and its Tender accordingly rejected. The decision of the Commission is final in this respect.

4.4.11 If awarded the Contract, an Applicant will be legally required under the Contract to put in place all proposals and measures put forward or agreed in such respect.

4.4.12 Conflicts of interest and relevant measures will not be evaluated against the Award Criteria. However, the information, proposals and measures provided in this respect will be included as a Schedule to the Contract. The Commission may, post award, further engage with the Applicants concerned with a view to agreeing, where possible, any further proposals and measures to address by appropriate and adequate measures the risks and issues arising in such respect to the satisfaction of the Commission. In this case, the Schedule will include all such matters agreed in this way.

4.4.13 Applicants should note that the Contract also contains provisions dealing with conflicts. The Commission has the right under the Contract to prevent the

Service Provider from advising or acting for third parties (including a right to require the Service Provider to discontinue advising or acting for such third parties) during the term of the contract where the Commission considers that such may raise a conflict of interest.

## **4.5 Change in Applicant or Key Personnel**

4.5.1 The Commission recognises that arrangements in relation to consortia and subcontracting may be subject to future change. Applicants should therefore respond in the light of such arrangements as are currently envisaged.

4.5.2 It should be noted, however, that it is not permitted, after an Applicant has submitted an Application, to:

- add, delete or substitute constituent members of the Applicant or subcontractors or other parties identified in the Application;
- alter the intended shareholdings or control of individual members of the Applicant;
- alter the intended responsibilities, functions or duties of individual members of the Applicant, subcontractors or other parties identified in the Application;
- change or replace the key personnel identified in the Application or their intended responsibilities, functions or duties,

without the prior written approval of the Commission.

4.5.3 The Commission reserves the right to withhold approval for any such changes and to disqualify the Applicant concerned from any further participation in the procurement process where any such change is made without the Commission's prior approval or where the Commission's decision is not accepted.

4.5.4 While the Commission is not required to grant approval, approval will only be granted provided in particular the Applicant, in the view of the Commission, continues to meet the conditions for selection as set out in the Competition Documents and would not have received a lower score / grade in the evaluation process which would have impacted upon its ranking or to the extent that it would not have been selected and provided it does not substantially alter the composition of the consortium or team in question, is not to the detriment of the Commission and the Commission is satisfied that the change does not present any risks from a public procurement perspective.

4.5.5 It should be noted that a change to the Applicant will be judged as against the structure, shareholdings, control, duties and responsibilities of the team proposed in the original Application submitted. Similarly, a change to the key personnel will be judged as against the educational and professional

qualifications and experience, and duties, functions and roles, of the key personnel proposed in the original Application.

4.5.6 Any such change is at the risk of the Applicant.

4.5.7 Any proposed changes must be notified to the Commission as soon as possible. Failure to notify any changes may result in disqualification of the Applicant.

4.5.8 The Contract contains provisions dealing with changes in the proposed team during the term of the Contract.

## **4.6 Change in Legal Form of Applicant**

4.6.1 An Applicant may, with the Commission's prior written approval, establish a new legal entity or entities that will take on the position of the Applicant that pre-qualified provided that:

- the conditions for selection as set out in the Competition Documents are satisfied by the new legal entity/entities;
- the new legal entity or entities would not have received a lower score / grade in the evaluation process which would have impacted upon its ranking or to the extent that it would not have been selected;
- the Commission gives its prior written approval to the establishment of such entity or entities for the purposes of this process;
- the Applicant undertakes, prior to such date as may be stipulated by the Commission, that any such new legal entity or entities will be established; and
- the change in legal form of the Applicant is not to the detriment of the Commission.

4.6.2 The Commission reserves the right to set out further requirements in relation to any proposed new legal entity or entities, including requirements for guarantees, warranties or other forms of security from any members of the Applicant or Persons identified in its team.

4.6.3 Any proposed new legal entity or entities must be notified to the Commission as soon as possible.



## **4.7 Registerable Interest**

- 4.7.1 Any registerable interest involving an Applicant and the Commission (or their relatives) must be fully disclosed in the response to this ITT, or should be communicated to the Commission immediately upon such information becoming known to the Applicant in the event of this information only coming to their notice after the submission of the Application.
- 4.7.2 The terms “registerable interest” and “relative” are interpreted as per Section 2 of the Ethics in Public Office Act 1995.
- 4.7.3 Applicants with a registerable interest may be deemed ineligible where this is considered necessary to maintain the probity of the Competition, or alternative steps may be taken to mitigate any issues arising in such respect.

## **4.8 Article 45 Declaration**

- 4.8.1 An Application made by an Applicant whose personal situation falls within any of the mandatory circumstances referred to in Article 45 of the Public Sector Directive 2004/18/EC and Regulation 53 of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006) will be rejected. If it falls within any of the discretionary criteria in Article 45 or Regulation 53, it may be rejected at the discretion of the Commission. This is a pass / fail requirement. Please complete Appendix 5.

## 5 Information And Queries

5.1.1 Applicants may not address queries to, or communicate with, the Commission other than in the manner provided in this Section 5.

5.1.2 Each Applicant must fully satisfy itself as to the nature and requirements of the Competition Documents. In addition, if Applicants consider that any aspect of the Competition Documents are not clear or are ambiguous, contain errors or have any queries regarding the manner in which the evaluation will be undertaken or any of the Minimum Requirements, Selection Criteria or Award Criteria will be applied or are properly understood, this must be raised with the Commission.

5.1.3 All queries regarding any element of the Competition Documents must be forwarded to the Commission by e-mail only to:

**fiachra.odoherty@comreg.ie**

Subject line should be entitled:

**“Questions: ITT for the Provision of advice and assistance concerning an award of spectrum rights of use in the 2.6 GHz band and additional bands”**

A query is deemed to not have been made unless and until it is acknowledged or responded to by the Commission.

5.1.4 Queries should be received by the Commission by the time and date stated in Section 2.4 and prior to submission of an Application. It is the Applicant's responsibility to ensure that all queries are received by the Commission by this deadline. The Commission reserves the right, at its absolute discretion, to respond to queries submitted after this deadline, although it may opt not to do so.

5.1.5 Queries may not be made orally, or by any other means except that provided for in Section 5.1.3. The Commission will not be bound by any oral communications unless, and only to the extent, to which they are subsequently confirmed by the Commission in writing.

5.1.6 Queries from all Applicants will be accumulated and answers, where appropriate and subject to the following sections, will be sent simultaneously to all Applicants to ensure that all Applicants have the same opportunity to respond. The Commission will, if appropriate, circulate copies of all queries submitted pursuant to this Section 5, together with the Commission's responses to them, to all Applicants.

5.1.7 The Commission reserves the right to respond separately to an Applicant's

query if, in the Commission's absolute opinion, the response is particular to that particular Applicant.

- 5.1.8 If an Applicant believes a query relates to a confidential or commercially sensitive aspect of its submission it must mark the query as "confidential" or "commercially sensitive" and specify clear and substantive reasons for this. If the Commission, at its discretion, is satisfied that the query should be properly regarded as confidential or commercially sensitive, the nature of the query and its response will be treated on a confidential basis<sup>14</sup>.
- 5.1.9 If the Commission is of the opinion that it would be inappropriate to answer the query on a confidential basis, it will notify the Applicant accordingly and require the Applicant to either withdraw the query or to raise any objection within one (1) working day of such notification and state the grounds for its objection. If the Applicant does not withdraw the query or raise any objection within the specified period, or Commission is of the opinion that, notwithstanding the objection of the Applicant, the query is not confidential or commercially sensitive, the Commission may issue the query and its response to all of the Applicants.
- 5.1.10 The Commission does not accept responsibility for any communications issued by it which are missed or not received by Applicants or for communications issued by Applicants which are not received or responded to by the Commission. The onus is on Applicants to follow up with the Commission if no response is received.
- 5.1.11 The Commission is not responsible for information relayed (or not relayed) via third parties.
- 5.1.12 It should be noted that all communications in respect of this Competition will be issued to the e-mail address of the nominated contact person as provided by the Applicant in response to the PQQ. Accordingly, Applicants should ensure that such e-mail addresses can receive communications from e-mails with the domain comreg.ie and that they are monitored when the recipient is not in the office or otherwise unavailable. The Commission will not follow up on out of office or message failure notices received.
- 5.1.13 If, as a result of queries/requests, any discussion or other communication between the Commission and an Applicant and/or otherwise, the Commission is of the opinion that a clarification of and/or amendment to the Competition Documents is required to be made and/or additional information is required to be issued, then the Commission is entitled to do so at any time by notice in writing or by circulating it otherwise.

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<sup>14</sup> For further information see the Commission's Guidelines on the treatment of confidential information, ComReg Document 05/24

# 6 Delivery, Content And Format Of Applications

## 6.1 General

6.1.1 Applicants must submit Applications in the format and manner required by Appendix 2, as well as this Section 6.

## 6.2 Delivery of Application

6.2.1 The Commission requires applicants to submit two hard copies (together with one read-only electronic copy on CD or USB key) of the Application by hand or by pre-paid registered post to be received by the deadline set out in Section 2.4.1 above.

6.2.2 The Application should be enclosed in a sealed envelope entitled:

**“Strictly Confidential – Tender for advice and assistance concerning the release of spectrum rights of use in the 2.6 GHz frequency band and additional bands”**

6.2.3 The Application must be delivered to the following address:

**Mr. Fiachra O’Doherty  
The Commission for Communications Regulation  
2nd Floor Reception  
Abbey Court  
Block D, E, F  
Irish Life Centre  
Lower Abbey Street  
Dublin 1  
Ireland**

6.2.4 Please allow sufficient time to deliver Applications to the Commission’s offices as they are not located on ground floor. Delivery to the security desk at the ground floor does not constitute delivery to the Commission.

6.2.5 Applications may not be submitted by e-mail and/or fax.

6.2.6 Applications should be in English and complete and all details requested must be submitted.

6.2.7 Applicants must mark one of the hard copies of the Application as the “Master Copy”. This will take precedence in the event of any identified inconsistency or conflict between it and any other copies of the Application, as the case may

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be. If no copy is marked as the “Master Copy”, the Commission may choose a hard copy at random which will then operate as the “Master Copy” in the same way as if the Applicant had identified it as the “Master Copy”.

6.2.8 Applicants are fully responsible for the safe and timely delivery of their Applications. Late Applications will not, subject to 6.2.9, be accepted by the Commission under any circumstances.

6.2.9 Late Applications may exceptionally be accepted by the Commission where it, at its absolute discretion, considers that the principle of proportionality may require such because of any exceptional circumstances such as where, for example, the lateness results from the fault of the Commission. This would only arise in an exceptional case and no representation or warranty is made to this effect. The Commission may, at its absolute discretion, investigate any relevant circumstances in order to make a determination in this regard and an Applicant is required to provide all such assistance, access and verification as the Commission may require in such respect. The failure by a part of the delivery chain to deliver on time is unlikely to be considered an exceptional circumstance in the normal course.

## 6.3 Format of Application

6.3.1 The format and requirements for Applications are identified in Appendix 2. Applications must address all the requirements set out in this ITT.

6.3.2 An Application must comprise of the following documents:

- the PQQ;
  - This will be evaluated against the Minimum Requirements and the Selection Criteria which are both identified in Section 8. This assessment concerns Applicants’ economic and financial standing, and technical and professional ability/knowledge.
- the Tender; and
  - This will contain the proposed solution and commercial offering of an Applicant. The highest ranked Tender will be awarded the Contract, subject to the terms of this ITT. This assessment concerns the Applicant’s approach to delivery of the Services and its cost. The format of the Application should accord with the format as described in Appendix 2.
- Statements and certificates as set out in paragraph 6.3.6.

6.3.3 The PQQ and Tender should be submitted as separate documents but as a part of a single Application at the same time subject to, and in accordance

with, the Competition Documents. See Appendix 2 in this respect.

- 6.3.4 Applicants must submit an Application in respect of all of the Services specified. Variants are not permitted.
- 6.3.5 The onus is on Applicants to demonstrate the manner in which they meet the Minimum Requirements, Selection Criteria and Award Criteria.
- 6.3.6 The Application must include the following statements and certificates, duly completed and executed by an authorised representative of the Applicant in whatever manner is usual and legally permissible for the Applicant (including, all members of the Applicant) to effect binding contracts
- Acceptance Certificate (see Appendix 4)
  - Article 45 Declaration (see Appendix 5)
  - Declaration of Compliance with Minimum Requirements
- (See Appendix 7)
- 6.3.7 In the case of a consortium or group, these certificates or statements should be executed by each member of the consortium or group on its own behalf.
- 6.3.8 The name of each person signing should be typed or written in block capitals below his or her signature. The official capacity or authority of the persons signing should be shown.
- 6.3.9 Failure to submit the completed and executed certificates and statements may, at the Commission's absolute discretion, result in an Application being deemed invalid and rejected.

## **6.4 Comments on Indicative Contract**

- 6.4.1 A copy of the indicative Contract is enclosed in Appendix 10. The indicative Contract is not open to substantial amendment.
- 6.4.2 Applicants are asked to carefully consider the terms and conditions set out in the indicative Contract.
- 6.4.3 If an Applicant has a comment or query on any provision of the Contract it must submit such comment or query by the deadline stipulated in Section 2.4. It is recommended that specific concerns are identified and proposed acceptable amendments clearly set out. This is because Applicants may not be given a further opportunity in this respect. If considered appropriate, a revised draft of the Contract (and at the Commission's discretion, answers to some or all of the comments raised). All questions and answers will be circulated via e-mail to all Applicants. The Commission will not, however, disclose the identity of any party which has posed a question, except where it is legally obliged to do so.

- 6.4.4 Applicants will be deemed to have accepted in principle any provisions of the indicative Contract if no observations are made in relation to such provisions in accordance with 6.4.3. General statements such as subject to discussion / negotiation should not be made, as they will be of no effect and mean you have wasted your opportunity to engage with the Commission in relation to the Contract.
- 6.4.5 The Commission will consider any observations received in this way and may, at its absolute discretion, accept or reject any observations, proposed amendments or supplemental provisions proposed by an Applicant. The Commission is also entitled, on an individual basis, to seek clarification, raise queries, make a response or propose solutions or amendments where any observations, proposed amendments or supplemental provisions are proposed by an Applicant.
- 6.4.6 The Commission will then, insofar as it elects to make any changes to the Contract, issue a revised draft of the indicative Contract. Applicants will be required to confirm substantial acceptance of the revised draft in order to remain eligible for award of the Contract or, if no revised draft is issued, the original draft of the indicative Contract. The Commission may issue a revised draft before and/or after the deadline for submission of Applications, and may issue further revised drafts.
- 6.4.7 The Commission may, at its absolute discretion, eliminate an Applicant who will not accept, to the satisfaction of Commission, the indicative Contract in substantially the form which it is in or substantially in the revised form proposed by the Commission.
- 6.4.8 The Preferred Applicant, as a condition of its provisional selection, is required to enter into the Contract on terms satisfactory to the Commission.
- 6.4.9 The Commission is entitled to amend, revise or replace at any time during the competition, the provisions of the indicative Contract whether, in particular, on its own initiative or arising from observations, proposed amendments or supplemental provisions made by Applicants for consideration by the Commission. For the avoidance of doubt, it should be noted that the indicative Contract enclosed in Appendix 10 is not open to substantial amendment.

## **6.5 Full Information**

- 6.5.1 Applicants must disclose all relevant information in their Applications and otherwise. Applicants that withhold, or attempt to withhold, any information that the Applicants knows to be relevant, or to mislead the Commission, may, at the Commission's absolute discretion, be rejected and eliminated from this competition.
- 6.5.2 If an agreement or agreements are awarded to an Applicant that has knowingly withheld relevant information or misled Commission, the agreements may, at the Commission's absolute discretion, be rendered null

and void.

## **6.6 Change in Events or Applicant Status**

6.6.1 Any material information or change in events which relates to an Applicant and/or its Application that come to light subsequent to the submission of an Application must be clearly identified and clearly disclosed in writing to the Commission by the relevant Applicant as soon as possible. This includes any material changes in an Applicant's financial or other circumstances or the ownership of an Applicant. The Commission may (but is not obliged to) revisit any assessment and evaluation as a result of any such change on the basis of the information then available to the Commission.

6.6.2 If, as a result of a change in events, circumstances or otherwise, any information given by an Applicant to the Commission, in the Application or otherwise, was (when submitted) or has become (by reference to facts as they then stand) untrue, incomplete or misleading, the Applicant must so inform Commission in writing as soon as it becomes aware of this. This includes, without limitation, information in relation to an Applicant's financial and economic standing.

6.6.3 If it comes to the Commission's attention that:

- there has been a change in events or circumstances concerning an Applicant that could affect Commission's assessment of that Applicant's Application or the decision to pre-qualify or select the Applicant; or
- information submitted by an Applicant was (when submitted) or has become (by reference to facts as they then stand) untrue, incomplete or misleading,

the Commission may (but is not obliged to) revise its assessment of the Applicant's Application (including pre-qualification and its ability to meet the Minimum Requirements) on the basis of the information then available to Commission and, at its absolute discretion, reject or not reject the Applicant's Application.

6.6.4 The Commission may, for example, treat an Applicant as ineligible or decide not to permit an Applicant to continue to participate in the procurement process if the economic and financial standing of the Applicant deteriorates during the procurement process to such an extent that the Applicant no longer has the requisite financial standing to be awarded the Contract.



## **6.7 Sensitive Information**

- 6.7.1 The Commission is designated as a public body pursuant to the provisions of the Freedom of Information Acts 1997 and 2003 (“Freedom of Information Acts”).
- 6.7.2 Accordingly, if an Applicant considers that any information it provides during the course of the process should not be disclosed because of its commercial sensitivity or confidentiality, this must be clearly stated and the information clearly marked as being confidential, commercially sensitive and/or proprietary, and the reasons for this specified. The content and nature of the relevant documentation may then be taken into account by the Commission in considering requests, if any, for access to such information under the Freedom of Information Acts.
- 6.7.3 The final decision on any freedom of information request rests with the Commission, subject to applicable law.
- 6.7.4 Applicants should seek their own legal advice on the applicability of the Freedom of Information Acts.
- 6.7.5 The Commission is not liable or responsible under any circumstances whatever for any loss, damage or suffering of any kind suffered as a result of disclosure of such information before, during or after this Competition and process.

## **6.8 Compliant and Unqualified Application**

- 6.8.1 Applicants must submit a fully compliant Application which is not qualified in any way.

## **6.9 Abnormally Low Applications**

- 6.9.1 The Commission reserves the right to reject an Application if it considers that some or all of the pricing components of that Application are abnormally low. The approach adopted in this respect will be in line with the process provided for by Regulation 69 of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006) and Article 55 of Directive 2004/18/EC, to reject an Application if it considers that some or all of the pricing components of that Application are abnormally low. The Commission shall, by notice in writing and before rejecting the Application, request the Applicant to provide written details of such of the constituent elements of the Application as are specified in the notice.

## 6.10 Pricing Strategies

6.10.1 Applicants' prices for the various scenarios set out in Appendix 8, and the hourly rates required under Appendix 8, must be fair and balanced. Applicants may not try to use strategies to manipulate or distort the price evaluation formula to the detriment of the Commission.

6.10.2 The Commission may require an Applicant to explain and justify variances between different elements of its price. The Commission may reject an Application that cannot justify to the Commission's satisfaction any variance in its pricing where the Commission considers the Applicant to be in breach of section 6.10.1.

# 7 Evaluation Committee And Its Powers

## 7.1 Evaluation Committee

- 7.1.1 The evaluation committee appointed by the Commission will conduct the evaluations. Each member of the relevant evaluation committee will undertake such functions and tasks as each may agree to be allocated to a member or members. The Commission reserves the right, at its discretion, at any time to remove, substitute, appoint, decrease or increase the members of the evaluation committee without notice to Applicants.
- 7.1.2 The Commission, at its absolute discretion, may divide the evaluation committee's responsibilities so that a particular member or particular members have principal responsibility for the evaluation of only specific aspects of an Application to the exclusion of other parts. Nonetheless, while principal responsibility for evaluating specific aspects may be divided, each member of the evaluation committee will be entitled (without any obligation to do so), at its absolute discretion, to consider and comment upon other aspects of Applications, as the case may be, which may be taken into account to the extent considered appropriate by the evaluation committee having regard to the division of responsibilities.

## 7.2 Powers of Evaluation Committee

- 7.2.1 The evaluation committee may nominate one or more persons to conduct certain meetings or discussions or to evaluate or consider certain matters on its behalf during the competition.
- 7.2.2 The evaluation committee is entitled to carry out investigations and undertake such other matters in respect of any matter arising out of or incidental to the competition and/or its evaluations where, in the opinion of the evaluation committee, this is necessary, appropriate or helpful. The evaluation committee may, in particular, seek independent financial and market advice to validate information declared, or to assist in the evaluation.
- 7.2.3 The Commission, at its absolute discretion, may contact and visit Applicants and any or all of their sub-contractors, members, suppliers and/or referees which might be provided in the Application of an Applicant. Applicants, on request, must facilitate same.
- 7.2.4 The Commission reserves the right, at its absolute discretion, to ask Applicants for supplementary information, clarification or elaboration of their Applications to assist in the evaluation of Applications. Applicants should respond to such requests within two (2) calendar days of the date of the request or such later or earlier date as the Commission may specify.
- 7.2.5 Applicants may not, in responding to any such request, amend, supplement or elaborate upon their Applications in any way which would give rise to a

material change that would breach procurement law.

## **7.3 Interviews**

7.3.1 The Commission reserves the right to require any of the Applicants to attend meetings and/or interviews. In such event, the Applicant will bear all its costs and expenses in attending any such meeting. Applicants should note that the Commission may elect to hold such meetings and/or interviews with only those Applicants whom the Commission considers, at its absolute discretion, it necessary to do so.

## **7.4 Right of Waiver, Clarification and Rejection**

7.4.1 If an Application fails to address and satisfy any of the mandatory conditions or other elements of the Competition Documents, or its Application is ambiguous or unclear or requires amplification or clarification in any respect, the Commission may, at its absolute discretion and subject to applicable law:

(a). reject the Application and eliminate the Applicant from this competition;

or

(b). meet with, raise issues and/or seek clarification or supplementary information from the Applicant in respect of the Application and/or the non-compliance; and/or

(c). request the Applicant to provide the Commission with information on items which have not been provided or have been provided in an incorrect form; and/or

(d). waive a requirement if this is, in the opinion of the Commission acting reasonably and permitted by applicable law, appropriate in the circumstances (particularly if it is minor and/or procedural) and to proceed to evaluate such Application in accordance with this ITT provided in the case of (c) to (d) that this would not give rise to a material change that would breach procurement law.

## **7.5 Right to Require Verification**

7.5.1 Applicants may be required, at the Commission's absolute discretion and at any time, to provide evidence verifying any information set out in their Applications. An Applicant may be rejected in the event that it cannot provide evidence verifying information provided in its Application in circumstances where such failure is material in the context of this Competition and its selection. This includes in particular anything set out in the Declaration of Compliance with the Minimum Requirements.

# 8 Overview Of Evaluation Process

## 8.1 Opening of Applications

8.1.1 Applications will be opened in a closed meeting in the presence of such persons as the Commission considers appropriate. Applicants will not be present at the opening of Applications.

## 8.2 Overview of Evaluation of Applications

8.2.1 Applications will be evaluated in accordance with the sections below.

8.2.2 This includes the following stages:

Stage 1 – Compliance Check

Stage 2 – Compliance with Minimum Requirements

Stage 3 – Evaluation of PQQs on the basis of the Selection Criteria.

Stage 4 – Evaluation of Tenders on the basis of the Award Criteria

Stage 5 – Appointment of Preferred Applicant / Verification of Minimum Requirements.

Stage 6 – Final Approval/Execution.

8.2.3 Each stage is sequential so that an Application which does not pass a particular stage will not be assessed in a following stage, but rather will be rejected.

8.2.4 Information considered under, or provided in, the PQQ will not be considered when evaluating Tenders in accordance with the Award Criteria.

## 8.3 Stage 1 – Compliance Check

8.3.1 Applications will be subjected to a check for completeness to ensure that all Applicants have provided a complete and compliant response to all questions and requirements contained in the ITT and have submitted all necessary supporting documentation where required.

8.3.2 Any Applicant who has not provided a complete and compliant Application in accordance with the requirements of the ITT may be eliminated from the competition. This is subject to Section 7.4 of this ITT.

8.3.3 It should be noted that this is an initial check for obvious non-compliance and does not prevent the Commission from subsequently identifying an element of

non-compliance.

## 8.4 Stage 2 - Compliance with Minimum Requirements

8.4.1 In order to reduce bureaucracy and simplify the tendering process, Applicants are no longer asked, in respect of a number of requirements, to supply detailed evidence of capacity in the first instance. Instead, Applicants are required to self-declare compliance with the Minimum Requirement by submitting the Declaration set out in Appendix 7. In the first instance, Applications will be subject to a check to ensure Applicants have submitted an executed copy of the Declaration confirming that they satisfy the Minimum Requirements. Any Applicants who do not meet this requirement will have their Applications rejected, subject to Section 7.4.

8.4.2 The Minimum Requirements are:

Criteria	Minimum Requirement
Banker's Letter	Each member of the Applicant must provide a letter from its current principal banker dated within the past 3 months stating that, to the best of its knowledge, this is the Applicant's principal account and it is currently in good standing.  <b>Applicants must initially declare that they are in a position to obtain such a letter by submitting the Declaration at Appendix 7. No other information is required in the first instance.</b>
Insurance <sup>15</sup>	The Applicant must demonstrate that it has in place or available to it the following minimum levels of insurance: <sup>16</sup> <ul style="list-style-type: none"><li>• Professional Indemnity Insurance: five million euro (€5,000,000) for each and every claim;</li></ul>

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<sup>15</sup> The insurance details provided by the Applicant and any existing arrangements it has in place or proposes to make in relation to insurance are subject to further comment and approval by the Commission and its insurance advisers and the Commission and its insurance advisers may query or seek clarifications or supplemental information on any matters pertaining to insurance as they see fit. The Commission reserves the right, at its absolute discretion, to reject any Application if the terms of insurance which is proposed to be provided are not to the Commission's satisfaction.

<sup>16</sup> If you do not currently have insurance in place which meets the minimum requirement set out above, an ability to take it out can be demonstrated by providing a letter/statement from the organisation's (reputable) insurance company or broker confirming it has such insurance available to it.

<b>Criteria</b>	<b><i>Minimum Requirement</i></b>
	<ul style="list-style-type: none"> <li>• Public Liability Insurance: one million euro (€6,500,000) for each and every claim; and</li> <li>• Employer's Liability Insurance: eleven million euro (€13,000,000) for each and every claim.</li> </ul> <p>The Service Provider will be required at a minimum to take out and maintain at its sole cost and expense for the benefit of the Commission at all times for the duration of the Contract and for such further times as is reasonable and /or may be required in the circumstances the minimum insurance levels stated above.</p> <p>The insurance in each case must extend to subcontractors engaged by the Applicant. The insurance must name the Commission or include an indemnity to principal's clause covering the Commission.</p> <p>If the Applicant is a consortium, each member of the Applicant must meet each of the above requirements or, alternatively, be covered by the insurance of another member if it does not meet a particular requirement.</p> <p><b>Applicants must initially declare that they are in a position to take out and maintain such insurance by submitting the Declaration at Appendix 7. No other information is required in the first instance.</b></p>
<i>Economic and Financial Standing</i>	<p>The Applicant must demonstrate that it has sufficient economic and financial standing to meet its financial and economic obligations anticipated under the Contract and in respect of the Services over the full term of the Contract.</p> <p>The assessment of the Preferred Applicant in this respect will be undertaken in the manner set out in Appendix 9.</p> <p><b>Applicants must initially declare that they have sufficient economic and financial standing by submitting the Declaration at Appendix 7. No other information is required in the first instance.</b></p>

8.4.3 The Applicant provisionally selected as the Preferred Applicant will subsequently be required to provide evidence substantiating that it satisfies



the Minimum Requirements as provided for in Stage 5 (Section 8.7) below.

## 8.5 Stage 3 – Evaluation on the basis of the Selection Criteria

8.5.1 The PQQs will then be evaluated against the Selection Criteria. Any Applicant which does not achieve the minimum score for any of the Selection Criteria will be rejected. All other Applicants will be selected for stage 4. The Selection Criteria are:

Selection Criteria	Explanation	Marks	Minimum Score (xx %)
Design services of a similar nature, size and complexity	Demonstrate experience in the design of competitive spectrum award processes e.g. multi-band vs. single band etc. <sup>17</sup>  <b>Please refer to Section 5.1 of Appendix 6 for further detail.</b>	35	70
Implementation services of a similar nature, size and complexity	Demonstrate experience in the implementation of competitive spectrum award processes. <sup>18</sup>  <b>Please refer to Section 5.2 of Appendix 6 for further detail.</b>	35	70
Experience, educational and professional qualifications (managerial and personnel staff)	Demonstrate that the Applicant's staff has the required level of experience, educational and professional qualifications  <b>Please refer to Section 6 of Appendix 6 for further detail.</b>	30	70
<i>Total</i>		100	N/A

8.5.2 Marks will be awarded in accordance with Appendix 3. Applicants should note that their submission must achieve the minimum percentages set out in the table above for each of the Selection Criteria, in order to avoid elimination

<sup>17</sup> For the avoidance of doubt, a list of work done is not adequate evidence. Copies of terms of reference and reports may be required however this information is not required in the first instance..

<sup>18</sup> For the avoidance of doubt A list of work done is not adequate evidence. Copies of terms of reference and reports may be required however this information is not required in the first instance.

from consideration. In the event that an Applicant is eliminated from consideration due to a failure to reach the minimum percentage threshold for any of the Selection Criteria listed above, then that Applicant's Application (including its Tender) will not be taken into further consideration.

8.5.3 The Commission reserves the right to interview Applicants before completing the final assessment under the Selection Criteria. Applicants who achieve the minimum percentage marks in any of the Selection Criteria above will then have their Tenders evaluated under the Award Criteria in the manner set out below.

## 8.6 Stage 4 – Evaluation on the basis of the Award Criteria

The Tenders of the Applicants selected in Stage 3 will be evaluated against the Award Criteria. The Award Criteria is the most economically advantageous Application from the Commission's point of view in accordance with the following criteria and weightings:

<b>Award Criteria<sup>19</sup></b>	<b>Marks Available</b>	<b>Minimum Score xx%</b>
<b>Criterion 1: Demonstration of Understanding of the Subject Matter of the Services Requirement</b>  <i>Please refer to Section 1 of Appendix 8 for further detail.</i>	20	60
<b>Criterion 2: Proposed Approach</b>  <i>Please refer to Section 2 of Appendix 8 for further detail.</i>	40	60
<b>Criterion 3: Project Plan, Timing and Resources</b>  <i>Please refer to Section 3 of Appendix 8 for further detail.</i>	20	60

<sup>19</sup> The subsections in sections 1 and 2 of Appendix 8 are intended to provide an explanation of what the Commission intends to consider under the relevant criterion. The Commission will take a holistic approach in this respect. There are no sub-criteria or sub-weightings.

<b>Cost</b>  <i><b>This will be evaluated in the manner set out in Section 4 of Appendix 8.</b></i>	20	n/a
Total	100	n/a

8.6.1 Marks will be awarded in accordance with Appendix 3. Applicants should note that their submission must achieve the minimum percentages set out in the table above for each of the Award Criteria, in order to avoid elimination from consideration.

8.6.2 Applicants which do not achieve the minimum percentage scores for any of the Award Criteria will have their Applications rejected. The price of any rejected Applicants will not be taken into account in the evaluation on cost determined in accordance with Appendix 3.

## **8.7 Stage 5 – Elimination/Appointment of Preferred Applicant**

8.7.1 The Tenders will be provisionally ranked in accordance with the Award Criteria and the Applicant who has submitted the highest ranked Tender will be provisionally selected as the Preferred Applicant.

8.7.2 The Commission will notify this Applicant in writing of its provisional ranking and provisional selection as a Preferred Applicant. Any such provisional notification will be conditional on the Preferred Applicant agreeing to, and entering into, the Contract with the Commission on terms satisfactory to the Commission. Furthermore, any notification issued to the Preferred Applicant is provisional, is not binding on the Commission, gives rise to no legitimate expectations and may be revoked at any time prior to finalisation of such appointment.

8.7.3 As a condition of any provisional notification, the Preferred Applicant may be required to comply with any notified conditions to the satisfaction of the Commission.

8.7.4 The Preferred Applicant will, in particular, be required to provide evidence substantiating that it satisfies the Minimum Requirements which it declared it met within seven (7) days (or such less or greater period as may be determined by the Commission at its absolute discretion) of a request to do so. If it fails to do so within the time required, or does not provide sufficient evidence to substantiate that it satisfies the Minimum Requirements the Application of the Preferred Applicant may be rejected and the Preferred

Applicant eliminated from the process.

8.7.5 The Commission reserves the right to de-select and eliminate an Applicant originally provisionally selected as the Preferred Applicant and reject its Application on the basis of non-compliance:

- if it cannot comply with any conditions of its provisional selection;
- if it cannot verify any information contained within its Application (including anything listed in the Declaration of Compliance with the Minimum Requirements) to the satisfaction of the Commission where requested to do so within the time allowed;
- if the Contract is not executed with such Applicant (or it does not comply with any pre-conditions of the Contract);
- if final close is not reached with such Applicant for whatever reason; or
- for any other reason whatever which the Commission considers appropriate.

8.7.6 The Commission is not liable for any costs or expenses incurred by the Preferred Applicant arising out of or in connection with the issue of the notification, its revocation and anything occurring in between such stages.

8.7.7 If the Preferred Applicant is rejected, the Commission will follow the same process with respect to the next provisionally highest ranked Applicant. If a Preferred Applicant who has been rejected had submitted the lowest evaluation price, the evaluation against price will be re-executed without using the original Preferred Applicant with the then lowest evaluation price as the reference point for the price evaluation. This will be done until an Applicant enters into a Contract with the Commission.

## **8.8 Stage 6 - Final Approval / Execution**

8.8.1 The evaluation committee's recommendation as to the execution of the Contract with the Preferred Applicant may be subject to final internal approval within the Commission. The Contract will then be executed.

## **8.9 Unsuccessful Applicants**

8.9.1 Unsuccessful Applicants will be notified of this in writing. The Commission will not enter into the Contract with the Preferred Applicant until fourteen (14) days have elapsed from the date following that on which unsuccessful Applicants were notified by fax or electronic means of their rejection.

# 9 Additional Conditions

## 9.1 Open Applications

9.1.1 All Applications (including unaccepted Applications) must remain open and valid for twelve months from the deadline date of submission, as set out in Section 2.4. Applications are contractually binding offers. No Application may be withdrawn after its acceptance.

## 9.2 Canvassing

9.2.1 Applicants must not canvass directly or indirectly any member of the Commission, officer or employee of Commission, its advisers, or any member of the evaluation committee. Failure to comply with this requirement will result in disqualification from the selection process.

## 9.3 Collusion / Improper Influence

9.3.1 Collusion, or any attempt by interested parties/Applicants to influence, in any way, the procurement process, will result in the disqualification of that/those interested parties/Applicant(s). Examples of such improper influence are collusion, price fixing, bid rotation or market division.

9.3.2 The Commission may disqualify an Applicant if the Applicant is economically, legally, commercially, financially or otherwise related to one or more other Applicants in a way that would impede in any way the incentive that the Applicant should have to compete to be a Service Provider in the competition.

## 9.4 Confidentiality

9.4.1 The Competition Documents are confidential and personal to each Applicant who is in receipt of it and may be only used for the purposes of submitting an Application. Applicants may not release details of the Competition Documents to third parties other than on a confidential basis to those who have a legitimate need to know or with whom they need to consult for the purpose of preparing the Application. All information supplied to Applicants as part of the process remains confidential and is to be treated as such. Failure to comply with the confidentiality of this process may disqualify an Applicant.

## 9.5 Publicity

9.5.1 No publicity whatever regarding the Competition Documents, the competition and/or process is permitted unless and until the Commission has consented in writing, at its absolute discretion, to the relevant communication.

9.5.2 The Commission may issue such communications and generate such publicity in relation to this process as it considers appropriate and without notice to Applicants. The Commission, in particular, has the right to publicise or otherwise disclose to any person information regarding this process, the identity of the Applicants (including the identity of their members and sub-contractors), shortlisted Applicants, the process or the award of the Agreement (including, without limitation, details of the contract price) at any time.

## 9.6 Errors

9.6.1 If an Applicant discovers any error or omissions or lack of clarity in the Competition Documents, the Applicant must immediately notify the Commission in writing of such error, omission or lack of clarity which will be resolved by the Commission in such manner as it considers appropriate.

## 9.7 No Warranty and Termination

9.7.1 The publication of the Competition Documents does not warrant or imply that any Applicant will be awarded the Contract or any Applicant will be awarded the Contract on any particular conditions.

9.7.2 The Commission reserves the right, for any reason whatever at its absolute discretion (in accordance with applicable law):

- to re-run parts of its process;
- to amend the Award Criteria or Service Requirement;
- to reject any and all Applications;
- not to proceed with any evaluation and/or negotiations;
- not to select any Applicant or Application;
- not to provide an Applicant with any additional information;
- not to implement any arrangement contemplated by the Competition Documents;
- to withdraw from discussions;

- to suspend the process or discussions;
- not to award any Contract;
- to procure the Services by alternative means; and/or
- to terminate the Competition Documents, the process and/or the competition at any time and without reason.

## **9.8 Own Costs**

9.8.1 Each Applicant is fully responsible for the entirety of all expenses and/or costs it incurs in the presentation or submission of an Application or in participating in this process and Competition. The Commission is not responsible for and will not pay for any expense or cost incurred or loss suffered by an Applicant in the preparation or submission of its Application, the participation in this competition or otherwise. Further, the Commission is not responsible for any travel or accommodation costs incurred by the Applicant unless previously agreed in writing by the Commission.

## **9.9 Exclusion of Liability**

9.9.1 No representation, warranty or undertaking, express or implied, in respect of any error or misstatement by or on behalf of the Commission is made or given to any Applicant and no responsibility or liability is accepted by Commission for the accuracy or completeness of the Competition Documents or omissions from them. Any and all liability and/or loss of any nature whatever and however arising (including liability and/or loss in any way resulting from the process and Competition which arises out of the Competition Documents) is hereby expressly disclaimed and excluded by the Commission, including as a result of flaws in the process. This Section 9.9 operates to the fullest extent permitted by applicable law.

## **9.10 No Contract**

9.10.1 The Commission is under no obligation to award the Contract to the lowest priced, most economically advantageous or any Application it may receive.

## **9.11 Own Advice**

9.11.1 Applicants are responsible for obtaining their own financial, taxation, legal, technical, investment and other appropriate advice, and undertaking their own due diligence, in relation to this process, the Competition Documents, the Services, Contract and all information provided or made available to them, at their own cost and expense.

## **9.12 Legal Obligations**

9.12.1 No contractual obligations in relation to the Services, the process and/or the competition on the part of the Commission will arise unless and until an agreement has been entered into, formally executed in writing and delivered between the Commission and the Service Provider and any conditions precedent to such have been fulfilled. Legal and contractual obligations are imposed on Applicants who download or respond to the Competition Documents and the Commission reserves the right to enforce such obligations. However, the Competition Documents do not give rise to any enforceable contractual obligations against the Commission and no collateral contract is entered between the Commission and any Applicant in such respect.

## **9.13 Waiver**

9.13.1 The failure or neglect by the Commission to enforce any provision of the Competition Documents is not (and will not be deemed to be) a waiver of that provision and does not prejudice the Commission's right to take subsequent action in respect of such provision.

9.13.2 Subject to compliance with applicable law, the Commission reserves the right, at its absolute discretion, to accept or reject any or all Applications and/or to waive any irregularity, non-compliance or informality in any Application or failure to comply with a timeline.

## **9.14 Timelines**

9.14.1 The Commission has the right, at its absolute discretion and subject to applicable law, to extend or waive any of the timelines specified in the Competition Documents. The Commission may, at its absolute discretion and subject to applicable law, give (or not give) notice to Applicants of any such extensions or waivers.



## **9.15 Amendments**

9.15.1 The Commission reserves, at its absolute discretion, the right, at any time until the conclusion or termination of the process, to amend or modify any documents, information, data, procedures, the Services, rules and/or timelines in or related to the Competition Documents or process in any respect by way of clarification, addition, deletion or otherwise. The Commission will inform Applicants of any such amendments or modifications, if appropriate.

## **9.16 Conclusion of Process**

9.16.1 The process and the competition will be concluded when the Service Provider has been awarded the Contract, have entered into and delivered it and the Contract has come into force (and any conditions precedent to the effectiveness of them have been fulfilled), or if the process and Competition is terminated by the Commission in accordance with the provisions of the Competition Documents.

## **9.17 Governing Law**

9.17.1 The Competition Documents and any matter related to or in any way connected with the Competition Documents and this process are governed by and construed in accordance with Irish law and subject to the exclusive jurisdiction of the Irish courts.

# Appendix: 1 Potential Additional Bands

- a. This appendix provides information on spectrum bands that could be considered by the Commission for inclusion in 2.6 GHz award process. The bands identified are non-exhaustive.
- b. The information in this appendix should be read in conjunction with *RSPG Opinion on Strategic Challenges Facing Europe in Addressing the Growing Spectrum Demand for Wireless Broadband (RSPG13-521rev1)*<sup>20</sup>. This document provides a potential roadmap for the harmonisation of spectrum bands for wireless broadband in Europe.
- c. Table 1 below presents information on a number of spectrum bands which were highlighted in RSPG13-521rev1 and its current use in Ireland.

Bands	Potential Bandwidth (MHz) <sup>21</sup>	Current use in Ireland	Status of Harmonisation in Europe
<b>700 MHz</b>	<b>~86</b>	Currently allocated to and used for the provision of Digital Terrestrial Television ('DTT') services.  Two DTT Multiplex Licences have been issued to RTE, which expire in 2019.	Under study for Mobile/Fixed Communication Networks ('MFCN') by CEPT. EC Decision expected circa mid-2016. See RSCOM12-37rev3.
<b>1452 - 1492 MHz</b>	<b>~40</b>	No current usage of the band.	Nearing an Electronic Communications Committee ('ECC') decision on harmonisation for MFCN supplementary down-link ('SDL') usage.  See ECC Report 188 on the future harmonised use of the band in CEPT.
<b>2.3 GHz</b>	<b>~100</b>	Part of the band (2307-2326 MHz / 2407-2427 MHz) is used for the Rurtel <sup>22</sup> service	Sharing studies for Broadband Wireless Systems ('BWS') complete (ECC Report 172).

<sup>20</sup> The Commission has excluded bands identified in this document which it does not believe will be available for assignment within the timeframe for release as set out in section 3.4 of the ITT.

Document available at <http://rspg-spectrum.eu/staging/rspg-opinions-main-deliverables/>

<sup>21</sup> Subject to further consideration and ongoing harmonisation activities etc.

<sup>22</sup> The Rurtel (Rural Telecommunications) service operated by Eircom provides wireless telephony services to customers in rural areas of the country where it is not economically viable to provide copper to the premises

Bands	Potential Bandwidth (MHz) <sup>21</sup>	Current use in Ireland	Status of Harmonisation in Europe
		under fixed point-to-multi-point licences. These licences are for specific areas.	Highlighted for potential licensed shared access ('LSA') use.  Nearing an ECC decision on harmonisation for MFCN usage.
<b>3.6 GHz</b>	<b>~400</b>	Currently used for the provision of Fixed Wireless Access Local Area ('FWALA') services.  The 3.6 GHz FWALA licensing scheme shall end on 31 July 2017 and all FWALA licences still active at that date shall expire and shall not be renewed. <sup>23</sup>	EC Decision 2008/411/EC obliges terrestrial ECS use.  Art 6.2 of EC RSPD Decision 243/2012/EU promotes broadband use.  ECC Decision 11(06) designates band for MFCN (including IMT) <sup>24</sup> .  Draft CEPT Report 49 (published 2013) proposes an updated preferred channelling arrangement and a BEM.

**Table 1: Spectrum Bands highlighted for Wireless Broadband in RSPG13-521rev1 – Information on current use**

- d. Table 2 below presents information on a number of other bands which could be considered and its current use in Ireland.

Bands	Potential Bandwidth (MHz) <sup>25</sup>	Current use in Ireland	Status of Harmonisation in Europe
<b>410 - 414 / 420 - 424 MHz</b>	<b>2x4</b>	Two Wideband Digital Mobile Data Services ('WDMDs') licences issued. Licences expire Dec 2015.	Currently designated for PMR/PAMR within CEPT (ECC Dec 04(06)).  No harmonised approach.
<b>872 - 876 / 917 - 921 MHz</b>	<b>2x4</b>	One WDMDs licence issued Licence expires Dec 2015.	Currently designated for PMR/PAMR within CEPT (ECC Dec 04(06)).  No harmonised approach.
<b>26 GHz</b>		Part of Spectrum Band	Preferred Channel Arrangements set out

<sup>23</sup> See the Commission's Document 10/29

<sup>24</sup> A revised version of this Decision is under public consultation at present

<sup>25</sup> Subject to further consideration and ongoing harmonisation activities etc.

Bands	Potential Bandwidth (MHz) <sup>25</sup>	Current use in Ireland	Status of Harmonisation in Europe
<b>National Blocks</b>		Licensed for Point to Point (P2P) and Point to Multipoint services under 26 GHz. National Block Licences. Expiry date in July 2018. Some unassigned blocks available.	in ERC Recommendation 13-02.
<b>10.0 – 10.154 GHz</b>	<b>154</b>	Not used in Ireland <sup>26</sup> .	No harmonised approach.

**Table2: Other spectrum bands – Information on current use in Ireland**

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<sup>26</sup> See the Commission's Documents 09/03 and 09/36 for further details  
Tender title: Competition for the provision of advice and assistance concerning an award of spectrum rights of use in the 2.6 GHz band and additional bands.

## Appendix: 2 Application Format

The Contract and the Services will be conducted in the English language and all deliverables must be submitted in English.

The Application should comprise the following documents:

- Acceptance Certificate (see Appendix 4)
- Article 45 Certificate (see Appendix 5)
- Declaration of Compliance with Minimum Requirements (see Appendix 7)
- Pre-Qualification Questionnaire (see Appendix 6)
- Tender (see Appendix 8)
- Statements required regarding Conflicts of Interest (see Section 4.4)

The above documents must be separated with clearly marked divisions to facilitate easier accessibility and referencing.

The specific information to be included in the PQQ and Tender are identified in the Appendices referred to above.

Please carefully review the requirements of the ITT.

In creating your Application, it is in your interest to tailor it to respond to the various requirements and criteria identified in the ITT, particularly the Minimum Requirements, Selection Criteria and Award Criteria.

# Appendix: 3 Marking Scheme

Applications which are assessed against the Selection Criteria and Award Criteria will be marked against each of those criteria using the marking scheme set out below.

Applicants will be given a percentage score against each of the Selection Criteria or, as the case may be, Award Criteria set out in Section 8 in accordance with the following table. This is with the exception of the cost Award Criterion which will be marked as provided further below.

The percentage score awarded within each range will be determined as considered appropriate by the evaluation committee having regard to the description below and the Applicant's response to the relevant criterion.

Percentage Score	Meaning
0	No answer provided or Applicant completely fails to fulfil the criteria.
1-20%	Poor: Application significantly fails to fulfil the criteria or the Application contains significant shortcomings or inconsistencies.
21 – 40%	Fair: Application does not FULLY fulfil the criteria: the Application only partially fulfils the criteria.
41 – 60%	Good: Application fulfils the criteria in most material respects, but is lacking or inconsistent in others.
61 – 80%	Very Good: Application adequately fulfils the criteria in all material respects but does not give the Commission a high level of confidence that it has done so.
81 – 100%	Excellent: The Application is so complete and detailed that it gives the Commission a high level of confidence that the Application completely fulfils the criteria.

The percentage score will then be multiplied by the marks available under the relevant Selection Criterion or, as the case may be, Award Criterion to give the score under the criterion concerned.

The marks awarded under the cost Award Criterion will be calculated in accordance with the following formula:

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Where:

“Tender Fee for N”, is the Tender Fee submitted by the relevant Applicant (N in the above example)<sup>27</sup>;

Lowest Tender Fee, is the lowest Tender Fee received from the responsive valid Tenders.

Maximum points: 20 marks.

The Lowest Tender Fee is determined by reference to Applications which have not been rejected or failed to pass a particular stage of, or minimum score in, the evaluation process set out in Section 8.

There is no negative marking. Marks are awarded to two decimal points. There will be no rounding up or down of decimals. Using the weighting (20) for the cost Award Criterion, the maximum marks that can be achieved under the cost Award Criterion is 20.

In order to facilitate the evaluation, the Tender Fee will be computed on the basis set out in Section 4.1 of Appendix 8.

The above in no way gives rise to any suggestion, guarantee or warranty in respect of the volume, quantity or value of Services that may be drawn down by the Commission pursuant to the Contract.

The Commission reserves the right not to commission any Services under the Contract.

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<sup>27</sup> Please refer to Section 4.1 of Appendix 8.

# Appendix: 4 Acceptance Certificate<sup>28</sup>

(Please sign and submit with PQQ and Tender)

I hereby agree and declare for and on behalf of the Applicant entity identified below that:

- it has taken account of its obligations relating to employment protection and working conditions that are in force where the Services are to be provided when drawing up its Application; and
- it will comply with the obligations relating to employment protection and working conditions that are in force where the Services are to be provided, if selected to provide the Services.

In addition, I hereby agree and declare for and on behalf of the Applicant entity identified below that:

- such entity fully, unconditionally and irrevocably accepts the terms and conditions of the Competition Documents and is fully and legally bound thereby;
- to the best of its knowledge, the information submitted in the Application, and the documentation submitted with it, are correct and accurate and not misleading in any respect and all relevant information has been disclosed;
- any registerable interest (as defined in section 2 of the Ethics in Public Office Act 1995) involving an Applicant and the Commission (or their relatives) has been fully disclosed in the Application;
- any actual, potential or perceived conflicts required to be disclosed pursuant to Section 4.4 have been so disclosed;
- the contents of the Application is legally binding on the Applicant; and
- it unconditionally accepts the terms of the Contract in the form most recently circulated by the Commission.

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<sup>28</sup> Applicants which comprise a group or consortium are referred, in particular, to Section 4.1 of the ITT. Each member of the Applicant must execute this certificate.



Signed as an authorised signatory  
for and on behalf of the Applicant  
entity identified below  
in the presence of:

Authorised Signatory: \_\_\_\_\_

Name: \_\_\_\_\_

Position (Job Title): \_\_\_\_\_

Applicant Entity: \_\_\_\_\_

Date: \_\_\_\_\_

Witness Name: \_\_\_\_\_

# Appendix: 5 Article 45 Certificate<sup>29</sup>

**THIS DECLARATION MUST BE COMPLETED AND SIGNED BY A DULY AUTHORISED OFFICER OF THE APPLICANT**

Name of Applicant:	
Address:	

1. On behalf of the above named organisation I hereby declare that none of the circumstances specified in Article 45 of Directive 2004/18/EC and Regulation 53 of SI 329 of 2006 apply to the above named organisation (except, if at all, to the extent indicated in the tables in 2 and 3 below).
2. Has your organisation or any director or partner or any other person who has powers of representation, decision or control in respect of your organisation been convicted of any of the following offences?

Answer Yes / No

No.	SECTION	YES	NO
		Please ✓	
A.	Participation in a criminal organisation (as defined in Article 2 of Council Joint Action 2008/841/JHA).		
B.	Corruption (as defined in Article 3 of the Council Act of 26 May 1997 and Article 2(1) of Council Joint Action 2003/568/JHA respectively).		
C.	Fraud (within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities).		
D.	Money laundering (as defined in Article 1 of Council Directive 2005/60/EC of 26 October 2005 on prevention of the use of the financial system for the purpose of money laundering).		

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<sup>29</sup> Applicants which comprise a group or consortium are referred, in particular, to Section 4.1 of the ITT. Each member of the Applicant must execute this certificate.

3. Is any of the following true of your organisation? Answer Yes / No

No.	SECTION	YES	NO
		Please ✓	
A.	It is bankrupt or is being wound up, its affairs are being administered by the court, it has entered into an arrangement with creditors, it has suspended business activities or is in any analogous position arising from a similar procedure under national laws or regulation in this or any other jurisdiction.		
B.	It is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up, or under administration by the court, or for an arrangement with creditors, or of any other similar proceedings under national laws or regulations in this or any other jurisdiction.		
C.	It has been convicted of an offence concerning its professional conduct by a judgment which had the force of res judicata.		
D.	It has committed an act of grave professional misconduct in the course of your business or profession.		
E.	It has supplied information that is inaccurate or false in relation to the submission.		
F.	It has failed to fulfil its obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which it is established or with those of the country of the contracting authority.		
G.	It has failed to fulfil its obligations relating to the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the contracting authority.		

*I certify that the information provided above is accurate and complete to the best of my knowledge and belief and not misleading in any respect. I understand that the provision of inaccurate or misleading information in this declaration may lead to my organisation being excluded from participation in this and/or future competitions.*

Signature		Date	
Name		Position	
Phone		Email	
Entity/Company			

# Appendix: 6 Pre-Qualification Questionnaire

Each section of the Pre-Qualification Questionnaire must be separated with clearly marked tab dividers to facilitate easier accessibility and referencing.

## Section 1: Applicant Details

Please complete the following tables:

Lead Firm Name:	
a) Your organisation is bidding to provide the services required as an independent entity.	YES / NO (please delete)
b) Your organisation is bidding in the role of prime contractor and intends to use third party sub-contractors to provide some services.	YES / NO (please delete)
c) The Applicant is a consortium.	YES / NO (please delete)

If the Applicant is a consortium, joint venture or other arrangement, please complete the table below.

Please explain current legal form of consortium (i.e. incorporated / unincorporated joint venture / other).	
If the consortium is not currently incorporated, is it proposed to do so for the purposes of the Contract if successful?	YES / NO (please delete) If yes, please provide proposed details in respect of arrangement.
Are there any legal agreements between the consortium members?	YES / NO (please delete) If yes, please give details of the agreements:

Please indicate in the table below (by inserting the relevant company/organisation name) the identity and roles of each member (including the Lead Firm) and any proposed sub-contractors of the Applicant.

Organisation	
Lead Firm / Member / Sub-contractor of Applicant	
What Services will they directly deliver / proposed role and percentage involvement.	
Organisation	
Lead Firm / Member / Sub-contractor of Applicant	
What Services will they directly deliver / proposed role and percentage involvement.	

This section should be completed in respect of the Lead Firm of the Applicant, as well in respect of each member or sub-contractor of the Applicant.

Organisation Name	
Type of Organisation (e.g. limited / unlimited company, partnership, sole trader etc.)	
Address	
Town/City	
Postcode	
Country	
Website (if any)	
Contact Name	
Phone Number	
E-mail	

*Please note that the Commission will generally only communicate with the contact of the Lead Firm.*

Please disclose any information required pursuant to section 4.4 of the ITT.	
Please disclose any information required pursuant to section 4.7 of the ITT.	
Please disclose any information required pursuant to section 6.5 of the ITT.	

## **Section 2: Bankers letter – Minimum Requirement**

Each member of the Applicant must provide a letter from its current principal banker dated within the past 3 months stating that, to the best of its knowledge, this is the Applicant's principal account and it is currently in good standing.

Applicants are required to self-certify that this requirement is met by submitting the Declaration in Appendix 7 in the first instance. No other information is required in this respect in the first instance.

Please see Sections 8.4 and 8.7 of the ITT for more information in this respect.

## **Section 3: Insurance – Minimum Requirement**

The Applicant must demonstrate that it has in place or available to it the following minimum insurance required set out in the table at Section 8.4.2.

Applicants are required to self-certify that this requirement is met by submitting the Declaration in Appendix 7 in the first instance. No other information is required in this respect in the first instance.

Please see Sections 8.4 and 8.7 of the ITT for more information in this respect.

## **Section 4: Economic and Financial Standing – Minimum Requirement**

The Applicant must demonstrate that it has sufficient economic and financial standing to meet its financial and economic obligations anticipated under the Contract and in respect of the Services over the full term of the Contract.

Applicants are required to self-certify that this requirement is met by submitting the Declaration in Appendix 7 in the first instance. No other information is required in this respect in the first instance.

Please see Sections 8.4 and 8.7 of the ITT for more information in this respect.



## **Section 5: Services of a similar nature, size and complexity – Selection Criteria**

### Section 5.1: Demonstrate experience in the design of competitive spectrum award processes.

The Applicant must demonstrate that it has in the past 5 years (from the date of the contract notice) provided (or is currently providing) services of a similar nature, size and complexity to the service requirements of this Competition set out in Sections 1 and 2 of the Service Requirement (see section 3.3 of the ITT).

More specifically, to pass this requirement, the Applicant must, in particular, demonstrate that it (or it with the aid of sub-contractors or as part of a consortium) has previously provided services inclusive of the following in the design of comparable competitive spectrum award processes including:

- a. the formulation of spectrum fees (including spectrum usage fees and auction reserve prices) based on international benchmarking or other methodologies;
- b. the design of an appropriate spectrum release mechanism having considered other mechanisms used for spectrum release internationally;
- c. the provision of advice relating to spectrum release matters including analysis of setting of lot sizes, the substitutability and compatibility of spectrum bands and the suitability of different duplex solutions;
- d. the formulation of detailed rules for the implementation of an award process (e.g. an auction, beauty contest, or other mechanism) including and relevant price determination algorithms used; and
- e. provision of advice regarding the setting of appropriate licence conditions, having regard for national laws and competition concerns.

### Section 5.2: Demonstrate experience in the implementation of comparable competitive spectrum award processes.

The Applicant must demonstrate that it has in the past 5 years (from the date of the contract notice) provided (or is currently providing) services of a similar nature, size and complexity to the service requirements of this Competition set out in Section 3 of the Service Requirement (see section 3.3 of the ITT).

More specifically, to pass this requirement, the Applicant must, in particular, demonstrate that it (or it with the aid of sub-contractors or as part of a consortium) has previously provided services inclusive of the following in the implementation of comparable competitive spectrum award processes including:

- a. the provision of secure and tested software or hardware for the implementation of spectrum award processes as applicable;
- b. the monitoring of award processes for compliance with process rules; and
- c. the validation of award process results.

### Guidance.

Please note the following non-exhaustive guidance for the purposes of section 5.1 and 5.2:

- “nature”: this refers, in particular, to services relating to the release of spectrum bands for IMT, wireless broadband or similar usage;
- “scale”: this refers, in particular, to services relating to the concurrent release of multiple spectrum bands; and
- “complexity”: this refers, in particular, to services relating to the concurrent release of multiple spectrum bands where rights to such bands may be substitutable and/or complementary to one another.

## **Section 6: Experience, educational and professional qualifications (managerial and personnel staff) – Selection Criteria**

The Applicant must demonstrate that it has the level of experience, educational and professional qualifications that are required to provide the Services.

In order to meet this threshold, the Applicant must demonstrate that the proposed personnel collectively meet the following requirements:

- experience in the provision of services of a similar nature, size and complexity both on the award design and award implementation phases;

- experience in the provision, through either development or procurement, of bespoke auction software for the successful implementation of services of a similar nature, size and complexity;
- experience in the development of pricing algorithms services of a similar nature, size and complexity; and
- that senior and intermediate level<sup>30</sup> proposed personnel include 'expert(s)' or 'specialist(s)'<sup>31</sup> in the field of auction design or game theory.

Note: the threshold is demonstrate that the above requirements are met by the proposed personnel collectively – as a result, there is no requirement for each individual to meet all of the above requirements.

The required Services are described in Section 3 of this ITT.

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<sup>30</sup> See Section 4.2 of Appendix 8 for the definition of these grades

<sup>31</sup> Expert or specialist in this context can apply to proposed personnel with extensive experience with services of a similar nature, size and complexity or proposed personnel with academic renown in the field

# Appendix: 7 Declaration Compliance<sup>32</sup>

of

To Commission for Communications Regulation (ComReg)

I declare for and on behalf of the Applicant entity identified below that the Applicant meets the Minimum Requirements identified in Section 8.4 and Appendix 6 of the *ITT for the provision of advice and assistance concerning the release of spectrum rights of use in the 2.6 GHz frequency band and additional bands*.

Furthermore, I will provide any required evidence to substantiate this declaration to the Commission within seven or less days to support this declaration when requested to do so.

It is understood that the Application may be rejected if, upon request, it does not demonstrate to the satisfaction of the Commission that the Minimum Requirements are all met.

Name of Company (Applicant entity) Tendering: \_\_\_\_\_

Postal Address: \_\_\_\_\_

Contact email address: \_\_\_\_\_

Signature: \_\_\_\_\_

Print name of signatory: \_\_\_\_\_

Capacity or Authority of signatory: \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 2013

\_\_\_\_\_

<sup>32</sup>Applicants which comprise a group or consortium are referred, in particular, to Section 4.1 of the ITT. Each member of the Applicant must execute this Declaration.

# Appendix: 8 Tender

Each section of the Tender must be separated with clearly marked tab dividers to facilitate easier accessibility and referencing.

Submitted Tenders should follow the following format:

## **Section 1: Demonstration of Understanding of the Subject Matter of the Services Requirement**

The Applicant should detail its understanding of the subject matter of the Services Requirement in accordance with the following headings:

- a. The operation of the Irish telecommunications market including any forthcoming or projected changes as relevant to the spectrum bands under consideration for this award process (i.e. the 2.6 GHz band and the Additional Bands<sup>33</sup> identified by the Commission).
- b. The role of the Commission and its statutory functions, objectives and duties as it relates to the radio spectrum<sup>34</sup> and to include the Applicant's understanding of the relevant Irish regulatory landscape.
- c. The decision made by the Commission in relation to the 2.6 GHz band<sup>35</sup> in Ireland and the usage of the band internationally.
- d. An analysis of the Additional Bands for potential release alongside the 2.6 GHz band as set out in Appendix 1 and their suitability to the process.
- e. Relevant EC Decisions, European Conference of Postal and Telecommunications Administrations ('CEPT') Decisions/Reports etc. and any ongoing work relevant to the spectrum bands under consideration for this award process.

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<sup>33</sup> Appendix 1 provides information on a number of spectrum bands that could be considered by the Commission for inclusion in 2.6 GHz award process. This list is non-exhaustive as over the course of the consultation process other spectrum bands could also require consideration, e.g. new bands are proposed by stakeholders.

<sup>34</sup> See in particular Annex 2 of the Commission's Document 13/05 and the Commission's Strategy Statement for Managing the Radio Spectrum 2011-2013 (Document 11/89).

<sup>35</sup> See in particular the Commission's Document 12/132.

- f. Issues addressed by the Commission in its MBSA<sup>36</sup> process and its Spectrum Strategy<sup>37</sup> which may be relevant to this award process (insofar as is apparent from information in the public domain). **Please note** that response to this section should not include information that is not in the public domain.
- g. Best practice in relevant spectrum awards across Europe and internationally.
- h. Any other issues identified by the Applicant which are specific to this project.

## Section 2: Proposed Approach

This criterion will assess the Applicant's proposed approach, project plan, timings and quality of allocation of resources for meeting the Services Requirement.

The Applicant should detail its proposed approach for meeting the substantive aspects of the Services Requirement including, but not limited to:

- an overview of its proposed analytical framework for the assessment of the suitability of the Additional Bands for inclusion in the proposed award process;
- preliminary analysis of alternative competitive award strategies and suitability of each to the award process;
- preliminary views on the alternative means of determining the structure and level of spectrum fees and the suitability of each; and
- proposed approach (or preliminary views) as to award implementation in light of the above.

## Section 3: Project Plan, Timing and Resources

- a. The Applicant should propose a project plan and timings with reference to the Service Requirements and indicative timelines set out in Section 3 the ITT<sup>38</sup>;

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<sup>36</sup> See, in particular:

[http://www.comreg.ie/radio\\_spectrum/consultations\\_and\\_associated\\_documents.713.1096.html](http://www.comreg.ie/radio_spectrum/consultations_and_associated_documents.713.1096.html) and the Wireless Telegraphy (Liberalised Use and Preparatory Licences in the 800 MHz, 900 MHz and 1800 MHz Bands) Regulations 2012 (S.I. 251 of 2012).

<sup>37</sup> Commission Document 11/88 and Commission Document 11/89.

<sup>38</sup> See Section 3 of this ITT for details on the Service Requirements and indicative project timelines.

- b. The Applicant should set out its project team proposal (including identification of any proposed sub-contractors) to comprehensively meet the Service Requirements. The allocation of resources quality assessment will consider to what extent the Applicant has allocated specific responsibilities, roles and time commitments to personnel with the appropriate skills, experience and qualifications.<sup>39</sup> The Applicant should:
- Identify each of the proposed personnel, their specific responsibilities and proposed role, as well the proposed man-hour contribution of each such team member (in days).
  - The project team proposal should also indicate each team member's expected availability throughout the duration of the project, a contingency plan and the identification of the person proposed to be the primary point of contact with the Commission.
  - Describe how the allocation of these resources will contribute to a quality and cost efficient Service, including an explanation of the quality and benefits that each team member will bring to the assigned role having regard to their proposed time commitment. Applicants may refer to the relevant professional qualifications, skills and expertise of the proposed project and support personnel (including any sub-contractors proposed) in doing so.
- c. The Applicant should set out a project communication plan to include:
- proposed meeting schedule and methodology; and
  - nominated contact person.

The subsections above are intended to provide an explanation of what the Commission intends to consider under this criterion. The Commission will take a holistic approach in this respect and, as such, there are no sub-criteria or sub-weightings.

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<sup>39</sup> Please note that the qualification criteria have already assessed whether the Tenderer and its proposed personnel have the required capability. The assessment under this element of this award criterion is based upon the quality of the resource allocation in order to determine the benefits this will deliver to the Commission in quality terms.

## Section 4: Cost

### 4.1: Tender Fee

Applicants must provide a fixed price quotation based on the provision of all aspects of the Service Requirements in the context of the potential award scenarios set out in the table below. These fixed fees will apply under the Contract for the purposes of whatever scenario comes to pass.

In addition, Applicants must tender a notional fixed price fee for a notional basket of hours of work. This must be done using the Applicant's tendered hourly rates. These hourly rates will apply as maximum hourly rates for the purposes of any additional Services required under the contract beyond those covered within the fixed fee. The notional basket of hours is computed in accordance with the table in section 4.2 below.

Applicants must provide in section 4.3 below a breakdown of the fixed fee for each of scenarios (A) – (E) described in the table below.

Award Type		Fixed Price Quotation (excluding VAT)
<b>Single band (2.6 GHz) Award Process</b>		
A	2.6 GHz band – comparative selection procedure.	A = €
B	2.6 GHz band – auction process.	B = €
<b>Auction process for 2.6GHz band and a certain number of the Additional Bands<sup>40</sup></b>		
C	2.6 GHz band plus 1 to 2 Additional Bands	C = €
D	2.6 GHz band plus 3 to 4 Additional Bands	D = €
E	Price per band for the inclusion of Additional Band/s over and above scenario D	E = €

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<sup>40</sup> Based on the issues which arose and were required to be addressed in its recent MBSA award, the Commission is currently of the view that a multi-band comparative evaluation procedure might not be a particularly viable means of efficiently awarding spectrum rights of use in multiple bands, particularly where rights of use in those bands might be complementary and/or substitutable to one another. Please note that the Commission has not made any pre-determination in relation to the final basis on which the relevant band(s) will be awarded.



Hourly Rates		Notional Fixed Price for Basket of Hours (excluding VAT)
F	Basket of Hourly Rates – this should be computed using the table in section 4.2.	F = €

For the purposes of providing a price quotation for (A) to (E):

- The fixed price fee must be inclusive of all costs and expenses as well as the provision of any software (whether third party or not).

For the purposes of providing a price quotation for (C), (D) and (E):

- Applicants should not make any assumptions as to the actual, specific Additional Band/s which might be determined by the Commission for award alongside the 2.6 GHz band;
- rather, Applicants should provide their price quotation for the cost of additional bands on the worst-case basis (such as in relation to the number, complexity and cost of adding the Additional Bands identified); and
- given the above approach, Applicants are expressly put on notice that quotations provided by them are binding irrespective of the identity of the additional band/s that may be determined by the Commission for award alongside the 2.6 GHz band.

The Tender Fee, for evaluation purposes, is the total of A + B + C + D + E + F.

Tender Fee	€ (excluding VAT)
A + B + C + D + E + F	€

Section 4.2: Hourly Rates

Applicants must populate the following table:

Grade	Description	Tendered Hourly Rate (excluding VAT)	Tendered Daily Rate (8 hour day) (excluding VAT)	Notional Number of Days for Evaluation Purposes	Notional Fixed Price for Basket of Hours (A x B)
			<b>A</b>	<b>B</b>	€
<b>Junior</b>	1 – 3 years post qualification experience			12 days	
<b>Intermediate</b>	4 – 7 years post qualification experience			8 days	
<b>Senior</b>	8 + years post qualification experience			6 days	
<b>Total</b>					

Section 4.3: Breakdown of Fixed Fee for each of Scenarios (A) – (E)

Applicants must include a breakdown of the fixed fee for each of Scenarios (A) – (E) using the table below in each case. This breakdown is for information purposes. It does not entitle the Service Provider to any variation in its fixed fee.

Team Member Name and Title	Team Member Grade – Junior, Intermediate or Senior	Tendered Daily Rate (8 hour day) (excluding VAT)	Number of Days	Total Cost (excluding VAT)
<b>Personnel: Sub-Total</b>				
<b>Expenses included in Fixed Fee</b>				<b>Total Cost (excluding VAT)</b>
<b>Expenses / miscellaneous [please identify]</b>				
<b>Expenses / miscellaneous [please identify]</b>				
<b>Expenses / miscellaneous: Sub-Total</b>				
<b>Total Fixed Fee</b>				<b>Total Cost (excluding VAT)</b>
<b>Total Fixed Fee:</b>				

# Appendix: 9 Economic And Financial Standing

This Appendix sets out the approach to the financial and economic assessment of Applicants as provided for in Section 8.4.

The Applicant must demonstrate that it has sufficient financial and economic standing to perform and fulfil its obligations under the contract which is the subject of this competition. This is a minimum pass / fail requirement.

The Applicant will be deemed to have passed this minimum requirement if it receives a mark of "Acceptable" in this regard. It should be noted that the fact that the proposed Applicant satisfies the other requirements set out in Section 8.4 does not mean that it meets this minimum requirement.

The assessment, with respect to the Applicant, in relation to this minimum requirement will include an assessment of the economic and financial standing of all members of the Applicant collectively together, where applicable and subject to Section 4 of the ITT, with any third party which will provide a guarantee in relation to the Applicant's performance of the contract. The economic and financial standing of subcontractors will not be taken into account in this assessment of the Applicant.

The following definitions will be used to determine, for each individual assessment, if the Applicant meets this minimum requirement:

"Acceptable" - Where the Applicant's economic and financial standing is not "Unacceptable".

"Unacceptable" - The assessment indicates a risk exists in terms of the Applicant's capability of meeting the financial and economic obligations anticipated under the contract which is the subject of this competition.

The Commission will consider as a part of this assessment the information provided in response to the table below, together with any additional information that the Commission may request (including the specific additional information identified in the table, such as audited accounts / management accounts etc.).

The assessment of economic and financial standing may consider a number of financial indicators and a holistic approach will be adopted to the assessment in this respect. The assessment may, as appropriate, possibly include, for example, operating revenue, shareholder funds, profit margin before tax, liquidity ratios, gearing etc. The economic and financial standing of other group companies may in some cases be relevant where there are intra-group loans (or write-offs of loans) or

general dependencies on the group as a whole or proposed guarantees. Other information provided in response to this question may also be considered including additional information contained within the financial statements including post balance sheet events, contingent liabilities and provisions, and (where applicable) information regarding the Applicant's credit rating (including information in a credit rating report).<sup>41</sup>

A holistic approach will be taken to the evaluation of economic and financial standing for the purposes of this minimum requirement. No one financial indicator will be taken in isolation - an overall commercial judgment will be made by the Commission on the basis of the response.

***Applicants, in the first instance, should submit the declaration at Appendix 7 confirming that it has sufficient financial and economic standing to perform and fulfil its obligations under the contract which is the subject of this competition.***

Applicants, **upon request**, must promptly provide the Commission with the table below fully completed separately in respect of each relevant entity, together with any additional information that it may request for the purposes of assessing whether an Applicant meets the stated minimum requirements. The information provided must be representative, current, up-to-date and accurate as at the date of its submission to the Commission and not misleading as to the Applicant's economic and financial standing, and any other material information relevant to the Applicant's economic and financial standing must also be submitted by the Applicant.

If information submitted is not representative, current, up-to-date and accurate or is misleading in any respect, the Applicant must state this when providing the information and set out the correct position.

An Applicant may be rejected if it fails to provide any of the information requested by the Commission or required by this section of the Commission.

Financial Information				
<b>1</b>	What was your turnover in respect of [relevant activity to be inserted] activities in the last three financial years (if this applies)?	€..... for year ended --/--/- -	€..... for year ended --/--/- -	€..... for year ended --/-- /--

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<sup>41</sup> Applicants, by submitting an Application, consent to the Commission obtaining independent credit references from specialist third parties in relation to the Applicant's economic and financial standing.

<b>2</b>	What was your turnover across all areas in the last three financial years (if this applies)?	€..... for year ended --/--/- -	€..... for year ended --/--/- -	€..... for year ended --/-- /--
<b>3</b>	What was the pre-tax profit (or loss) for the last financial three years (if this applies)?	€..... for year ended --/--/- -	€..... for year ended --/--/- -	€..... for year ended --/-- /--
<b>4</b>	What was your net worth / shareholders funds (or net liabilities) at the date of the latest accounts?	€..... at --/--/--	€..... at --/--/--	€..... at --/--/--
<b>5</b>	What is your present cash and credit position?		€..... cash (overdraft) at --/--/--	Available credit facility €..... at --/--/--
<b>6</b>	Please identify any intra-group loans to or from your organisation (including the relevant other entity)?			
<b>7(a)</b>	Have the terms of all intra-group loans to or from your organisation been met during the past three financial years?			Yes / No
<b>7(b)</b>	If "No", please provide details, what were the reasons, and what has been done to put things right?			
<b>8(a)</b>	Have any intra-group loans to or from your organisation been written off, in whole or in part, during the past three financial years?			Yes / No
<b>8(b)</b>	If "Yes", please provide details, what were the reasons, and what has been done to put things right?			
<b>9(a)</b>	Have the financial accounts for the most recent financial year been signed off by the directors and auditors?			Yes / No

<b>9(b)</b>	If no, please explain why not, providing full details.	
<b>10(a)</b>	Have there been any significant changes since the end of the last financial year and/or since the last set of financial accounts were signed off by the directors and auditors?	Yes / No
<b>10(b)</b>	If yes, please provide full details of the changes and their implications for your financial and economic standing.	
<b>11(a)</b>	Has your organisation met the terms of its banking facilities and loan agreements (if any) during the past year?	Yes / No
<b>11(b)</b>	If "No", please provide details, what were the reasons, and what has been done to put things right?	
<b>12(a)</b>	Has your organisation met all its obligations to pay its creditors and staff during the past year?	Yes / No
<b>12(b)</b>	If "No", please provide details, what were the reasons, and what has been done to put things rights?	
<b>13(a)</b>	Do you intend to obtain / provide a parent company or other third party guarantee? Note: any guarantee must be on terms acceptable to the Commission. Also, note the Commission may assess the economic and financial standing of the guarantor on a similar basis to the Applicant.	Yes / No
<b>13(b)</b>	If yes, please state from whom and explain the relationship.	
<b>14</b>	What is the name and branch of your bankers (who may be asked to provide confirmation that all your accounts are in good standing)?	Name:
		Branch:
		Contact details:

<b>15(a)</b>	Has the Applicant applied for a credit rating?	Yes / No
<b>15(b)</b>	If yes, please either (i) confirm that the application was rejected or (ii) provide this rating and any accompanying or relevant explanatory documents.	
<b>16(a)</b>	Are there any contingent liabilities or losses that are relevant to your overall financial performance whether stated in the audited accounts or otherwise?	Yes / No
<b>16(b)</b>	If yes, please fully disclose and explain (including cross-references to the accounts if applicable):	
<b>17(a)</b>	Is there any other material information relevant to your economic and financial standing that should be disclosed?	Yes / No
<b>17(b)</b>	If yes, please fully disclose and explain:	
<b>18</b>	Please confirm you will provide the following upon request:	
(a)	A copy of your most recent audited accounts (for the last three years if this applies)?	Yes / No
(b)	A statement of your turnover, profit & loss account and cash flow for the most recent year of trading?	Yes / No
(c)	A statement of your cash flow forecast for the current year and a bank letter outlining the current cash and credit position?	Yes / No
(d)	Management accounts current to the date of the request (and/or with future projections to a particular date)?	Yes / No
(e)	If the accounts for the most recent financial year have not been signed off by the directors and/or auditors, the most recent draft accounts.	Yes / No
<b>19</b>	Please confirm you will provide the following upon request in respect of any group companies and any proposed guarantor?	
(a)	A copy of your most recent audited accounts (for the last three years if this applies)?	Yes / No
(b)	A statement of your turnover, profit & loss account and cash flow for the most recent year	Yes / No



	of trading?	
(c)	A statement of your cash flow forecast for the current year and a bank letter outlining the current cash and credit position?	Yes / No
(d)	Management accounts current to the date of the request (and/or with future projections to a particular date)?	Yes / No
(e)	If the accounts for the most recent financial year have not been signed off by the directors and/or auditors, the most recent draft accounts.	Yes / No
(f)	This table duly completed.	Yes / No
<p><b>Important Note:</b>  The Commission may (but is not obliged to) reject an Applicant which fails to provide any of the information set out in this table (including the information that may be requested by the Commission as set out in questions 18 and 19).</p>		

# Appendix: 10 Draft Contract



Commission for  
**Communications Regulation**

**(1) THE COMMISSION FOR  
COMMUNICATIONS  
REGULATION**

**(“THE COMMISSION”)**

**(2) [COMPANY NAME]**

**(“THE CONSULTANT”)**

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**CONSULTANCY AGREEMENT**

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**IMPORTANT NOTE:**

Applicants must submit any comments on the Consultancy Agreement prior to submission of their Applications, and by the date set out in section 2.4 of the ITT. See section 6.4 of the ITT for more information in this regard.

# COMREG CONSULTANCY AGREEMENT

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COMREG CONSULTANCY AGREEMENT

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DRAFT

**CONSULTANCY AGREEMENT** dated the **[DATE]** day of month **[YEAR]**

**BETWEEN**

- (1) The Commission for Communications Regulation, established in accordance with the Communications Regulation Act, 2002 and having its offices at Block DEF, Abbey Court, Irish Life Centre, Lower Abbey Street, Dublin 1 (the “Commission”, which expression shall include its successors and assigns)

**AND**

- (2) ●, a [company incorporated] under the laws of [Ireland] (Registered No. ●) and having its offices at ● (the “Consultant”, which expression shall include its successors and permitted assigns).

**WHEREAS**

- (A) The Commission requires the performance of certain Consultancy Services in accordance with a significant, complex, valuable and important project and wishes to engage the Consultant to perform the Consultancy Services.
- (B) By an Invitation to Tender the Commission invited the submission of a proposal to provide Consultancy Services as further specified in this Agreement and its Schedules and, in reliance upon the commitments and representations in the Response, the Consultant’s Tender has been chosen as the most economically advantageous after an evaluation process.
- (C) The Consultant has agreed to perform the Consultancy Services on the terms and conditions contained in this Agreement.

**NOW IT IS HEREBY AGREED**

**1 INTERPRETATION AND DEFINITIONS**

- 1.1 In this Agreement, unless the context otherwise suggests:

“**Agreement**” means the provisions of this Agreement, including the Schedules, as may from time to time be varied in accordance with Clause 28;

“**Authorised Undertaking**” means an authorised undertaking as defined in the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011;

“**Background Intellectual Property**” means any and all Intellectual Property that is owned by or licensed to either Party and which are or have been developed independently of this Agreement and the Consultancy Services (whether prior to or after the Commencement Date);

**“Best Industry Practice”** means the exercise of the degree of skill and care which would reasonably and ordinarily be expected of a market leading skilled and experienced person engaged to carry out services similar to the Consultancy Services under the same or similar circumstances seeking in good faith to comply with its contractual obligations and complying with all laws and codes of practice;

**“Change of Control”** means a change in the possession, whether directly or indirectly, of the power to direct or cause the direction of the Consultant’s management or policies, whether through ownership of shares, by contract, or by any other means;

**“Commencement Date”** means the date first set out in this Agreement;

**“Confidential Information”** means this Agreement, all information of whatever nature relating to the Consultancy Services or Deliverables which, before, on or after the Commencement Date, is disclosed by the Commission to the Consultant (its officers, employees, advisers, agents, representatives, contractors, sub-contractors or consultants) or the Consultant is given access to, whether in, written, oral, visual, graphic, photographic, electronic, digital or in any other tangible form whatsoever, and any other information which ought reasonably be regarded as confidential information or which the Commission designates as confidential information. Confidential Information includes, but is not limited to all know-how, Intellectual Property, ideas, experience, drawings, designs, diagrams lists, computer programs, algorithms, engineering data, economic data, statistical data, formulae, specifications and all other technical or other tangible information in the possession or procurement of the Commission and any other matters relating to the Consultancy Services, whether pursuant to written communication, or correspondence with the officers, management, employees, contractors or sub-contractors of the Commission, or the advisers or consultants to or agents or representatives of the Commission. Confidential Information also includes analyses, compilations, studies, notes, reports, presentations and any other documents or records of whatsoever nature in whatever form prepared by the Consultant and/or his officers, employees, advisers, agents, representatives, contractors, sub-contractors or consultants with respect to the Consultancy Services.

**“Conflict of Interest”** means an interest that the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services) has, which, in the reasonable opinion of the Commission:

- (a) would or could actually compromise the independence of the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services) in its performance of the Consultancy Services;
- (b) would or could create the perception that the independence of the Consultant (or any third party engaged by it to assist in the provision of

the Consultancy Services) in its performance of the Consultancy Services might be so compromised;

- (c) a pecuniary interest (whether by way of a shareholding or otherwise) in an Authorised Undertaking or any person (or a subsidiary or an associated company of an organisation) which is the subject of the Consultancy Services or conceivably may bid for the spectrum rights of use being considered as a part of the Consultancy Services;
- (d) a contract (whether oral or written) with an Authorised Undertaking or any person (or a subsidiary or an associated company of an organisation) which is the subject of the Consultancy Services or conceivably may bid for the spectrum rights of use being considered as a part of the Consultancy Services; or
- (e) a position of employment, directorship (whether executive or non-executive) or any position of emolument with an Authorised Undertaking or any person (or a subsidiary or an associated company of an organisation) which is the subject of the Consultancy Services or conceivably may bid for the spectrum rights of use being considered as a part of the Consultancy Services; and
- (f) includes for the avoidance of doubt any work undertaken or contracted to be undertaken on or after the Commencement Date on behalf of any Authorised Undertaking or any person (or a subsidiary or an associated company of an organisation) which is the subject of the Consultancy Services or conceivably may bid for the spectrum rights of use being considered as a part of the Consultancy Services;

and also includes where the Consultant has in the past undertaken work for an organisation (or a subsidiary or an associated company of an organisation) that might be affected by decisions to be taken by the Commission which are in any way connected with the Consultancy Services, in circumstances where the Consultant was privy to confidential information that would give, or might reasonably be perceived to give, the Consultant (and by extension the Commission) an unfair advantage or inappropriate information in relation to an organisation that might be affected by any future decisions to be taken by the Commission.

**“Consultancy Services”** means the services to be provided by the Consultant to the Commission as described in Schedule 1 and any other services which can reasonably be inferred as being required for the proper execution of same;

**“Contract Documents”** means this Agreement, the ITT and the Response;

**“Deliverables”** has the meaning given to it in Clause 9.1.



**“Developed Software”** means the items of bespoke computer software developed (at any time before, on or after the Commencement Date) by or on behalf of the Consultant as part of or in connection with the Consultancy Services for the Commission in accordance with this Agreement;

**“Eur”** and **“euro”** mean the lawful currency of Ireland;

**“Fees”** means the Fees described in Schedule 2 and payable in accordance with Clause 5 and Schedule 2;

**“Intellectual Property”** and **“Intellectual Property Rights”** means without limitation, copyrights (including copyright in computer software and source code), database rights, patents, registered and unregistered trademarks, know-how, service marks, business methods, utility models, design rights (whether registered or unregistered) trade secrets and all other industrial or intellectual property rights of whatever nature whether registered or unregistered and any application (or right of application) for such rights and any similar proprietary rights worldwide;

**“Invitation to Tender (ITT)”** means the invitation to submit a proposal for the provision of Consultancy Services issued by the Commission in connection with the Consultancy Service and the Pre-qualification Questionnaire document (“PQQ”) which was issued in conjunction with the ITT (and all amendments and clarifications issued by the Commission in relation to same) as more particularly identified in Schedule 2;

**“Parties”** means the Commission and the Consultant and **“Party”** means either of them;

**“Response”** means the response to the ITT submitted by the Consultant which includes the “Tender” and completed “PQQ” (and any written clarifications in respect of the Response), as more particularly identified in Schedule 2;

**“Scheduled Personnel”** means the person(s) referred to in Schedule 2 whom the Consultant has identified as proposed personnel in the Response;

**“Software Product”** means the items of non-bespoke computer software, the licence of which is to be either granted or procured by the Consultant for the Commission as part of the Consultancy Services in accordance with this Agreement, and which Software Products shall be exhaustively agreed between the Parties in writing as being “Software Products” for the purposes of this Agreement. Any software not identified and described in this way is deemed to be Developed Software.

**“Source Code”** means computer software or data in eye-readable form and in such form that it can be compiled, rebuilt, understood and interpreted by a reasonably skilled programmer into equivalent object code, together with all technical information and documentation necessary for the

use, reproduction, modification and enhancement of such computer software.

**“Tax Clearance Certificate”** means a tax clearance certificate issued by the Irish Revenue Commissioners.

1.2 In this Agreement (except where the context otherwise requires or unless otherwise specified):

1.2.1 any reference to a Clause, Schedule, sub-clause or paragraph is to the Clause, Schedule, sub-clause or paragraph of or to this Agreement and any reference to a sub-clause or paragraph is to the relevant sub-clause or paragraph of the Clause or Schedule in which it appears;

1.2.2 the index and clause headings are included for convenience only and shall not affect the interpretation of this Agreement;

1.2.3 the use of the singular includes the plural and vice versa;

1.2.4 the use of any gender includes the other genders;

1.2.5 a reference to any provision of any legislation includes a reference to that legislation as amended, extended or re-enacted and to any regulation, order, instrument or subordinate legislation under the relevant legislation;

1.2.6 references to persons in this Agreement include bodies corporate, unincorporated associations or partnerships and any reference to a person includes a reference to that person’s legal personal representatives, successors and permitted assigns;

1.2.7 where the words “include(s)”, “including” or “in particular” are used in this Agreement, they are deemed to have the words “without limitation” following them and where the context permits, the words “other” and “otherwise” are illustrative and shall not limit the sense of the words preceding them; and

1.2.8 any obligation in this Agreement on a person not to do something includes an obligation not to agree, allow, permit or acquiesce in that thing being done.

1.3 Unless a right or remedy of the Commission is expressed to be an exclusive right or remedy, the exercise of it by the Commission is without prejudice to its other rights and remedies under this Agreement and/or at law or in equity. The Commission’s rights and remedies survive any delivery, inspection, acceptance, payment, reports or performance pursuant to this Agreement and extend to any substituted or remedial Services provided by the Service Provider.

- 1.4 The grant of any approval, acceptance, confirmation or consent by the Commission, or the receipt of, or failure by the Commission to respond to, any communication, in respect of any matters:
- (a) does not pass any liability or responsibility to the Commission in connection with same;
  - (b) does not imply or suggest compliance with this Agreement; and
  - (c) does not in any way diminish the responsibility and liability of the Consultant in connection with same.
- 1.5 The Schedules to this Agreement form part of this Agreement and shall have effect as if set out in full in the body of this Agreement and any reference to this Agreement includes the Schedules to this Agreement.
- 1.6 In the event of any conflict between the Contract Documents, then the following order of precedence shall apply:
- i. this Agreement (other than the Schedules to this Agreement);
  - ii. the Schedules to this Agreement;
  - iii. the ITT; and
  - iv. the Response.
- 1.7 Any qualifications, assumptions or similar contained in the Response are of no legal effect and are deemed to be excluded from the Contract Documents.

## **2 ENGAGEMENT**

- 2.1 In consideration for the Fees, the Consultant shall provide the Consultancy Services subject to and in accordance with the Contract Documents and in accordance with all laws and Best Industry Practice.
- 2.2 The Consultant hereby acknowledges and agrees that, despite its engagement under this Agreement:
- 2.2.1 it does not have any exclusive right to provide the Consultancy Services or Deliverables, or anything similar or identical to the Consultancy Services or Deliverables, to the Commission;
  - 2.2.2 the Commission may use its own personnel or other third parties in relation to the provision of the Consultancy Services or Deliverables or anything similar or identical to the Consultancy Services or Deliverables; and

- 2.2.3 there is no guarantee of any scope, value, volume or frequency of Consultancy Services or Deliverables.
- 2.3 The Consultant shall render and perform, and shall procure that any third party engaged by it to assist in the provision of the Consultancy Services renders and performs, the Consultancy Services to the best of its skill and ability, in a timely manner and in accordance with the description of the requirements of the Consultancy Services, so as to give to the Commission the full and complete benefit of the Consultant's experience and expertise.
- 2.4 The Consultant shall exercise, and shall procure that any third party engaged by it to assist in the provision of the Consultancy Services exercises, that standard of skill, care and diligence required by Best Industry Practice having regard to the type, scope, complexity, value, importance and purpose of the Consultancy Services.
- 2.5 The Consultant will ensure that all reports and advice is written in excellent English in a clear, accurate, factual, neutral, not overly academic, style and that all Deliverables are fit for the purpose intended.
- 2.6 The Consultant will prioritise its obligations under this Agreement in relation to the other business activities of the Consultant to ensure that it can comply with its covenants and obligations in the manner contemplated by this Agreement.
- 2.7 The Consultant will, and will procure that all its personnel, agents and subcontractors will, act subject to, and in accordance with, any requirements, procedures, policies, rules, guidelines and/or directions notified by the Commission to the Consultant from time to time.
- 2.8 If the Commission is not satisfied with the standard of any part of the Consultancy Service performed by the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services), it may by written notice require the Consultant to remedy any defective work within a period of seven (7) days of the receipt of such a notice. The Commission may terminate this Agreement with immediate effect if it is not satisfied with the standard of any such remedial work undertaken by the Consultant.

### **3 CONSULTANT WARRANTIES**

- 3.1 The Consultant represents and warrants to the Commission:
- i. the accuracy and truthfulness of all representations and/or statements made by the Consultant in the Response;
  - ii. that it is an expert in, and is fully competent in all areas of, providing services, works, deliverables, tasks and functions of a similar scope,

nature, scale, importance and complexity to the Consultancy Services and Deliverables;

- iii. it will adopt and adhere to the project management methodologies and quality control systems and standards referred to in the Response at all relevant times in providing the Consultancy Services and Deliverables;
- iv. that it will perform the Consultancy Services with all due care, skill, professionalism and diligence and in accordance with Best Industry Practice and that the Consultancy Services and Deliverables will be for the purpose intended;
- v. that neither it, the Scheduled Personnel nor any third party engaged by it to assist in the provision of the Consultancy Services has a Conflict of Interest (except to the extent that a Conflicts of Interest has been disclosed to the Commission but declared acceptable by the Commission in writing);
- vi. that it shall not place or retain itself, or permit any of the Scheduled Personnel or any third party engaged by it to assist it in the provision of the Consultancy Services to place or retain themselves, in a position of a Conflict of Interest during the term of, and for a period of twelve (12) months following, the termination or expiration of this Agreement;
- vii. that it (and any third party engaged by it to assist in the provision of the Consultancy Services) have the capacity, experience, qualification, training and necessary ability to undertake the Consultancy Services;
- viii. that it is a [[limited liability company]] duly incorporated and validly existing under the laws of the country in which it was established and has the legal right and full power and authority to carry on its business as currently carried on and to own its property and assets;
- ix. that it has the legal right and full power and authority to execute, deliver and perform all its obligations under the Agreement;
- x. the execution, delivery and performance by it of this Agreement has been authorised by all necessary action on its part;
- xi. that it understands each of the obligations under this Agreement constitute legally binding obligations;
- xii. that there are no actions, suits or proceedings or regulatory investigations pending or, to the Consultant's knowledge or belief, threatened against or affecting the Consultant before any court or administrative body or arbitration tribunal that might affect the ability of the Consultant to perform its obligations under this Agreement or

the decision of the Commission to enter into this Agreement with the Consultant;

- xiii. that it has satisfied itself as to the requirements, demands, obligations and all risks assumed by it under this Agreement;
- xiv. that it agrees it is responsible for the management and organisation of the Consultancy Services; and
- xv. that all Intellectual Property Rights provided by the Consultant to the Commission under or in connection with this Agreement, including all Intellectual Property Rights in and to any Developed Software or Software Products, do not and will not infringe any third party Intellectual Property Rights.

3.2 The representations and warranties of the Consultant in Clause 3.1 shall be deemed to be repeated on each payment date with respect to the facts and circumstances existing at that time, as if made at that time.

#### **4 COMMENCEMENT AND TERMINATION**

4.1 This Agreement takes effect on and from the Commencement Date. The Agreement shall continue after that until the Commission notifies the Consultant in writing that it considers that the Consultancy Services have been satisfactorily completed and that it does not have any further need for the Consultancy Services at which point it will terminate, unless terminated earlier in accordance with the provisions of this Agreement.

4.2 The Commission may terminate this Agreement (in whole or in part) with immediate effect by giving written notice to the Consultant if:

4.2.1 the Consultant abandons this Agreement

4.2.2 the Consultant commits a material breach of any of its obligations under this Agreement which is incapable of remedy or which, if capable of remedy, is not remedied within fifteen (15) days of receiving notice from the Commission to remedy such breach;

4.2.3 the Consultant or its employees, servants or agents or any of them commit any act of grave misconduct or gross default or any conduct tending to bring either the Consultant or the Commission or the Consultancy Services into disrepute or otherwise negatively affecting the business or reputation of the Commission;

4.2.4 the Consultant through its employees, servants or agents or otherwise is in default or neglect in the discharge of its obligations under this Agreement or is, by reason of the ill health of its employees, servants or agents or otherwise, unable to fulfil its

obligations under this Agreement to the satisfaction of the Commission;

- 4.2.5 the Consultant becomes bankrupt, or makes any composition or arrangement with, or conveyance or assignment for the benefit of his creditors, or any application is made under any bankruptcy act for the time being in force for a sequestration of his estate, or a trustee is granted by him on behalf of his creditors, or if the Consultant, being a company, enters into voluntary or compulsory liquidation (except for the purpose of reconstruction or amalgamation on terms approved by the Commission), or if a receiver, receiver manager or administrator, or examiner of any of its assets is appointed;
- 4.2.6 the Consultant undergoes a Change of Control and the Commission does not give its prior written consent to such Change of Control on the basis that the Change of Control would represent result in the Consultant having a Conflict of Interest or is otherwise considered by the Commission likely to have a negative effect on the Consultant's performance of its Consultancy Services;
- 4.2.7 there is a sustained absence of any of the Scheduled Personnel, or any approved replacement thereof, in providing the Consultancy Services; and/or
- 4.2.8 any of the Scheduled Personnel, or any approved replacement thereof, fails to work the number of days such person was proposed in the Response to work.
- 4.3 The Commission may, without cause, terminate this Agreement (in whole or in part) by thirty (30) days notice in writing to the Consultant.
- 4.4 The Commission may terminate this Agreement (in whole or in part) by notice in writing with immediate effect if, in the reasonable opinion of the Commission, it is necessary or prudent to terminate it in order to comply with the requirements of applicable public procurement law or settle or resolve any complaint or challenge received by the Commission in such respect
- 4.5 If this Agreement is terminated for any reason, the Consultant shall only be entitled to payment directly attributable to the proportion of the Consultancy Services properly completed in accordance with this Agreement prior to such termination of this Agreement. Any prepaid charges for the Consultancy Services to be completed after such termination shall forthwith, upon termination, be refunded in full by the Consultant to the Commission (without set-off, reduction, withholding, abatement, counter-claim or similar).
- 4.6 The Commission shall not be liable to the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services) for any loss of profit, contracts, goodwill, business opportunity or anticipated saving

suffered or incurred by the Consultant arising out of or in connection with this Agreement for any reason.

- 4.7 The termination or expiry of this Agreement (in whole or in part) does not affect either Party's rights, remedies, liabilities or obligations accrued prior to the effective date of the termination or expiration or any rights, remedies or obligations of either Party which are stated or by implication are intended to survive or commence after the expiration or termination of this Agreement.
- 4.8 On termination of this Agreement, the Consultant shall execute and deliver all documentation and data prepared or obtained by the Consultant and all other documentation and data in its custody or control relating to the Consultancy Services to the Commission and shall take further steps as the Commission may reasonably require for the purpose of fully vesting in the Commission all rights and benefits of the Consultant arising therefrom.
- 4.9 The Commission's rights to terminate this Agreement as provided for in this Clause 4 are in addition to any other rights of termination provided for in this Agreement.
- 4.10 If the Commission terminates this Agreement because of a material breach of this Agreement it may rely on a single breach, a number of breaches or repeated breaches which individually or together constitute a material breach.
- 4.11 Upon termination of this Agreement for any reason, the Commission may procure substitute Consultancy Services from another supplier. If the Commission terminates this Agreement under Clause 4.2, the costs of procuring an alternative supplier of the Consultancy Services shall promptly on demand be reimbursed in full to the Commission by the Consultant.

## **5 FEES**

- 5.1 In consideration of the provision of the Consultancy Services in accordance with this Agreement, the Commission shall pay to the Consultant the Fees for the amounts and at the times set out in Schedule 2.
- 5.2 The Commission shall pay the Consultant all amounts due and owing within 30 days of the receipt of a valid invoice from the Consultant unless the Commission disputes any portion of an invoice, in which case the Commission shall notify the Consultant of the amount in dispute and the reasons therefor. Invoices shall be supported by a written report and time analysis in respect of the work undertaken by the Consultant.
- 5.3 Invoices with respect to any Fees additional to the fixed fee set out in Schedule 2 shall not be submitted to the Commission unless the Commission has provided prior written approval and in accordance with Clause 12.



- 5.4 The Consultant agrees that neither it (nor any third party engaged by it to assist in the provision of the Consultancy Services) is or shall become an employee or agent of the Commission or be entitled to any fee, salary, pension, bonus, or other fringe benefits from the Commission and it is agreed that the Consultant shall be responsible for the deduction of income tax liabilities and pay related social insurance (P.R.S.I.), USC, levies or similar contributions, if applicable, arising from the payment of the Fees to the Consultant under this Agreement. The Consultant agrees to indemnify and hold harmless the Commission from and against any claims or demands that may be made by any relevant authority in respect of income tax, P.R.S.I., USC, levies or similar, as well as any penalties or interest relating to such payments, in connection with the provision of the Consultancy Services. This indemnity survives the expiration or termination of this Agreement.
- 5.5 Where a Tax Clearance Certificate expires during the course of this Agreement, the Consultant must immediately procure a renewed Tax Clearance Certificate. The Fees are only payable where the Consultant maintains and is in possession of a valid and current Tax Clearance Certificate.
- 5.6 If the Commission is not satisfied with the standard of any part of the work carried out by the Consultant and requires the Consultant to rectify any defective work in accordance with Clause 2.8, such remedial work as may be required shall be carried out by the Consultant at its own expense and it shall not be entitled to any Fees in respect of such remedial work.

## **6 ASSIGNMENT AND SCHEDULED PERSONNEL**

- 6.1 The Consultant shall allocate, both in terms of time and quality, appropriate personnel with appropriate qualifications, levels of experience and seniority to perform the Consultancy Services in the manner and to the standard required by this Agreement.
- 6.2 The Consultant shall, if requested by the Commission, agree in advance with the Commission the dates upon which any Scheduled Personnel will take scheduled annual leave. The Consultant shall ensure that the taking of any such leave is timed so as to cause the least possible inconvenience with respect to the performance of the Consultancy Services.
- 6.3 The Consultant, without limiting or affecting its obligations under this Agreement, shall use the Scheduled Personnel in the manner and to the extent proposed in the Response. The Consultant may not, in any case whatever, change (or reduce the contribution proposed in the Response of) any of the Scheduled Personnel without the prior written consent of the Commission.
- 6.4 If the Commission becomes dissatisfied with the performance, conduct, capacity or availability of any of the Scheduled Personnel assigned by the

Consultant for any reason whatsoever, the Consultant shall, upon request, immediately remove the said person and replace him or her with a replacement reasonably acceptable to the Commission. If the Consultant fails to nominate a replacement who is acceptable to the Commission, acting reasonably, within ten (10) days of the Commission's request, the Commission may immediately terminate this Agreement by notice in writing.

- 6.5 Any replacement of the Scheduled Personnel must, without limiting or affecting the other provisions in this Clause 6, to the satisfaction of the Commission, possess qualifications and experience equal to or greater than the Scheduled Personnel who are being replaced.

**7 ACCESS TO INFORMATION, REPORTING OBLIGATION, CO-OPERATION**

- 7.1 The Consultant shall appoint a competent and appropriately qualified and experienced manager for the Consultancy Services for the purposes of overseeing, managing and co-ordinating the timely and proper provision of the Consultancy Services and whom shall be available (from to time) for consultation with the Commission during normal business hours during the Agreement.

- 7.2 The Consultant shall liaise and co-operate with the Commission with a view to achieving the most effective and cost efficient implementation and completion of the Consultancy Services.

- 7.3 The Consultant shall report to the Commission on all matters referred to the Consultant under this Agreement in such form and with such frequency and within such time periods as are reasonably specified by the Commission from to time time. The Commission shall be entitled to have full and free access to all papers, results, information, documents, reports, data or similar generated or used by the Consultant in the performance of the Agreement and Consultancy Services.

- 7.4 The Consultant shall submit to the Commission reports at such times as the Commission shall reasonably require and in such format and with such detail as the Commission shall reasonably require (including electronic format).

- 7.5 The Consultant shall maintain proper accounts and records of its performance under this Agreement. Without prejudice to any legal requirement or longer retention requirement under this Agreement, all records and reports shall be retained for a period of 3 years following the later of the completion of the Consultancy Services or termination of this Agreement.

- 7.6 The Consultant will co-ordinate, co-operate and liaise with the Commission and any other persons involved or connected with the Consultancy Services or Deliverables and, where requested, will attend meetings with the Commission and others.

**8 CONFIDENTIAL INFORMATION AND ANNOUNCEMENTS**

8.1 Subject to Clause 8.2, during the term of this Agreement and at any time after the termination or expiry of this Agreement (for any reason) the Consultant:

- i. may not use any Confidential Information for any purpose other than in the performance of its obligations under this Agreement;
- ii. may not disclose any Confidential Information to any person except with the prior written consent of the Commission or in accordance with Clause 8.2; and
- iii. shall use all reasonable endeavours to prevent the use, access or disclosure to Confidential Information to any third party.

8.2 The Consultant may disclose information which would otherwise be Confidential Information if and to the extent that:

- i. it is required by applicable law;
- ii. the information has come into the public domain or in to the knowledge of the Consultant, otherwise than through a breach of this Clause 8 (or any other confidentiality agreement or obligation);
- iii. it is required by existing contractual obligations of which the Commission is made aware and has acknowledged in writing prior to the Commencement Date of this Agreement;
- iv. it is required by a regulatory or governmental body in Ireland to which it is subject; or
- v. the disclosure is to its professional advisers, other officers, employees and sub-contractors ("a Recipient") to the extent that disclosure is reasonably necessary for the purposes of this Agreement.

8.3 The Consultant shall ensure that a Recipient is made aware of and complies with the Consultant's obligations of confidentiality under this Agreement as if the Recipient was a Party to this Agreement.

8.4 On termination or expiry of this Agreement, the Consultant shall within one (1) month of the date of termination or expiry:

- i. return to the Commission all Confidential Information insofar as it is in tangible form together with all copies thereof, provided however that in such case the Consultant shall be entitled to retain one copy

of same for professional indemnity purposes which copy shall only be used for such purposes; and

- ii. provide a signed statement to the Commission certifying that all Confidential Information has either been delivered to the Commission or irrevocably destroyed.
- 8.5 The Consultant acknowledges that the Commission may be required to grant access to records held by the Commission in relation to the Consultancy Services (including Confidential Information) to members of the public pursuant to the provisions of the Freedom of Information Acts 1997–2003 and the Consultant shall provide the Commission with copies of any relevant records (for the purpose of the Freedom of Information Acts 1997–2003) held by it within five (5) days of a request being made by the Commission.
- 8.6 The Consultant acknowledges that prior to the execution of this Agreement it has familiarised itself with and is aware of the provisions of the Freedom of Information Acts 1997–2003 and the Commission’s procedures in relation thereto which are published on the Commission’s website at [www.comreg.ie](http://www.comreg.ie)
- 8.7 The Consultant shall not make any public announcement concerning this Agreement, the Consultancy Services or any ancillary matter without the prior written consent of the Commission. The Consultant, in particular, shall not therefore communicate directly or indirectly with the print or broadcast media or any agency nor shall it publish any articles or similar relating to this Agreement or the Consultancy Services.
- 8.8 Clause 8.7 does not apply to a public announcement, communication or circular to be made or sent by the Consultant, if it is required by law, or any regulatory or governmental body, to which it is subject.
- 8.9 The Commission reserves the right at its sole discretion to publish information about the Agreement. Where the Consultant (acting reasonably) notifies the Commission that financial and/or economic information supplied by it to the Commission is confidential or commercially sensitive information, the Commission may take account of such representations in considering whether to disclose the relevant information to the extent the Commission considers appropriate.
- 8.10 The Commission is not liable to the Consultant for any information the Commission discloses purportedly pursuant to applicable law.

## **9 INTELLECTUAL PROPERTY RIGHTS**

- 9.1 In this Clause 9, “Deliverables” include, without limitation, all items, reports, papers, analysis, advice, data, databases, spreadsheets, compilations, output, Developed Software, product, work, models and any other

deliverables whatever resulting from the performance by the Consultant of the Consultancy Services and/or this Agreement.

- 9.2 The Consultant (and any other third party) has no, and will not, subject to Clause 9.9 and Clause 9.10, acquire any right, title or interest in or to the Intellectual Property of the Commission or its third party licensors.
- 9.3 The Commission has not, and will not, subject to Clause 9.5, acquire any right, title or interest in or to the Background Intellectual Property of the Consultant or its third party licensors.
- 9.4 The Consultant hereby absolutely assigns, conveys and sets unto the Commission all right, title and interest to all present and future rights and interest in all Intellectual Property in the Deliverables and Consultancy Services and all Intellectual Property arising out of and/or in connection with the Consultancy Services and Deliverables ("**Foreground Intellectual Property**") (excluding, for certainty, the Background Intellectual Property of the Consultant).
- 9.5 The Consultant hereby grants to the Commission (and its service providers and other contractors) an irrevocable non-terminable perpetual fully paid up worldwide royalty free non-exclusive transferable sub-licensable licence to use, update, amend, improve, adapt and/or modify the Consultant's Background Intellectual Property in any way whatever in connection with, and/or in order to obtain the full benefit of the Consultancy Services, Deliverables and Agreement and/or for any related and/or connected purpose whatever. This Clause 9.5 survives the termination or expiration of this Agreement.
- 9.6 The Consultant:
- 9.6.1 hereby grants to the Commission an irrevocable, non-terminable, perpetual, fully paid up, royalty free, worldwide non-exclusive licence for the Commission (and its employees, service providers, consultants, agents, representatives and other contractors) to use the Software Products; or
- 9.6.2 if and to the extent that it does not have the power to itself grant such a licence, will procure, at its sole cost and expense, the direct grant by the owner or authorised licensors to the Commission of an irrevocable, non-terminable, perpetual, fully paid up, royalty free, worldwide non-exclusive licence for the Commission (and its employees, service providers, consultants, agents, representatives and other contractors) to use the Software Products to the extent that the Service Provider can, using its best endeavours, procure such terms,

in any way whatever in connection with, and/or in order to obtain the full benefit of, the Consultancy Services, Foreground Intellectual Property, Developed Software, Software Products, the Deliverables and/or this

Agreement and/or for any related and/or connected purpose whatever. The Service Provider shall, in any given case, notify the Commission in advance of the best licence terms available in respect of any Software Product. This Clause 9.6 services the termination or expiration of this Agreement for any reason.

- 9.7 The Consultant acknowledges and agrees that the whole or any part of any or all of the Deliverables may be used, publicised and made available to the public by the Commission in its own name (subject to the following sentence) and in such manner as it sees fit at its absolute discretion. The Commission will use reasonable endeavours to credit the Consultant as the original author of any Deliverable (or part of a Deliverable) which the Commission publishes or which the Commission cites, quotes or uses in a published report or similar document where considered appropriate by the Commission (acting reasonably), except that the Commission is not required to do so where the Commission, acting reasonably, considers that this may be to the detriment of the Commission or adverse to its interests or adverse to the intended use to which the Deliverable may be put by the Commission.
- 9.8 The Consultant hereby irrevocably waives, and will procure the irrevocable waiver of, all moral rights in the Deliverables.
- 9.9 The Commission hereby grants the Consultant, subject to the Commission's prior written consent in any case (which consent will not be unreasonably delayed or withheld by the Commission), a revocable non-exclusive non-transferable limited licence to use the Commission's Intellectual Property solely to the extent necessary for the Consultant to provide the Consultancy Services in accordance with this Agreement, and not for any other purpose. This licence will immediately cease upon the termination or expiry of this Agreement (or earlier to the extent that any such Intellectual Property is not required by the Consultant for the purpose of fulfilling its obligations to provide the Consultancy Services under this Agreement).
- 9.10 The Commission hereby agrees to grant the Consultant upon written request a revocable non-exclusive non-transferable limited licence to use the Foreground Intellectual Property. The grant of a licence in any case is subject to the Commission's prior written consent and will extend only to the specific parts of the Foreground Intellectual Property, and be limited solely to the use of those specific parts of the Foreground Intellectual Property for the purpose and in the manner, expressly set out and identified in the written consent in that case. The Consultant hereby agrees that the Consultant has no right or claim against the Commission whatever arising out of or in connection with the Consultant's use of the Foreground Intellectual Property or any claim that the Foreground Intellectual Property infringes the rights of any third party or otherwise and that it uses the Foreground Intellectual Property at its sole and exclusive risk. The licence in any case may also be made subject by the Commission to any other conditions or requirements set out in the written consent (including, without

prejudice to the generality of the foregoing, restrictions on the use of, or an exclusion from the licence of, specific content, Intellectual Property or Confidential Information contained in, connected with or associated with the Foreground Intellectual Property). Each licence granted under this Clause 9.10 is separate and independent of any other licence granted under it. Each licence will immediately terminate when the Consultant ceases to require use of the Foreground Intellectual Property for the purpose for which the licence was granted. The Commission may withhold, limit or withdraw its consent under this Clause 9.10 if the Commission considers that the use to which the Foreground Intellectual Property may be put by the Consultant may (i) be to the detriment of the Commission; (ii) be adverse to its interests; (iii) be adverse to the intended use to which the Foreground Intellectual may be put by the Commission; and/or (iv) result in the use, access or disclosure of Confidential Information. A consent will only be deemed to have been given by the Commission under this Clause 9.10 where it is expressly stated to have been given under this Clause 9.10 and the consent has been signed in pen on behalf of the Commission by an authorised person.

- 9.11 The Consultant agrees to respect the Commission's and its third party licensors' legal and beneficial rights in and to each of their Intellectual Property and the Consultant will not act or omit to act in any manner which adversely affects the rights of the Commission or its third party licensors in or to either of their Intellectual Property.
- 9.12 The Consultant agrees on request at any time to give the Commission or any person authorised by the Commission access to the Consultant's Intellectual Property and to provide copies of same at its own expense.
- 9.13 The Consultant warrants, represents and undertakes that:
- (a) it has the right to grant, licence, assign, convey and set unto, as the case may be, all rights, licences, interests in and to all Intellectual Property granted by it under this Agreement; and
  - (b) the normal use and possession by the Commission or any other person in accordance with this Agreement of any Intellectual Property supplied, procured, made available or used by or on behalf of the Consultant under this Agreement and/or in connection with the Consultancy Services and/or Deliverables (including the Background Intellectual Property, Foreground Intellectual Property, Developed Software and Software Products) does not, and will not, infringe the Intellectual Property rights of any third party.
- 9.14 The Consultant hereby agrees to fully and effectively indemnify, hold harmless and keep so indemnified on demand the Commission (and its officers, employees, contractors and agents) from and against any liabilities whatever arising out of or in connection with any threat or claim that the Consultancy Services, Deliverables, Background Intellectual Property, Foreground Intellectual Property, Developed Software, Software Products

and/or any other Intellectual Property supplied, generated or made available by the Consultant breach the Intellectual Property rights of a third party. This indemnity survives the termination or expiration of this Agreement.

9.15 The provisions under this Clause 9 will continue to apply notwithstanding the termination or expiration of this Agreement for any reason and notwithstanding the completion of the performance of the Consultancy Services.

9.15 In the event of any discrepancy or conflict between the Consultant's obligations under Clause 8 and this Clause 9, Clause 8 shall take precedence over this Clause 9.

## **10. SOFTWARE**

10.1 The Consultant will deliver to the Commission any Developed Software in both Source Code and object code forms, and will promptly provide Commission with any updates to them.

10.2 The Consultant will not, without the Commission's prior and specific written consent, include in the Developed Software any open source code or software that would:

10.2.1 breach the terms applicable to any software owned by or licensed to the Commission;

10.2.2 create, or purport to create, obligations for the Commission with respect to Intellectual Property rights owned or licensed by the Commission; and/or

10.2.3 grant, or purport to grant, to any third party, any rights or immunities under or in respect of Intellectual Property rights owned or licensed by Commission.

## **11 COMPLIANCE WITH LAWS**

11.1 The Consultant shall comply with and shall procure that its employees, agents and servants, sub-contractors or any other third parties engaged to provide the Consultancy Services, comply with all relevant laws and the requirements of any statutory authority, regulatory or government body in performing the Consultancy Services.

## **12 VARIATION OF CONSULTANCY SERVICES**

12.1 The Commission may by written notice require the Consultant to vary the nature, scope or timing of the Consultancy Services or to provide additional



Consultancy Services that are not included within the scope of the fixed fee set out in Schedule 2.

12.2 Where the Commission requires additional Consultancy Services and such additional Consultancy Services would affect the scope of the Consultancy Services, the Parties shall, if necessary, negotiate a variation of the Fees and the time for completion of the Consultancy Services, but otherwise the variation of the Consultancy Services shall be on the same terms and conditions as contained in this Agreement. The Consultant shall act reasonably in such regard. The variation to the Fees shall, at the Commission's discretion:

12.2.1 be in proportion to the variation in the Consultancy Services; or

12.2.2 be based upon rates no higher than the daily and hourly rates set out in Schedule 2 and the increase or decrease in required time.

The Consultant may be required to provide a fixed fee or a capped fee for any variation or agree to such other financial fee / payment model as is requested by the Commission.

12.3 If the Parties cannot agree the variation of the Fees and the time for completion of the Consultancy Services, this Agreement shall continue unaffected and unchanged. The Consultant shall continue to provide the Consultancy Services to the Commission during the period of any negotiations described in this Clause 12.

### **13 SUSPENSION OF CONSULTANCY SERVICES**

13.1 The Commission may by notice require the Consultant to suspend the progress of the whole or any part of the Consultancy Services for a specified period upon receipt of such a notice.

13.2 Unless such suspension is necessary by reason of some default of or breach of this Agreement by the Consultant for which it is responsible, the following provisions shall apply:

i. the Consultant shall be entitled to an extension of time for performance of the obligation(s) to which the suspension relates; and

ii. the Consultant shall be reimbursed by the Commission in respect of any increased costs reasonably incurred by the Consultant by reason of such suspension.

13.3 Following any such period of suspension referred to in this Clause, the Consultant shall, on request by the Commission, immediately recommence work on all or any part of the suspended Consultancy Services.

#### 14 INDEMNITY AND LIMITATION OF LIABILITY

- 14.1 The Consultant acknowledges that the Commission will be relying on the Consultant's skill, expertise and experience in providing the Consultancy services. The Commission will also be relying on the accuracy of all representations or statements made by the Consultant in its Response to the ITT, and the Deliverables and advice given by the Consultant in connection with the provision of the Consultancy Services.
- 14.2 The Consultant hereby agrees to indemnify, hold harmless and keep so indemnified the Commission (and the Commission's officers, employees and agents) from and against all liabilities, losses, claims, demands, damages, costs (including legal costs) and professional and other expenses of any nature whatsoever incurred or suffered by the Commission, whether arising (directly or indirectly) under contract, tort, statute or otherwise, arising out of or in connection with the Consultant's breach of any of the obligations or the warranties contained in this Agreement or arising out of the Consultant's negligence in providing the Consultancy Services.
- 14.3 Nothing in this Agreement excludes or limits the liability of either Party in respect of death or personal injury to any person arising as a result of the negligence or wilful acts or omissions of a Party, its employees, agents, approved sub-contractors or any other person for which that Party has responsibility.
- 14.4 Except where the Consultant is in breach of Clauses 8 or 9 or under the indemnity in Clause 9.14, the Consultant shall not, subject to Clause 14.5, be liable to the Commission for any indirect or consequential losses suffered by the Commission arising out of or in connection with the Consultant's breach of this Agreement.
- 14.5 Clause 14.4 does not apply in relation to the following all of which are considered recoverable losses:
- 14.5.1 any time, charges or expenditure rendered unnecessary or wasted and/or incurred by the Commission;
  - 14.5.2 any additional operational and/or administrative costs and expenses;
  - 14.5.3 the additional cost of procuring and paying for services to replace the Consultancy Services;
  - 14.5.4 the costs, expenses, loss and/or liability arising out of or in connection with loss or damage to, or unauthorised access to or disclosure of, any information, data or Confidential Information of the Commission; and/or

14.5.5 third party claims threatened or taken against the Commission arising out of or in connection with the performance of the Consultancy Services and/or provision of the Deliverables.

## **15 INSURANCE**

- 15.1 The Consultant shall obtain and maintain, at its own expense, for the duration of the Consultancy Services and for a period of six (6) years following completion or termination of same, the insurance policies set out in Schedule 3 in order to meet any liabilities which it may have to the Commission or third parties arising out of or in connection with this Agreement. The interest of the Commission must either be noted on such insurance policies or an indemnity to principals clause contained on the policies.
- 15.2 The Consultant shall at the request of the Commission, or its insurance broker, furnish a certificate from its insurers confirming that the policies referred to in Clause 15 and Schedule 3 are in place and stating the amounts of cover in place. The supply to the Commission of any draft or final insurance policy or certificate or other evidence of compliance with this Clause 15 shall not, however, imply acceptance by the Commission that the extent of insurance cover is sufficient or that its terms are satisfactory.
- 15.3 The Consultant shall notify the Commission immediately in the event that any insurance required under this Clause 15 and Schedule 3 ceases to be available or maintained.
- 15.4 At the Commission's reasonable request, the Consultant shall increase the agreed insurance limits or obtain additional coverage.
- 15.5 If the Consultant fails to provide the insurance cover now specified the Commission may do so for the whole or part of the period for which such cover is required (without being under any obligation so to do) and may deduct any costs it incurs in obtaining such cover from any Fees due to the Consultant under this Agreement, or otherwise recover such sums from the Consultant.
- 15.6 Neither failure to comply nor fully comply with the insurance provisions of this Agreement shall limit or relieve the Consultant of its liabilities and obligations arising under this Agreement.

## **16 JOINT AND SEVERAL LIABILITY**

- 16.1 If the Consultant is comprised of more than one legal entity, all representations, warranties, indemnities, undertakings, covenants, agreements and obligations made, given or entered into in this Agreement by the Consultant are made, given and entered into jointly and severally by each of the persons that constitute the Consultant.

- 16.2 If the Consultant is comprised of more than one legal entity the Commission may take action against any one or more of the Consultant members and/or may release or compromise in whole or in part the liability of any one or more of the Consultant members under this Agreement or grant any time or other indulgence without affecting the liability of the other persons that constitute the Consultant under this Agreement.

## **17 NON-SOLICITATION**

- 17.1 During the term of this Agreement and for a period of six (6) months following its termination, the Consultant shall not and shall procure that its employees, servants and agents shall not, directly or indirectly solicit, seek or procure the services of any employees, servants or agents of the Commission without the prior written consent of and upon such terms specified by the Commission.

## **18 FORCE MAJEURE**

- 18.1 If a Party (the "Affected Party") is prevented, hindered or delayed from or in performing any of its obligations under this Agreement by a Force Majeure Event:
- 18.1.1 the Affected Party's obligations under this Agreement are suspended while the Force Majeure Event continues and to the extent that it is prevented, hindered or delayed;
  - 18.1.2 as soon as reasonably possible after the start of the Force Majeure Event the Affected Party shall notify the other Party in writing of the Force Majeure Event, the date on which the Force Majeure Event started and the effects of the Force Majeure Event on its ability to perform its obligations under this Agreement;
  - 18.1.3 if the Affected Party does not comply with Clause 18.1.2 it forfeits its rights under Clause 18.1.1; and
  - 18.1.4 the Affected Party shall make all reasonable efforts to mitigate the effects of the Force Majeure Event on the performance of its obligations under this Agreement and immediately after the end of the Force Majeure Event the Affected Party shall notify the other Party that the Force Majeure Event has ended and resume performance of its obligations under this Agreement.
- 18.2 If the Force Majeure Event continues for more than three (3) months starting on the day the Force Majeure Event starts, the Commission may terminate this Agreement by giving not less than thirty (30) days written notice to the Consultant.

18.3 In Clause 18, a “Force Majeure Event” means an act of God, war, riot, civil commotion, malicious damage, fire, flood and storm.

## **19 ASSIGNMENT AND SUB-CONTRACTING**

19.1 This Agreement is personal to the Consultant and the Consultant may not, without the written consent of the Commission, assign, sub-contract, mortgage, charge (otherwise than by floating charge), create an interest in any trust over, or dispose of or transfer any of its rights or obligations (in whole or in part) under this Agreement.

19.2 The Consultant shall not sub-contract or otherwise engage any third party to provide all or any part of the Consultancy Services without obtaining the prior written consent of the Commission. If the Consultant wishes to apply for the consent of the Commission to appoint or change a sub-contractor, the Consultant shall give the Commission not less than fourteen (14) days’ notice of:

- i. the intended appointment of the sub-contractor or other relevant third party, with detailed particulars which shall include its relevant experience; and
- ii. the intended commencement date and scope of the sub-contractor’s or relevant third party’s work.

19.3 If the Consultant has obtained the consent of the Commission referred to in Clause 19.2, the consent shall:

- i. not operate as an authority to transfer responsibility to the sub-contractor or relevant third party for the proper and due performance of the obligations of the Consultant contained in this Agreement; and
- ii. not relieve the Consultant from any of its obligations or liabilities under this Agreement and the Consultant shall be responsible for the acts or defaults of any sub-contractor or relevant third party, their agents or employees, as if they were the acts or defaults of the Consultant.

19.4 A change in the legal status of the Commission shall not affect the validity of this Agreement.

## **20 FURTHER ASSURANCE**

20.1 Each Party shall, at its own cost, from time to time and being required to do so by the other Party, now or at any time in the future, do or procure the doing of all such acts and/or execute or procure the execution of all such

documents in a form satisfactory to the other Party as the other Party may reasonably consider necessary, to give full effect to this Agreement.

## **21 RELATIONSHIP OF PARTIES**

- 21.1 Nothing in this Agreement and no action taken by the Parties pursuant to this Agreement shall create, or be interpreted or construed as creating a partnership, association, or joint venture or other co-operative entity between the parties, nor establish a relationship of agency between the Parties.
- 21.2 The Parties acknowledge that nothing in this Agreement or in any other agreement between the Parties shall give rise to the relationship of employer/employee between the Commission and the Consultant and any Scheduled Personnel and any replacement or any other persons supplied to the Commission by the Consultant in respect of the Consultancy Services to be performed under this Agreement.
- 21.3 Neither Party shall have any right, power or authority to enter into any agreement, or act on behalf of, or to act as or to be an agent or representative of, or to otherwise bind the other Party unless expressly provided otherwise in this Agreement.

## **22 ENTIRE AGREEMENT**

- 22.1 The Contract Documents constitute the entire agreement and understanding between the Parties with respect to the Consultancy Services and supersedes any previous agreements, negotiations and discussions between the Parties.
- 22.2 Each of the Parties acknowledges and agrees that in entering into this Agreement, and the documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly contained in the Contract Documents. Nothing in this Clause 22 shall, however, operate to limit or exclude any liability for fraud or fraudulent misrepresentation.

## **23 WITHHOLDING TAX**

- 23.1 All payments to be made pursuant to this Agreement shall be subject to professional services withholding tax in accordance with Irish law and at the prevailing rate.

## **24 NOTICES**

- 24.1 Invoices for payment in respect of the Consultancy Services should be sent to:

**The Finance Manager  
Commission for Communications Regulation  
Blocks D, E, F  
Abbey Court  
Irish Life Centre  
Lower Abbey Street  
Dublin 1  
Ireland.**

- 24.2 Any notice or other communication given or made under this Agreement shall be in writing, and may be delivered to the relevant Party or sent by pre-paid registered post to the address of that Party specified in this Agreement, or such other address as may be notified hereunder, by that Party from time to time for this purpose and shall be effective notwithstanding any change of address not so notified.
- 24.3 Unless the contrary is proved, each notice or communication for the purposes of this Agreement shall be deemed to have been given or made and delivered (if by post) forty eight (48) hours after posting or (if delivered by hand) when left at the relevant address.

## **25 WAIVERS AND REMEDIES**

- 25.1 The failure to exercise or delay in exercising a right or remedy shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement shall not constitute a waiver of any other breach or default and shall not affect the other terms of this Agreement. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement shall not prevent a Party from subsequently requiring compliance with the waived obligation.
- 25.2 The rights and remedies of the Commission provided by this Agreement are cumulative and (subject to what is otherwise provided in this Agreement) are not exclusive of any rights or remedies provided by law.

## **26 BONDS**

- 26.1 If requested, the Consultant shall, at its expense, procure the execution and delivery to the Commission of any bonds specified in the Invitation to Tender (ITT), if any, or otherwise agreed in writing between the Parties, Any such bond shall be provided by Consultant in a form approved by the

Commission and by a bank or other financial institution acceptable to the Commission.

- 26.2 Payment of the Fees to the Consultant hereunder shall be conditional upon the execution and delivery of any such bonds.

## **27 LEGAL OPINION**

- 27.1 Without prejudice Clause 3, the Consultant shall, if requested by the Commission, at the Consultant's expense, procure the provision of a written legal opinion of a qualified barrister or solicitor certifying that:

27.1.1 the Consultant has all requisite corporate power to execute, deliver and perform its obligations under this Agreement and any bonds required to be procured by the Consultant under this Agreement;

27.1.2 such execution, delivery and performance of this Agreement and any bonds required to be procured by the Consultant under this Agreement have been duly authorised by appropriate corporate action; and

27.1.3 this Agreement and any bonds required to be procured by the Consultant under this Agreement constitute legally binding obligations on the Consultant and the surety as the case may be.

- 27.2 Any legal opinion requested by the Commission in accordance with Clause 27.1 shall be of such form and content as shall be required by the Commission.

## **28 VARIATION**

- 28.1 A variation of any of the terms of this Agreement shall not be valid unless it is in writing and signed by or on behalf of each of the Parties.

## **29 SEVERABILITY**

- 29.1 If any provision of this Agreement shall be found by any court, arbitrator or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of this Agreement which shall remain in full force and effect.

## **30 EXECUTION AND COUNTERPARTS**

- 30.1 This Agreement is effective only upon the same being executed by or on behalf of each Party. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be an



original, and all the counterparts together shall constitute one and the same instrument.

### **31 COSTS**

- 31.1 The Parties shall be responsible for their respective legal and other costs incurred in relation to the preparation of this Agreement.

### **32 CONFLICTS OF INTEREST**

- 32.1 The Consultant acknowledges and agrees, unless otherwise agreed by the Commission in a specific case in writing, that it is required, during the term of this Agreement and for a period of twelve (12) months after its expiration or termination, not to place or retain itself in (and to procure that any Scheduled Personnel and any third party engaged by it do not place or retain themselves in), and to take steps to remove itself from (and to procure that any Scheduled Personnel and any third party engaged by it remove themselves from), any Conflict of Interest (including by ceasing, directly or indirectly, to act or advise any person who has an interest in the subject matter of the Consultancy Services [including any bidders for the relevant spectrum rights of use) for such period).
- 32.2 The Consultant shall, where applicable, put in place and maintain any measures agreed between the Parties or proposed by the Consultant in its Response in order to address any possible Conflict of Interest.

### **33 RESOLUTION OF DISPUTES**

- 33.1 The Parties shall make a good faith effort to settle amicably any dispute which may arise between them under or in connection this Agreement. The Consultant shall continue to perform its obligations under this Agreement pending any resolution of a dispute concerning it, unless otherwise request by the Commission. Any dispute arising out of or in connection with this Agreement which the parties are unable to settle amicably after such effort shall be decided, pursuant to Clause 34, by the courts of Ireland in accordance with Irish law.

### **34 GOVERNING LAW AND JURISDICTION**

- 34.1 This Agreement, and all disputes arising out of or in connection with this Agreement, shall in all respects be governed by, construed and take effect in accordance with the laws of Ireland.
- 34.2 The Parties irrevocably agree that the courts of Ireland shall have exclusive jurisdiction to hear and decide any suits, actions or proceedings and to settle any disputes which may arise out of or are in connection with this Agreement.

- 34.3 The submission to the jurisdiction of the courts of Ireland does not limit the Commission's right to take proceedings against the Consultant in another court of competent jurisdiction, nor does the taking of proceedings by the Commission in any one or more jurisdictions preclude the Commission taking proceedings in another jurisdiction (whether concurrently or not) if and to the extent permitted by applicable law.

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SCHEDULE 1

THE CONSULTANCY SERVICES

**See Section 3.3 of this ITT for details.**

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## SCHEDULE 2

## FEES AND SCHEDULED PERSONNEL

1. Fees

The Fee is an unconditional fixed fee. The fixed fee will be determined based upon whatever award type the Commission decides to take in relation to the award of the relevant spectrum.

The unconditional fixed fee for the various award type scenarios is as set out below.

<b>Award Type</b>	<b>Fixed Price (excluding VAT)</b>
Single band (2.6 GHz) Award Process	
<b>A</b> 2.6 GHz band – comparative selection procedure.	€
<b>B</b> 2.6 GHz band – auction process.	€
Auction process for 2.6GHz band and a certain number of the Additional Bands	
<b>C</b> 2.6 GHz band plus 1 to 2 Additional Bands	€
<b>D</b> 2.6 GHz band plus 3 to 4 Additional Bands	€
<b>E</b> Price per band for the inclusion of Additional Band/s over and above scenario D	€

## COMREG CONSULTANCY AGREEMENT

The fixed price fee is inclusive of all costs and expenses as well as the provision of any software (whether third party or not).

For the purposes of providing a price quotation for (C), (D) and (E):

- The Consultant has not made any assumptions as to the actual, specific Additional Band/s which might be determined by the Commission for award alongside the 2.6 GHz band;
- rather, the Consultant provided its fixed price for the cost of additional bands on the worst-case basis (such as in relation to the number, complexity and cost of adding the Additional Bands identified); and
- given the above approach, the Consultant agree that the fixed price provided by it is binding irrespective of the identity of the additional band/s that may be determined by the Commission for award alongside the 2.6 GHz band.

The following are the maximum hourly rates that may apply for the purposes of any variation to the Consultancy Services (though the Parties may agree to use lower rates for such purposes):

<b>Grade</b>	<b>Description</b>	<b>Tendered Hourly Rate (excluding VAT)</b>	<b>Tendered Daily Rate (8 hour day) (excluding VAT)</b>
<b>Junior</b>	1 – 3 years post qualification experience		
<b>Intermediate</b>	4 – 7 years post qualification experience		
<b>Senior</b>	8 + years post qualification experience		

The Consultant included a breakdown of the fixed fee for each of Scenarios (A) – (E) in its Response. This breakdown is for information purposes. It does not entitle the Consultant to any variation in its fixed fee. However, the Consultant is required to commit the time resources to the Consultancy Services in the manner contemplated by the breakdown of the fixed fee.

2. Payment of Fees

The Fees shall be payable monthly in arrears and in accordance with Clause 5.2 of this Agreement.

3. Method of Payment

Payment shall be by electronic funds transfer in to the Consultant's bank account.

4. Scheduled Personnel

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SCHEDULE 3

INSURANCES

The Consultant undertakes for the benefit of the Commission to take out and maintain at all times during the term and for a period of six (6) years following completion of the Consultancy Services sufficient insurances to cover its liabilities under or in connection with this Agreement, including the following:

1. Professional Indemnity Insurance with a limit of not less than Euro five million (**€5,000,000**) in respect of any one claim or series of claims arising from one event; and
2. Employers Liability Insurance with a limit of not less than Euro eleven million (**€13,000,000**) in respect of any one claim or series of claims arising from one event.

COMREG CONSULTANCY AGREEMENT

**IN WITNESS WHEREOF** this Agreement has been entered into the day and year first  
**HEREIN WRITTEN**

**PRESENT** when the Common Seal of  
**THE COMMISSION** was affixed hereto

**SIGNED** by

Duly authorised on behalf of the Commission

in the presence of:

**SIGNED FOR AND ON BEHALF OF THE CONSULTANT**

in the presence of:

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