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ar son na hAeráide & Comhshaoil**  
Department of Communications,  
Climate Action & Environment

# **National Broadband Plan: State Led Intervention**

## **Lot 1C (Combined)**

### **Invitation to Submit Final Tenders**

#### **Volume 1 (Instructions)**

13 September 2018

Version 2





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## Important Notice

The Department of Communications, Climate Action and Environment (“**Department**”) has prepared this Invitation to Submit Final Tenders (“**ISFT**”) for the sole purpose of inviting Final Tenders from the Bidders for the national broadband intervention project.

The information set out in the ISFT is being made available on condition that it is only used in connection with this Procurement and for no other purpose whatsoever. It is provided as a guide only and does not purport to contain all the information that a Bidder may require in connection with this Contract. In no circumstances shall the Minister, Department, its advisers, consultants, contractors and/or agents incur any liability or responsibility arising out of or in respect of the issue of the ISFT.

The information provided in the ISFT is offered in good faith for the guidance of Bidders but no warranty or representation, express or implied, is given as to the accuracy or completeness of any of the information set out in the ISFT or on which the ISFT is based or issued pursuant to the ISFT.

The Minister, Department and its advisers shall not under any circumstances whatsoever have any liability for the accuracy, adequacy or completeness of the ISFT or for any other written or other communication made available during the course of the Procurement process including, without limitation, for any loss, damage, cost or expense incurred or arising as a result of reliance on such information or communication. Where information in the ISFT is cited from a third party source, such information has not been independently verified.

The Department reserves the right to amend the ISFT, its requirements and any information contained herein at any time by notice, in writing, to the Bidders.

The Department reserves the right to take such steps as it considers appropriate, including (but not limited to):

- changing the basis of, or the procedures (including the timetable) relating to, the tender process;
- rejecting any, or all, of the Final Tenders;
- not inviting a Bidder or tenderer to proceed further;
- not furnishing a Bidder or tenderer with additional information; or
- abandoning the competition.

Nothing in the ISFT is, or may be relied upon as, a promise or representation as to the Department’s ultimate decision in relation to the award of the Contract(s) which are the subject of this competition, or as a representation of fact or promise as to the future. None of the information contained in the ISFT shall impose any legal obligations on the Department or Minister.

The Minister, Department, its advisers, consultants, contractors and/or agents do not accept any responsibility for the legality, validity, effectiveness, adequacy or enforceability of any documentation executed, or which may be executed, in relation to the Project.

The Department / Minister shall not be obliged to appoint any of the Bidders to undertake the Project and reserves the right not to proceed with the award process and to withdraw from the process at any time. No contract to be entered into with a successful Bidder will contain any representation or warranty from the Department in respect of the PIM, ITPD, ISDS, ISRDS or ISFT.

The ISFT is being made available by the Department to Bidders on the terms set out in the ISFT only. The ISFT is not being distributed to the public nor has it been filed, registered or approved in any jurisdiction. Its possession or use in any manner contrary to any applicable law is expressly prohibited. Bidders shall inform themselves concerning, and shall observe, any applicable legal requirements.

In this important notice, references to the ISFT includes all information contained in the ISFT, any accompanying documentation, and/or information and/or opinions made available during the remainder of the Procurement process by or on behalf of the Department, its advisers, consultants, contractors, servants and/or agents in connection with the ISFT or the Project including, without limitation, the information made available in response to any queries.



Each Bidder's downloading or acceptance of delivery of the ISFT constitutes its agreement to, and acceptance of, the terms set forth in this important notice. Any breach of the terms of this important notice may result in the exclusion of a Bidder from this Procurement, at the Department's sole discretion.



# 1 Definitions

For the purposes of this Procurement, the capitalised words and expressions that follow have the meanings hereby assigned to them unless the context specifically requires otherwise. It should also be noted that references to the singular include the plural and vice versa. All other capitalised words and expressions shall have the meaning assigned to them in schedule 1 (Definitions) of the Contract.

**Bidder** means the person or persons, firm or firms, or company or companies that submitted a PQQ Response or that has been invited to participate in the Procurement after pre-qualification, as the case may be;

**Bidder Members** includes:

- a) the Bidder;
- b) where the Bidder is a consortium, the members of the consortium and the Shareholders of the consortium (if different); and
- c) where the Bidder or a Bidder Member has relied on the resources of another entity (e.g. its parent company or a key subcontractor) in its PQQ Response, that other entity (or entities) whose resources the Bidder or Bidder Member has relied upon (whether that be for the purposes of demonstrating its economic and financial standing or its technical and professional capability);

**Combined Area Lot** means Lot 1C, which is the lot in respect of the combined Southern Intervention Area and Northern Intervention Area;

**Commercial Stimulus Model** means the commercial stimulus (gap funding) model more particularly described in section 5.2 of the PIM;

**Communications Protocol** means the communications protocol issued to Bidders via eTenders;

**Concession Model** means the concession model more particularly described in section 5.2 of the PIM;

**Confidential Information** has the meaning given to it in Appendix 1;

**Contract** means the contract and schedules included in Volume 3 of the ISFT, and any updates thereto during the Procurement;

**Contract Notice** means the contract notice published in the OJEU and eTenders in respect of this Procurement and Project on 22 December 2015;

**Department** means the Department of Communications, Climate Action and Environment;

**Department Key Personnel** means all of the persons identified by the Department as “Department Key Personnel” in section 4.7 or subsequent Procurement documents;

**Detailed Solution** means the solution submitted by the Bidders in response to the Invitation to Submit Detailed Solutions including any clarifications requested from, and submitted by, the Bidder;

**Evaluation Methodology** means the ISFT Volume 2 (Evaluation Methodology) (as updated from time to time by the Department during the Procurement by the issue of a new version of it);

**Final Tender** means the final tender submitted by the Bidders in response to the Invitation to Submit Final Tenders document including any clarifications requested from, and submitted by, the Bidder;

**Financial Memorandum** means the financial memorandum to be prepared by the Bidder to support and explain aspects of the Bidder’s a) Project Financial Model and b) Project Cost Model in accordance with ISFT Volume 4 (Financial Requirements);

**High Speed Broadband Service Determination** has the meaning given to it in section 3.4;

**Intervention Area** means the intervention area described in section 3.3 of this document, and as the Intervention Area is evolved from time to time in the manner contemplated by the PIM, the ITPD, the ISDS, the ISRDS and this ISFT (and references to the Intervention Area include, as the context so admits or requires, any part or parts of it or all of it). Bidders should note that “Intervention Area” as



defined in the Contract is intended to refer to the relevant Lot Area for the Contract concerned;

**Intervention Strategy** has the meaning given to it in section 3.1 of the PIM;

**Invitation to Participate in Dialogue or ITPD** means the initial invitation to participate in dialogue documents, comprising volumes 1 – 4), together with any documents, including the ISDS and ISRDS, or written clarifications issued by the Department at any time prior to issue of the ISFT (as updated from time to time by the Department during the Procurement by the issue of a new version of it);

**Invitation to Submit Detailed Solution or ISDS** means the invitation for Bidders to submit Detailed Solutions following completion of the detailed dialogue phase (as updated from time to time by the Department during the Procurement by the issue of a new version of it);

**Invitation to Submit Final Tenders or ISFT** means the invitation to submit final tender documents, comprising volumes 1 – 4, issued to the Bidders following the completion of the dialogue phase together with any documents or written clarifications issued by the Department at any time after issue of the ISFT (as updated from time to time by the Department during the Procurement by the issue of a new version of it);

**Invitation to Submit Refined Detailed Solution or ISRDS** means this invitation for Bidders to submit Refined Detailed Solutions following completion of the further detailed dialogue phase and submission of Detailed Solutions (as updated from time to time by the Department during the Procurement by the issue of a new version of it);

**Lot 1A or Single Area Lot 1A** means the lot for the Southern Intervention Area under the Commercial Stimulus Model;

**Lot 1B or Single Area Lot 1B** means the lot for the Northern Intervention Area under the Commercial Stimulus Model;

**Lot 1C or Combined Area Lot 1C** means the lot for the combined Southern Intervention Area and Northern Intervention Area under the Commercial Stimulus Model;

**Lot Area** means, as the context so admits or requires, any one or more of Lot Area A, Lot Area B and Lot Area C;

**Lot Area A** means the Southern Intervention Area;

**Lot Area B** means the Northern Intervention Area;

**Lot Area C** means the entire Intervention Area comprising the combined Southern Intervention Area and Northern Intervention Area;

**Lots** means the lots that comprise this Procurement from the point of issue of the ITPD, namely Lot 1A, Lot 1B and Lot 1C and reference to Lots includes, as the context so admits or requires, any, some or all of them (and the term “**Lot**” shall be interpreted as referring to any one of these Lots);

**Minister** means the Minister for Communications, Climate Action and Environment;

**NBPco** means the limited liability Special Purpose Company incorporated or to be incorporated in Ireland to undertake the Project.

**NGA** means next generation access;

**Northern Intervention Area** means that part of the Intervention Area (as it evolves from time to time in the manner contemplated by the PIM, the ITPD, the ISDS, the ISRDS and this ISFT) that is identified in section 3.3 as the Northern Intervention Area (and references to the Northern Intervention Area include, as the context so admits or requires, any part or parts of it or all of it);

**Northern and Southern Intervention Areas** means the Northern Intervention Area and the Southern Intervention Area (and references to the Northern and Southern Intervention Area include, as the context so admits, or requires, a part or parts of it or all of it).

**OJEU** means the Official Journal of the European Union;

**Ownership Model** means, as the context so admits or requires, either or both of the Commercial Stimulus Model and the Concession Model;





**Ownership Model Determination** has the meaning given to it in section 5.2 of the PIM;

**Preferred Bidder** means the Bidder selected or provisionally selected as providing the most economically advantageous tender;

**Pre-Qualification Document(s)** means the Contract Notice together with the Project Information Memorandum and the Pre-Qualification Questionnaire when read in conjunction with the Project Information Memorandum;

**Pre-Qualification Minimum Requirements** means the eligibility and other pre-qualification minimum requirements set out in sections 12.5.2 and 12.5.3 of the PIM;

**Pre-Qualification Questionnaire** or **PQQ** means the questionnaire that was issued by the Department to pre-qualify the Bidders who received the Invitation to Participate in Dialogue document (together with the Appendices and any written clarifications issued by the Department in respect of the PQQ);

**Procurement** means this procurement which includes the entire competitive dialogue process;

**Project** means the project for the appointment of NBPCo(s) for the financing, development, construction, operation, maintenance and exploitation of the national broadband intervention (NBI) project (including the provision of next generation access (NGA) wholesale services for premises that are unlikely to be able to access such services through commercial investment alone) and other elements of the project the subject of this Procurement and which are described in the Pre-Qualification Documents, the ITPD, the ISDS, the ISRDS and this ISFT;

**Project Information Memorandum or PIM** means the Project Information Memorandum (together with the Appendices and any written clarifications issued by the Department in respect of this Project Information Memorandum) issued by the Department to those who expressed an interest in the Contract Notice;

**Refined Detailed Solution** means the solution submitted by the remaining Bidders in response to the Invitation to Submit Refined Detailed Solutions document including any clarifications requested from, and submitted by, the Bidder;

**Relevant Persons** has the meaning given to it in Appendix 1;

**Response** or **PQQ Response** means a response submitted by a Bidder in response to the Contract Notice and the Pre-Qualification Documents which includes the completed PQQ and supporting documents including any clarifications requested from, and submitted by, the Bidder;

**Services or Service Requirement** means the services and/or service requirements referred to in the Contract (as same shall be amended from time to time);

**Shareholders** means, for the purpose of this ISFT Volume 1 (Instructions), those persons, firms or companies who will be shareholders in the Bidder / NBPCo, and for the avoidance of a doubt, a Shareholder may also be a Bidder Member;

**Southern Intervention Area** means that part of the Intervention Area (as it evolves from time to time in the manner contemplated by the PIM, the ITPD, the ISDS, the ISRDS and this ISFT) that is identified in section 3.3 as the Southern Intervention Area (and references to the Southern Intervention Area include, as the context so admits or requires, any part or parts of it or all of it);

**Single Area Lot** means, as the context so admits or requires, any, some or all of Lot 1A and Lot 1B (which are lots in respect of just one of either the Southern Intervention Area or Northern Intervention Area);

**Special Purpose Company** means the limited liability company incorporated or to be incorporated under the laws of Ireland specifically for the purposes of undertaking the Project;

**Solutions** means the solutions submitted by Bidders in response to the Invitation to Submit Detailed Solutions and any subsequent solutions submitted before submission of the Final Tenders (including the Detailed Solution and Refined Detailed Solution) including any clarifications requested from, and submitted by, the Bidder;

**State Aid Guidelines or SAG** means the EU Guidelines for the application of State aid rules in relation



to the rapid deployment of broadband networks (2013/C 25/01); and

Unless the context otherwise requires, any reference in this ISFT to a document refers to that document as updated from time to time during the Procurement.



## 2 Introduction

### 2.1 Background

On 22<sup>nd</sup> December 2015 the Department of Communications, Climate Action and Environment (“**Department**”) published a contract notice in the Official Journal of the European Union (the “**OJEU**”) regarding a proposed contract to appoint NBPco(s) for the financing, development, construction, operation, maintenance and exploitation of the national broadband intervention (“**NBI**”) project (including the provision of next generation access (NGA) wholesale services for premises that are unlikely to be able to access such services through commercial investment alone) (“**the Project**”).

As explained within the Project Information Memorandum (the “**PIM**”) that was provided to interested parties that expressed an interest in the contract notice, the Contract(s) that are the subject of the Procurement have been designated as a “service concession” as defined in the Public Procurement Directive 2004/18/EC and the European Communities (Award of Public Authorities’ Contracts) Regulations 2006. Consequently, that legislation does not apply to this Procurement in accordance with Article 17 of that directive and Regulation 14 of those regulations.

As explained within the Invitation to Participate in Dialogue (“**ITPD**”), the competitive dialogue procedure that is being followed for the purposes of this Procurement<sup>1</sup> comprises three main stages:

- **Stage 1 - pre-qualification:** This stage was governed by the Pre-Qualification Documents and involved the Department evaluating the PQQ Responses submitted by Bidders to determine the eligibility, economic and financial standing and technical and professional capability of each Bidder. The pre-qualification stage concluded with a short list of Bidders being notified by the Department in writing of their inclusion in the dialogue process (Stage 2) in accordance with section 12.5.6 of the PIM.
- **Stage 2 – dialogue:** This stage was governed by the ITPD which was issued to the pre-qualified Bidders following the pre-qualification stage. The Invitation to Submit Detailed Solutions (“**ISDS**”) then described the Department’s requirements for the Project and for the submission of Detailed Solutions during the dialogue stage. The Invitation to Submit Refined Detailed Solutions (“**ISRDS**”) then described the Department’s updated requirements for the Project and for the submission of Refined Detailed Solutions and explained how the Department proposed to run the remainder of the Procurement.
- **Stage 3 – final tender:** This stage is governed by the Invitation to Submit Final Tender (“**ISFT**”). The issue of the ISFT constitutes the closure of the dialogue stage. The ISFT is being issued to those Bidders remaining in the Procurement at this point.

### 2.2 Invitation to Submit Final Tenders

**This ISFT is in respect of Lot 1C (Combined Intervention Area) only** (i.e. the Bidder is to submit its Final Tender for Lot 1C only). The Department has terminated both of the Single Area Lots (Lot 1A and Lot 1B).

Unless the context otherwise requires (including where an express reference is made to previous documents), the provisions of this ISFT and, as applicable, the PIM (unless expressly superseded) shall

<sup>1</sup> As set out in the PIM, it is permitted to deviate from the exact form of the competitive dialogue under the legislation as the Public Procurement Directive 2004/18/EC and the European Communities (Award of Public Authorities’ Contracts) Regulations 2006 do not apply to this Procurement. The Department does not currently intend to do so, but reserves the right to do so by prior notice to the Bidders, including for example where there is a material delay to the contract being awarded or coming into effect for any reason in which case the Department will notify Bidders accordingly.

All references to the competitive dialogue process in the ISRDS should be construed accordingly.



apply with respect to the Procurement from the date of this ISFT onwards. If and to the extent that there is a conflict between this ISFT and the PIM then the terms of this ISFT shall apply.

### 2.2.1 Scope of the ISFT

This ISFT is in respect of Lot 1C (Combined Intervention Area). It sets out the requirements for the submission of a Final Tender for Lot 1C and describes, for the ISFT stage, the scope of the Services to be provided by NBPCo should any Contract be awarded in respect of this Lot.

The ISFT document set is made up of the following four volumes:

- Volume 1 - the instructions for the submission of Final Tenders;
- Volume 2 – the Evaluation Methodology;
- Volume 3 – the Contract, which comprises the clauses and the schedules; and
- Volume 4 – the financial requirements.

A short overview of the content of each volume is set out below:

### 2.2.2 Volume 1 – Instructions

This volume 1 provides background information on the Project, on the submission of Final Tenders and on the anticipated Procurement process from this point forward. It describes the nature of the Final Tender stage, the anticipated timetable for the remainder of the Procurement, the requirements for submission of Final Tenders and the conditions of the Procurement.

### 2.2.3 Volume 2 - Evaluation Methodology

Volume 2 (Evaluation Methodology) sets out the Final Tender questions, the information that Bidders are required to include within their Final Tender and the format in which responses are to be submitted. It also sets out the evaluation criteria and the evaluation methodology for the ISFT stage (as more particularly described in section 4 of this document).

### 2.2.4 Volume 3 - Contract

Volume 3 is the draft contract between NBPCo and the Department that may be entered into with NBPCo.

Bidders have been issued with the ISFT version of Volume 3. A separate document, comprising Annex 1 of ISFT Volume 3, titled “Additional ISFT Volume 3 Contract Terms” or like name or title, has also been issued to Bidders. This sets out a limited number of detailed commercial principles which have been agreed by the relevant Bidder and all its Bidder Members with the Department prior to ISFT (and are not therefore subject to further dialogue) but which have not yet, at that time, been fully reflected and incorporated in the drafting of other relevant clauses or Schedules of ISFT Volume 3, but which drafting will be so fully reflected and incorporated in ISFT Volume 3 at Preferred Bidder stage.

### 2.2.5 Volume 4 – Financial Requirements

Volume 4 sets out the Department’s requirements for the Project Cost Model, the Project Financial Model, the Wholesale Price Book and the Financial Memorandum that Bidders are required to include within their Final Tender.

## 2.3 Purpose of the ISFT

The issue of the ISFT constitutes the closure of the dialogue stage.

This ISFT is being issued to the pre-qualified Bidders that remain in the Procurement at this point and represents the formal invitation to Bidders to submit Final Tenders. The Department will review those Final Tenders and provide feedback to Bidders as further described in section 4 of this document.

This ISFT is being delivered to Bidders for their sole use and for the sole purpose of assisting them to prepare and submit a response to the ISFT in accordance with the requirements of the Department in



relation to this Project.

The Department reserves the right to amend or vary this ISFT including any of Volumes 1 to 4 and, for the avoidance of doubt, in particular, the right to either add to, delete or amend (including by making certain requirements optional) the Department's Service Requirements (and any information contained therein) within the scope of the EU procurement rules at any time prior to the submission of Final Tenders by means of written notice to each of the Bidders. It is for the Bidders to exercise due diligence in understanding the Department's requirements.

## **2.4 Acceptance**

Each Bidder (including, without limitation, all of its Bidder Members) irrevocably and unconditionally accepts, and agrees to, the terms and conditions of this ISFT and the conditions of this Procurement by receiving the ISFT, by participating in dialogue, by submitting or participating in a Final Tender and/or by participating in this Procurement, and are legally bound by them.

Bidders are responsible for communicating the terms of the ISFT (including clarifications) to their Bidder Members and other persons involved in their Final Tender.

## **2.5 Intention to Bid**

By participating in dialogue, by submitting or participating in a Final Tender and/or by participating in this Procurement, the Bidder is confirming its intention to submit a Final Tender and to contract with the Department should its Final Tender be accepted.

Bidders are required to notify the Department as soon as is practically possible if they no longer plan to submit or participate in a Final Tender and/or participate in this Procurement.



## 3 Procurement Scope

### 3.1 Introduction

This section describes the vision, objectives and scope of the Procurement that is addressed by this Lot. It also describes a number of conditions relating to the Procurement.

### 3.2 Vision and objectives

#### 3.2.1 Vision

Section 3.2 of the PIM set out the Government's vision and objectives for the State-led intervention. In particular, it highlights the Government's vision and primary objective for the State-led intervention which is to ensure that every citizen and business in Ireland, regardless of location, can have access to high speed broadband. This vision is underpinned by the objectives and principles set out below.

#### 3.2.2 Objectives

The Intervention Strategy has set out a number of objectives and related sub-objectives that the State-led intervention is expected to deliver. These include:

Table 3.1: Objectives

Objective	Sub-objectives
Develop intervention strategy for areas commercial operators will not deliver high speed broadband.	Deliver intervention as soon as possible to ensure a national high speed broadband network for Ireland.
Provide high quality and reliable broadband services.	Every home / business to have access to high speed broadband with a choice of service providers. Ensure network can meet current and future data demand.
Value for money.	Design economically advantageous procurement strategy. Maximise re-use of existing infrastructure. Incentivise additional commercial investment.
Underpin Government policy on economic recovery and jobs.	Stimulate retention/growth in jobs, enable farming, e-health, trading online, tourism, savings for consumers etc.

#### 3.2.3 Principles

Within the context of these objectives there are a number of principles that have been identified by the Department which inform the intervention strategy adopted for the Project. These principles include:

- **One-off intervention with target of achieving 100% coverage** - to deliver high speed broadband to all premises that will not be able to access such services through commercial investment alone.
- **Step change in services** - to conclusively address connectivity deficits across Ireland by setting down minimum speeds and delivering an infrastructure that is capable of meeting current and future demands for bandwidth.
- **Open, competitive market** - to ensure that services are affordable, competitive and on a par with those available in commercial areas, by delivering a wholesale service that is open to all retailers, with benchmarked and transparent pricing and conditions for access.

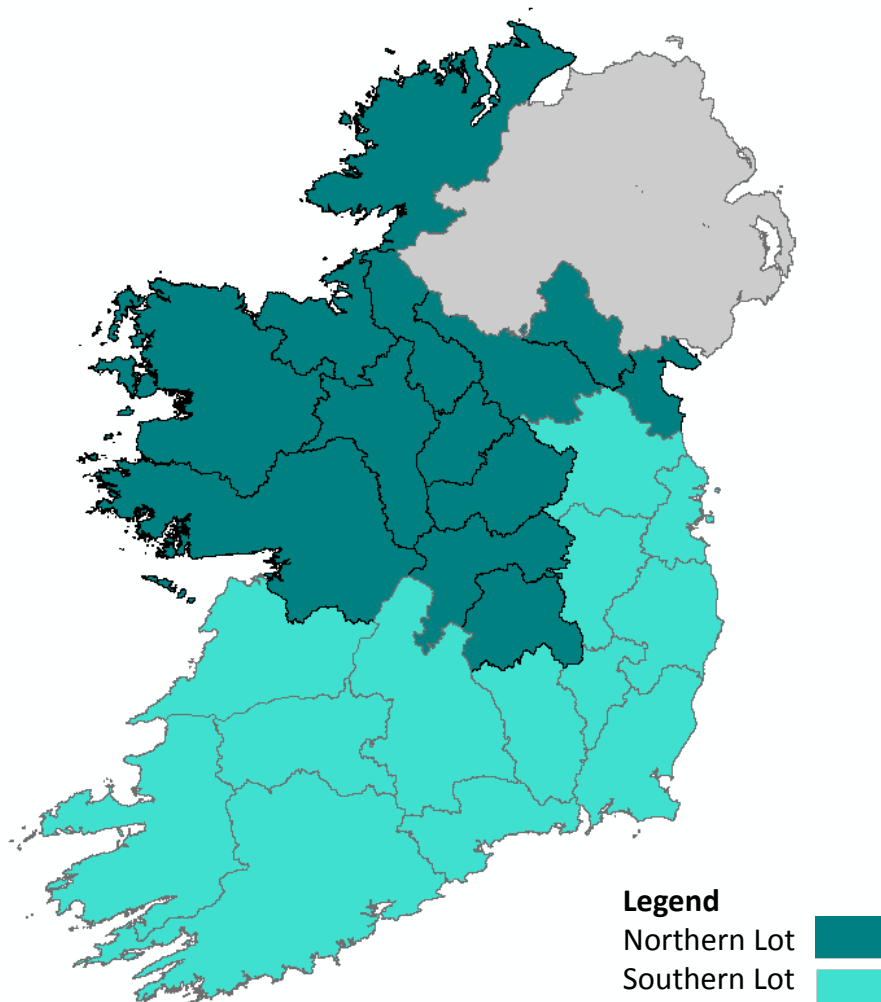


- **Technology neutral procurement** - to ensure value for money and compliance with EU State Aid Guidelines through a technology neutral procurement process that attracts multiple bidders over competing platforms.
- **Cost effective deployment** - to ensure that the most efficient and cost effective network is built within the shortest possible timeframe, by maximising the re-use of existing infrastructure.
- **Reliable, affordable and future proofed services** - to ensure that quality and affordable services are continuously provided through a long term contract with stringent governance measures.

### 3.3 Service Requirements

As explained in section 2.2 above, this **ISFT is in respect of Lot 1C (Combined Intervention Area)**. The ISFT therefore describes, for the purposes of Bidders submitting their Final Tenders, the current scope of the Services to be provided by NBPCo in respect of a Contract to deliver the Department's Service Requirements in the Southern and Northern Intervention Areas shown on the map below (should any Contract be awarded in respect of this Lot).

Figure 3.1: Lot Areas / Intervention Areas



The Lot Areas (and hence Intervention Areas) are structured according to county boundaries. The counties included within the Intervention Area for this Lot, and the corresponding number of premises included within the Intervention Area, are identified in Schedules 2.3, 11 and 12 of the Contract.



The Department's Service Requirements in respect of this Intervention Area are set out in the Contract.

### 3.4 High Speed Broadband Service Determination

The Department has set out in the Contract its Service Requirements in respect of Lot 1C (Combined Intervention Area) for ISFT purposes.

The High Speed Broadband Service Determination has been made. On the basis of the Solutions submitted in response to the ISRDS, it has been decided that 100% of premises in the Intervention Area for this Lot must receive at least the Minimum Bitstream Wholesale Product ("**Minimum Bitstream Wholesale Product Percentage**").

This means that the Final Tenders submitted by Bidders must achieve the Minimum Bitstream Wholesale Product Percentage for the Final Tender stage.

NBPco(s) will be contractually obligated to deliver the commitments made in its(their) Final Tender(s) under the terms of the concluded contract.

### 3.5 Subsidy Parameters Determination

The Subsidy Parameters Determination has been made. The Department has set out in ISFT Volume 4 (Financial Requirements) the parameters and key principles within which Bidders must structure their Final Tender subsidy proposals.

### 3.6 Network Cost Modelling

Bidders should ensure that the network cost modelling prepared in support of the Project Cost Model is set out at a level of detail that delivers substantial traceability and transparency of input costs to the Project Financial Model. Bidders should use the most recent statistical information available with regard to premises in the Intervention Area in support of the costs of passing and connecting premises. Any database tools used to identify locations and statistics such as Ordnance Survey and GeoDirectory should be up to date. Any proprietary mapping tools proposed by Bidders for use should be notified to the Department before being put forward to ensure they are acceptable for review and evaluation during the procurement process.

The Project Cost Model and Project Financial Model are a key part of the procurement process given their importance to Bidders in arriving at their proposed subsidy requirements. The models will continue to be relevant for the duration of the Contract, for example where the Intervention Area changes. It is therefore essential that the Department can identify forecast costs and subsidy at the premise level which will allow for a clear understanding of the eligible capital expenditure presented by Bidders. The Department has a very detailed in house network cost model and a financial model that it will use to inform its review and understanding of each Bidder's Project Cost Model and Project Financial Model. Bidders may be required to help explain any material differences in cost/subsidy required by area or premise in respect of their Final Tender. The evaluation of the Bidder's Project Cost Model and Project Financial Model will be undertaken in accordance with the Evaluation Methodology. The Department may also use its internal network cost model and financial model post contract award to assist with its review of NBPco costs.

### 3.7 Potential changes to Intervention Area during Procurement

This section replaces section 5.7 of the PIM.

The Department notified Bidders on the 4th April 2017 that the total number of Premises to be included in the Intervention Area has been reduced to circa 542,000. The Department subsequently issued to Bidders on the 2<sup>nd</sup> June 2017 updated versions of the Premises Database and the list of Strategic Community Points for the purposes of the Invitation to Submit Detailed Solutions. A further version of the Premises Database was issued on the 20<sup>th</sup> June 2018 and the list of Strategic Community Points was further updated on 2 August 2018. This is the scope of the Premises for the purposes of the Invitation to Submit Final Tenders.





The Intervention Area provides the current basis for this Procurement and for the definition of each Lot Area. Whilst the Department has no plans to do so at this point in time, the Department reserves the right to change the scope of the Premises in the Intervention Area during the remainder of the Procurement, at its absolute discretion, where it is considered absolutely necessary to do so.

The Department will not invite operators to come forward with new investment proposals in respect of the Intervention Area during the Procurement. However, the Department cannot prevent operators from making further announcements of planned High Speed broadband investments. Depending on the outcome of such examination, the Department may (but is not obliged to) update the High Speed Broadband Map and Intervention Area during Procurement (prior to the submission of Final Tenders) including when taking account of public procurement rules and/or State Aid rules and guidelines.

For this reason, the Department reserves the right, at its absolute discretion, to assess any changes to operator claims of planned coverage that arise during the Procurement and reserves the right to change the Intervention Area during the Procurement, at its absolute discretion, where it is considered absolutely necessary to do so.

The Department reserves the right, at its absolute discretion, to assess any changes to operator claims of planned coverage that arise post completion of the Procurement and reserves the right to change the Intervention Area post contract award, at its absolute discretion, where it is considered absolutely necessary to do so, in accordance with the terms of the Contract. The process by which this would be done is set out in more detail in the Contract.

The Contract includes a mechanism which enables NBPco to seek relief from its obligation to pass premises that have already been passed by a third party commercial operator provided that the Department's specification in the Contract has been met by the third party commercial deployment and the Department has the necessary assurances that the relevant premises can connect to the commercial network. If NBPco so requests, this mechanism will apply to provide NBPco with relief from the obligation to overbuild in respect of such premises. However, the mechanism does not provide for an increase in subsidy with respect to such premises that are passed by a third party commercial operator before the Commencement Date of the Contract. The mechanism only provides for a potential increase in subsidy in respect of premises that are passed by a third party commercial operator after the Commencement Date of the Contract where the deployment to such premises meets the Department's specification in the contract and where the Department has the necessary assurances that the relevant premises can connect to the commercial network.

The Department will continue to consult with the European Commission on the High Speed Broadband Map and Intervention Area as part of the State Aid notification process.

### **3.8 Variants**

Variant Final Tenders will not be permitted.

### **3.9 Deliberately Blank**

### **3.10 State Aid and ERDF funding**

Given the nature of the Project, the Department is taking steps to ensure that there is no inappropriate State Aid.

Bidders should be aware that the award of the Contract is subject to a favourable State Aid decision being obtained from the European Commission.<sup>2</sup>

<sup>2</sup> The Department reserves the right to change its requirements in respect of the Project and Contract as specified in the Procurement documents (including the Pre-Qualification Documents, ITPD, ISDS, ISRDS or ISFT) in order to comply with any conditions, recommendations or requirements made by the European Commission in connection with any State Aid decision or as a condition of ERDF funding.



A State Aid Compliance Report was consulted upon previously. Further details about this report are set out in section 3.1 of the PIM.

In addition, this Project involves ERDF (European Regional Development Fund) funding. The Procurement and Contract is accordingly subject to a number of requirements arising under ERDF funding conditions. This includes audits as well as a requirement for eligible expenditure for ERDF funding to be forecast, incurred and drawdown by specific timelines. The specific requirements for NBPCo that result from the use of ERDF funding are set out in schedule 5.4 of the Contract.

### 3.11 Background documents

There are various background documents referred to in the PIM, the ITPD, the ISDS and this ISRDS (including, in particular, the various reports identified in section 3.3.1 of the PIM such as the Intervention Strategy, for instance) (the “**Background Documents**”). All of these Background Documents are provided for background information only and outline the background in relation to this Procurement and the decisions made leading up to the launch of this Procurement process.

In many cases, the Background Documents may provide additional information in relation to specific aspects of the Project which are discussed in the PIM, the ITPD, the ISDS, the ISRDS and this ISFT. Whilst Bidders can use this information to inform their understanding of the background leading up to launch of the Project and Procurement, Bidders should note that this ISFT sets out the basis of this Procurement from this point forward and the Department’s requirements (which will be refined and changed in accordance with the competitive dialogue procedure). Consequently, the Department is not bound by what is stated in the Background Documents and may, at its discretion, take a different approach to any aspect of the Project or Procurement from that set out in the Background Documents where this has been considered appropriate following more detailed engagement with Bidders during the dialogue.

Nevertheless, the Background Documents are relevant and do provide relevant additional background information. Consequently, the Department may (without being obliged to) have regard to them during the Procurement and use them to inform its approach to the Procurement and its more detailed statement and refinement of its requirements for the Project.

If there is any discrepancy, conflict or inconsistency between what is stated in the Background Documents and this ISFT, Bidders may ask for clarification as to the position for the purposes of the Procurement and Project in accordance with sections 5 and 6 of this ISFT Volume 1. The Department will then clarify the position in such manner as it considers appropriate, at its absolute discretion.

### 3.12 Terms and Conditions

The Conditions of Procurement set out at Appendix 1 of this ISFT continue to apply.



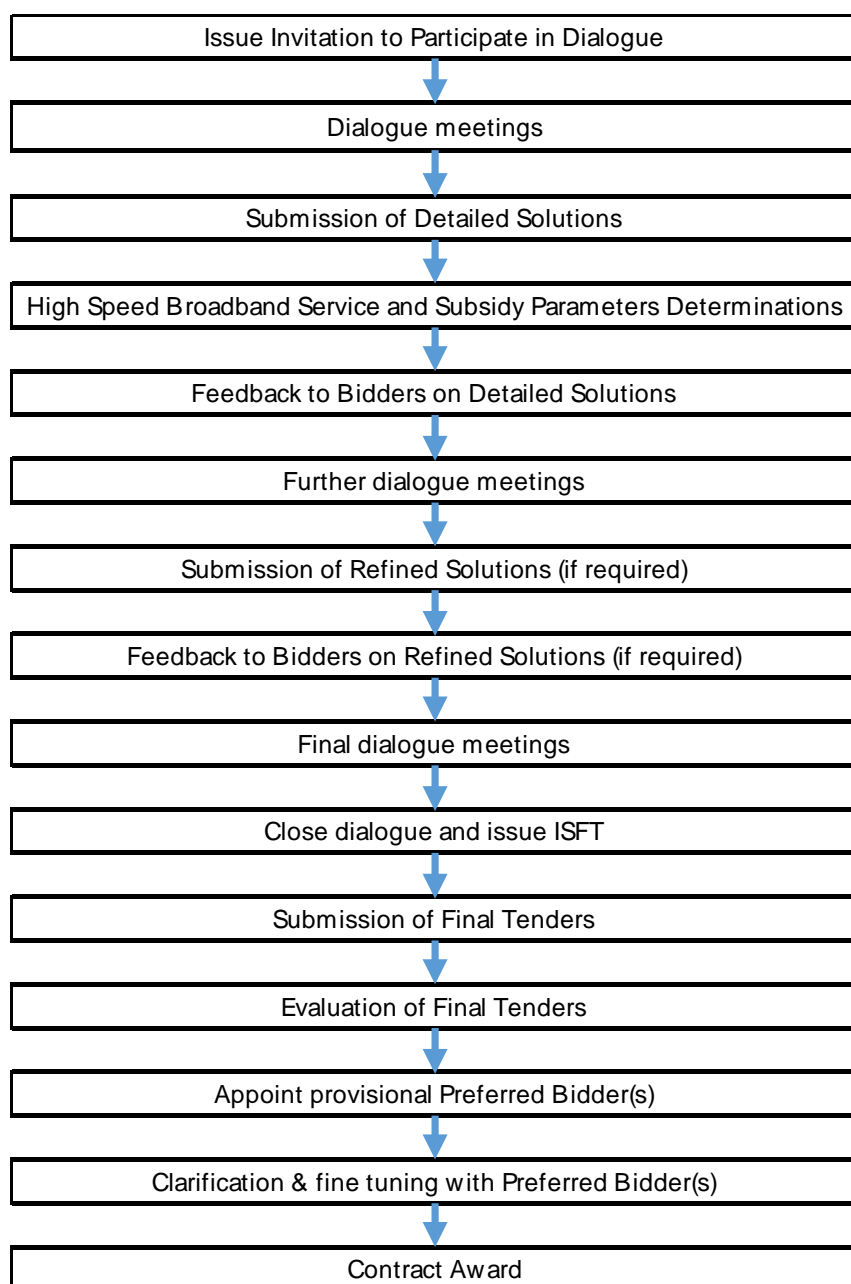
## 4 Procurement Process

### 4.1 Introduction

The Contracts that are the subject of this Procurement have been designated as a “service concession” as defined in the Public Procurement Directive 2004/18/EC and the European Communities (Award of Public Authorities' Contracts) Regulations 2006. Consequently, that legislation does not apply to this Procurement in accordance with Article 17 of that directive and Regulation 14 of those regulations.

The competitive dialogue procedure is being followed for the purposes of this Procurement. The figure below outlines the competitive dialogue process for this Procurement as set out in the ITPD.

Figure 4.1: Overview of the competitive dialogue process



### 4.2 Competitive Dialogue Process



The competitive dialogue process for this Procurement consists of a dialogue stage and a final tender stage, which will culminate in the nomination of Preferred Bidder(s).<sup>3</sup>

#### 4.2.1 Dialogue stage

The dialogue stage has now been completed. Bidders should note that all communications, positions and other statements given by the Department during dialogue were indicative only. The Department's position is as set out in Volumes 1 – 4 of the ISFT.

#### 4.2.2 Final Tender stage

The Final Tender stage has commenced with the closing of the dialogue and the issue of this ISFT to the Bidder and, subject to the Final Tender being capable of satisfying the Department's requirements and representing an acceptable outcome for the Department, will conclude with a recommendation on the provisional appointment of a Preferred Bidder.

**The ISFT is in respect of Lot 1C only** (i.e. the Bidder is to submit its Final Tender for Lot 1C only).<sup>4</sup>

The Final Tender stage will involve the following activities:

- Issue of the ISFT, which may include revised versions of specific volumes of the ISRDS.
- Submission of a formal written Final Tender by the Bidder in accordance with the instructions set out in the ISFT. The format of the Final Tender is further described below.
- Evaluation and scoring of the Final Tender to identify the most economically advantageous tender (i.e. the provisional Preferred Bidder) in respect of the Lot, in accordance with the evaluation criteria and methodology set out in Volume 2 of the ISFT (together with any such further information as may be issued by the Department through the course of the Procurement);
- The Department nominating a Preferred Bidder on a provisional basis.
- The Department providing feedback to any unsuccessful Bidder on its evaluation of the Final Tender.

The Department may, in particular, require the Bidder to clarify, specify and/or fine-tune its Final Tender. However, this may not involve changes to the basic features of the Final Tender which are likely to distort competition or have a discriminatory effect.

Provided that the Preferred Bidder's Final Tender:

- is capable of satisfying the Department's requirements (as defined by the Contract and the ISFT Volume 2 (Evaluation Methodology)); and
- represents an acceptable outcome for the Department,

the outcome of the final tender stage will be a recommendation to award a single Contract to the Preferred Bidder for the Combined Area Lot.

The Preferred Bidder, when appointed, may also be asked to clarify aspects of its Final Tender and confirm commitments contained in its Final Tender provided this does not have the effect of modifying

<sup>3</sup> As set out in the PIM, it is permitted to deviate from the exact form of the competitive dialogue under the legislation as the Public Procurement Directive 2004/18/EC and the European Communities (Award of Public Authorities' Contracts) Regulations 2006 do not apply to this Procurement. The Department does not currently intend to do so, but reserves the right to do so by prior notice to the Bidders, including for example where there is a material delay to the contract being awarded or coming into effect for any reason in which case the Department will notify Bidders accordingly. All references to the competitive dialogue in the ISFT should be construed accordingly.

<sup>4</sup> The Department may issue revised versions of the ISFT documentation (in whole or in part) prior to the deadline for submission of Final Tenders. This may, in particular, include amendments to the instructions, guidance, timetable and requirements set out in the ISFT, amendments to the Contract and any additional information requested by Bidders or considered beneficial by the Department. The Department may also amend, refine, add or remove requirements set out in the Statement of Requirement or elaborate upon the award criteria and related evaluation methodology set out in the Evaluation Methodology. Final Tenders will be required to take into account the revised ISFT in such case.



substantial aspects of the Final Tender or the ISFT and does not risk distorting competition or causing discrimination.

The Bidder's Final Tender should take the following form:

- for each of the areas of the Bidder's RDS that did not satisfy the Department's requirements, a formal written Final Tender submission setting out in detail the Bidder's revised solution for that area. This submission should include a track change version of the solution which shows the changes made by the Bidder since the most recent draft final tender submission (or RDS submission, if there has been no draft final tender submissions); and
- a letter listing the question responses that have changed between the RDS submission and the Final Tender and confirming in writing that, in respect of all other areas, the Bidder's RDS is also its Final Tender.

The onus remains fully on the Bidder to ensure that its Final Tender is fully compliant, meets any pass/fail requirements, and any minimum scores. The Department's previous evaluation of the Refined Detail Solution or any draft final tender during the dialogue stage was representative of its then current thinking and is open to change in any or all aspects.

#### 4.2.3 Preferred Bidder stage

Once the evaluation of the Final Tenders is complete, the Preferred Bidder will be notified and closing contract clarifications between the Department and the Preferred Bidder will begin. The appointment as Preferred Bidder is provisional and can be withdrawn at any time.

The principal activities associated with this stage include the following:

- appointment of the Preferred Bidder on a provisional basis;
- closing contract clarifications<sup>5</sup> between the Department and the Preferred Bidder;
- the finalisation of the contract documents with the Preferred Bidder;
- the Department seeking and receiving the necessary approvals to award the Contract to the Preferred Bidder(s); and
- the Department awarding the Contract to the Preferred Bidder.

The Department intends to seek explicit confirmation on a number of important issues prior to the provisional appointment of the Preferred Bidder. This confirmation will be secured by requiring the Preferred Bidder and, if appropriate, its principal subcontractors to countersign a detailed commitment letter prepared by the Department. The commitment letter, by way of example, will seek to confirm that:

- the terms of the Contract are accepted, subject to the resolution of a defined list of clarifications and commitments to be confirmed;
- the Contract price (i.e. total Subsidy Payments) set out in the Final Tender as at that date is the maximum price and will not increase thereafter, other than in accordance with the provisions of the Contract or the ISFT;
- the impact of any errors or inappropriate assumptions discovered subsequently in the Project Financial Model will be borne by the Preferred Bidder, other than where:

<sup>5</sup> As set out in the PIM, it is permitted to deviate from the exact form of the competitive dialogue under the legislation as the Public Procurement Directive 2004/18/EC and the European Communities (Award of Public Authorities' Contracts) Regulations 2006 do not apply to this Procurement. The Department does not currently intend to do so, but reserves the right to do so by prior notice to the Bidders, including for example where there is a material delay to the contract being awarded or coming into effect for any reason in which case the Department will notify Bidders accordingly. All references to the competitive dialogue in the ISFT should be construed accordingly.



- the correction of the error or assumption in the Project Financial Model would result in a reduction in the Contract price (i.e. total Subsidy Payments), in which case the error shall be corrected and the Contract price shall be reduced accordingly;
  - the existence or correction of the error or inappropriate assumption, if it had been identified at the time, would have altered the Department’s evaluation of the Final Tenders, in which case the Department will, where appropriate, revisit the original evaluation of the Final Tenders to see if the outcomes of the evaluation need to be changed in any respect as a result;
  - such amounts are subject to review or revision in accordance with the provisions of the Contract; and, to the extent relevant,
- the Preferred Bidder will finalise all of its commercial arrangements, including for example establishment of special purpose company, consortium agreements, finance agreements, subcontracts (including infrastructure sharing agreements), guarantees and performance bond, in sufficient time to allow for the award of the Contract and to the satisfaction of the Department.

The Preferred Bidder may be required to comply with any other notified conditions to the satisfaction of the Department.

Bidders should note that all contracts and agreements must be in a form satisfactory to the Department. The Department will undertake due diligence on all contracts and agreements and may require changes to them (regardless of whether any pass/fail requirements in Volume 2 have been passed).

Any attempt by the Preferred Bidder to change agreed positions or to introduce new issues may result in the withdrawal of provisional Preferred Bidder status.

Bidders are reminded that Final Tenders may be clarified by the Department during the period following closure of the dialogue and identification of the Preferred Bidder. Following the selection of the Preferred Bidder, there may be a further request by the Department for clarification of the Preferred Bidder’s Final Tender and confirmation of the commitments within it. This means that there will be limited opportunity to leave matters open and/or hold discussions with Bidders once Final Tenders have been submitted. Consequently, Bidders are required to undertake all required substantive due diligence during the dialogue stage, i.e. prior to issue of the ISFT.

The Preferred Bidder will be required to have in place any relevant third party finance as a condition of Contract close. The Preferred Bidder will be given an appropriate period in which to complete any necessary final due diligence (that is not capable of being performed prior to the issue of the ISFT) and to prepare its documentation for commercial and financial close. This is discussed further in Volume 2 ISFT. If the Preferred Bidder does not complete the required steps within the period allocated to it, the Department may take such steps as it considers appropriate.<sup>6</sup>

During the Preferred Bidder stage, the Department may verify any aspects of the Preferred Bidder’s PQQ Response or Final Tender if this is deemed necessary.

#### 4.2.4 Contract

Volume 3 is the draft contract between NBPco and the Department that may be entered into with NBPco.

Bidders have been issued with the ISFT version of Volume 3. A separate document, comprising Annex 1 of ISFT Volume 3, titled “Additional ISFT Volume 3 Contract Terms” or like name or title, has also been issued to Bidders. This sets out a limited number of detailed commercial principles which have been agreed by the relevant Bidder and all its Bidder Members with the Department prior to ISFT (and are not therefore subject to further dialogue) but which have not yet, at that time, been fully reflected and incorporated in the drafting of other relevant clauses or Schedules of ISFT Volume 3, but which drafting will be so fully reflected and incorporated in ISFT Volume 3 at Preferred Bidder stage.

Bidders are reminded that, as the Procurement is being carried out in accordance with the competitive

<sup>6</sup> This may include (but is not limited to) rejecting the Preferred Bidder’s Final Tender (if appropriate in the relevant circumstances) or allowing the Preferred Bidder additional time to complete the next steps



dialogue procedure, all substantive commercial and contractual discussions should have been completed before the dialogue was closed and the ISFT issued. Apart from the Department's entitlement to request a Bidder to clarify, specify or fine-tune its Final Tender in a manner permitted by public procurement law, the Department does not currently intend for there to be an opportunity to negotiate commercial and contractual terms after the dialogue has closed and the ISFT is issued. Any attempt to do so may result in provisional Preferred Bidder status being withdrawn and the Bidder rejected.

Accordingly, the Preferred Bidder will be expected to enter into the Contract unamended (except, if applicable, with respect to specific provisions stated to be subject to finalisation at Preferred Bidder stage in a manner permitted by public procurement law, including particularly those to be reflected and incorporated in the ISFT Volume 3 to give effect to the agreed detailed commercial principles set out in the "Additional ISFT Volume 3 Contract Terms" or provisions capable of being clarified, specified and fine-tuned).

#### 4.2.5 Preferred Bidder appointment

Any notification of Preferred Bidder status is provisional, is not binding on the Department, gives rise to no legitimate expectations and may be revoked at any time prior to finalisation of such appointment.

The Department, in particular, reserves the right to de-select and, if appropriate in light of the relevant circumstances, reject a Bidder originally provisionally selected as the Preferred Bidder if:

- it cannot comply with any conditions of its provisional selection;
- if the final Contract is not executed with such Bidder (or it does not satisfy any pre-conditions of such contracts) or final close is not reached with such Bidder for whatever reason; or
- for any other reason whatever which the Department considers appropriate.

The Department is not liable for any costs or expenses incurred by the Preferred Bidder(s) arising out of or in connection with the issue of the notification, its revocation and anything occurring in between such stages.

#### 4.2.6 Contract award

Any Contract that is awarded in respect of this Lot will be on the basis of the most economically advantageous tender in accordance with the evaluation criteria set out in the Evaluation Methodology.

The decision to proceed to the award the Contract(s) for the State-led intervention will require the consent of the relevant stakeholders within Government as described in section 4.5 below.

### 4.3 Deliberately Blank

### 4.4 Timetable for the Competitive Dialogue Process

The Department wishes to enter into a Contract with a Preferred Bidder for the State-led intervention as soon as possible and an overview of the timetable for the completion of the competitive dialogue process is set out below. The overall timescale to appointment of Preferred Bidder remains the same.

Table 2.1: Timetable for the completion of the competitive dialogue process

Milestone	Target Completion
Issue ISFT	Q3 2018
Receive Final Tenders	Q3 2018
Appoint Preferred Bidder(s)	Q3 2018
Contract award	Q4 2018

It is important from both a time and cost perspective that the timetables are adhered to as closely as possible and the Department will seek to identify and address any timetable issues as early as possible.



Bidders are reminded that the Department reserves the right to review and change the Procurement process (including the above timetable) or to cancel the Procurement or the procurement of a particular Lot at any stage.

## 4.5 Approval for Contract Award

The Government will have a number of requirements that will need to be met in order for the Department to obtain approval to award the Contract for the State-led intervention at the end of the Procurement. These requirements are likely to include an updated, positive cost benefit analysis (showing that the economic benefits of the proposed intervention outweigh the costs), an assessment of whether, in the context of there being one bidder remaining in the procurement, the Bidder's Final Tender represents an acceptable outcome for the Department (such assessment being conducted in accordance with the Department's "Single Bidder Solution Assessment Methodology") and final Cabinet approval of the Subsidy Payments required from Government (including final confirmations of the required budgetary cover and approvals).

## 4.6 Deliberately Blank

## 4.7 Department Key Personnel

For the purposes of the Conditions of Procurement set out in Appendix 1 of this ISFT Volume 1, the Department Key Personnel are defined as follows:

Table 4.2: Department Key Personnel

Role	Name
Programme Sponsor	Ciarán Ó hÓbáin
Programme Director	Fergal Mulligan
Principal Officer	Orla Ryan
Chief Technical Officer	Patrick Neary
Commercial Lead	Tom McCormack
Contract(s) and Compliance Lead	Ciara Kennedy





# 5 **Deliberately Blank**



## 6 Communications

### 6.1 Communications Protocol

The Department has prepared a Communications Protocol which explains how communications are to be managed in respect of this Procurement and other related workstreams (e.g. the High Speed Broadband Map). The Communications Protocol was shared with Bidders via eTenders during the pre-qualification stage and Bidders are required to continue to comply with the requirements of the Communications Protocol throughout the remainder of the Procurement.

### 6.2 Queries

Bidders may not address queries to, or communicate with, the Department in relation to this Procurement other than in the manner provided in this section and in the Communications Protocol.

Each Bidder must fully satisfy itself as to the nature and requirements of this ISFT. In addition, if a Bidder considers that any aspect of this ISRDS is not clear or is ambiguous or contains errors, or if a Bidder has any queries regarding the scope of the Project, the Service Requirements or the manner in which the evaluation will be undertaken or the manner in which any of the award criteria (including any sub-criteria), minimum requirements or other requirements will be applied, this must be raised with the Department in accordance with this section.

Any queries should be raised in writing with the Department via eTenders. The Department will use reasonable endeavours to respond to queries.

In order to avoid the duplication of queries, Bidders should ensure that all queries are submitted by the nominated representative of the Bidder.

Queries forwarded by letter, e-mail or fax will not be accepted. Verbal queries are deemed not to have been accepted unless they are subsequently submitted via the eTenders website and responded to by the Department in writing. Verbal clarifications are deemed not to have been made unless they are issued by the Department in writing. Where such a requirement arises from verbal queries or clarifications arising during a clarificatory or other meeting, the requirement for the query or clarification to be confirmed in writing shall be noted on the actions log for that meeting.

If, as a result of queries/requests, any discussion or other communication between the Department and a Bidder and/or otherwise, the Department is of the opinion that a clarification of and/or amendment to the ISFT is required to be made and/or additional information is required to be issued, then the Department shall be entitled to do so at any time by notice in writing on the eTenders website or by circulating it otherwise (for example via a data room).

The Department does not accept responsibility for any communications issued by it which are missed or not received by a Bidder or for communications issued by Bidders which are not received by the Department. The onus is on Bidders to follow up with the Department if no response is received. The Department may not follow up on out of office or message failure notices received. Accordingly, Bidders should ensure that valid contact details have been provided when registering for the eTenders website and that such emails are monitored.

### 6.3 Deliberately Blank

### 6.4 Commercially Sensitive Information

The Department is subject to the Freedom of Information Act 2014. Unless an exemption provided for under the Freedom of Information Act is applicable in relation to any particular information, the Department will disclose that information in response to a request made under the Freedom of Information Act 2014. Bidders should note that this can include price information (and also that information disclosed to unsuccessful Bidders may include price information).



The Department is not liable or responsible under any circumstances whatever for any loss, damage or suffering of any kind suffered as a result of the disclosure of any information in good faith purportedly pursuant to the Freedom of Information Act 2014 before, during or after this Procurement.

Bidders are therefore required to consider if any of the information that they supply to the Department in the course of this Procurement (including, for example, information submitted in advance of dialogue meetings) should not be disclosed because of its sensitivity.

Bidders should clearly mark as “CONFIDENTIAL – COMMERCIALY SENSITIVE” any information submitted to the Department during the course of this Procurement that is considered commercially sensitive. Such information should be submitted via eTenders in a separate message to any information that is not considered to be commercially sensitive, with the words “CONFIDENTIAL – COMMERCIALY SENSITIVE” included in the message title. Bidders should specify the reasons for its commercial sensitivity and specify the period for which the information will remain sensitive.

General statements to the effect that all information is confidential, commercially sensitive or proprietary will not be permitted. Rather, a detailed, genuine and bona fide explanation must be provided justifying the non-disclosure of any specific element of a solution or other information. This is an important aspect of this competition and Bidders are required to act reasonably and bona fides in this respect.

The Department will take into account statements of confidentiality and commercial sensitivity that are provided by Bidders and will endeavour to consult with Bidders about commercially sensitive information before making a decision on any Freedom of Information request received.

Nevertheless, the final decision on any Freedom of Information request rests with the Department, subject to applicable law. Bidders should seek their own legal advice on the application of freedom of information legislation.



## 7 Bidder Composition

### 7.1 Separate Legal Entity

The Department will require the successful Bidder to establish NBPco as a Special Purpose Company (in the form of a separate legal entity) that will contract with the Minister for the delivery of the Service Requirements. The Department's requirements in respect of this Special Purpose Company / separate legal entity (which is referred to in the Contract as "NBPco") are set out in the Contract (including the schedules to the Contract).

Bidders should note that the Preferred Bidder will be required to establish the NBPco. The Department will not accept an unincorporated joint venture or limited liability partnership to enter into the Contract for the Project.

### 7.2 Guarantees and Performance Bond

The Department's requirements in respect of Guarantees and Performance Bonds are set out in the Contract, in particular in clause 38, Schedule 7 (Approved Form Documents) and Schedule 9 (Required Documents).

### 7.3 Subcontractors

Bidders are required to disclose in their ISFT response the names and addresses of any Key Subcontractors that NBPco will rely upon for the purposes of undertaking the Contract (should they be awarded the Contract), clearly stating the responsibility and role of the relevant Key Subcontractors and the key contract deliverables that each Key Subcontractor will be responsible for. Bidders are reminded of the requirements set out in section 7.5.

As described in ISFT Volume 2 (Evaluation Methodology), the Department intends to review the proposed terms of any subcontracts (and any other significant commercial agreements to be entered into by NBPco) and to comment upon them and take them into account in the Procurement process.

In accordance with section 10.4 of the PIM, Bidders will be required to contract with Critical Key Subcontractors and Key Subcontractors on a basis which the Department considers appropriate in its discretion having regard to the nature, size and complexity of the Contract and the role of the Critical Key Subcontractor or Key Subcontractor (as applicable). The Department's final position is set out in the ISFT Contract. This includes a requirement for certain contract terms to be included within key subcontracts. Notwithstanding the compliance tests provided for in Volume 2 of the ISFT and any comments provided by the Department on the terms of any subcontracts and the requirements of the Contract with respect to subcontracts, the Department reserves the right to require changes at Preferred Bidder stage to the terms of any subcontracts with Critical Key Subcontractors and Key Subcontractors which it considers appropriate having regard to the overall circumstances of the Contract in respect of the Preferred Bidder.

The Department reserves the right to require direct interaction with relevant Critical Key Subcontractors and Key Subcontractors in respect of their relevant proposed roles and subcontracts at Preferred Bidder stage.

The Department also reserves the right to reasonably require a Bidder to market test one or more of its key subcontracts if the Department believes there to be an absence of competitive tension.

Subcontractors should be clearly identified as subcontractors and distinguished from the Bidder. The Bidder (in the form of NBPco) will remain solely liable under the Contract for its and any of its subcontractors acts, errors or omissions despite the use of any subcontractor.

Bidders should note the requirement to enter into Key Subcontractor Direct Agreement(s). Infrastructure access providers shall be considered Key Subcontractors for this purpose.



As set out in ISFT Volume 2, the Department has identified for the Bidder, based upon information known to it at this stage, which entities are Key Subcontractors.

## 7.4 Tax Clearance

The Preferred Bidder must secure tax clearance (or procure that Bidder Members secure tax clearance) in respect of all Bidder Members, Key Subcontractors and NBPCo in accordance with the terms of Department of Finance Circular 43/2006: Tax Clearance Procedure: Public Sector Contracts (or any replacement) as a pre-condition to Contract award.

## 7.5 Change in Bidder

As stated in section 10.6 of the PIM, any change in the:

- membership of the Bidder;
- ownership, control or structure of the Bidder (including to the shareholding as set out in the PQQ Response) or any Bidder Members, and/or
- intended roles and responsibilities of the Bidder Members,

after the Bidder has submitted its completed PQQ Response, may lead to its disqualification unless approved by the Department in writing. Any approval will be dependent on a number of factors including, without limitation, that, in the view of the Department, the change is not to the detriment of the Department and the Bidder continues to meet the conditions for selection as set out in the Pre-Qualification Documents (including the Department's responses to queries during the pre-qualification stage) and would not have received a lower score in the pre-qualification process which would have impacted upon its ranking to the extent that it would not have been selected and provided it does not substantially alter the composition of the consortium in question.

The Department reserves the right to withhold approval for any such changes and to disqualify the Bidder concerned from any further participation in the Procurement.

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

It should be noted that a change will be judged as against the structure, shareholdings and responsibilities of the team proposed in the original PQQ Response to the Pre-Qualification Documents. Any such change is at the risk of the Bidder.

The requirements in section 10.6 of the PIM with respect to the establishment of new legal entities also continue to apply.

## 7.6 Change in Circumstances

If, as a result of a change in events, circumstances or otherwise, any information given by a Bidder to the Department in the PQQ Response, Solution submission, Final Tender or otherwise, was (when submitted) or has become (by reference to facts as they then stand) untrue, different, incomplete or misleading, the Bidder must so inform the Department in writing as soon as it becomes aware of this. This includes, without limitation, information in relation to a Bidder's financial and economic standing.

If it comes to the Department's attention that:

- there has been a change in events or circumstances concerning a Bidder that could affect the Department's assessment of that Bidder's PQQ Response, Solution, Final Tender or the decision to issue the ITPD, ISDS, ISRDS or ISFT to that Bidder; or
- information submitted by a Bidder was (when submitted) or has become (by reference to facts as they then stand) untrue, different, incomplete or misleading,

the Department may (but is not obliged to) revise its assessment of the Bidder's PQQ Response, Solution or Final Tender, as the case may be, on the basis of the information then available to the



Department and, at its absolute discretion (but subject to applicable law), reject the Bidder's PQQ Response, Solution and/or Final Tender and eliminate the Bidder from the Procurement or adjust the scores awarded to the Bidder under the relevant criteria.

The Department reserves the right at any time prior to the award of Contract to request updates of information provided by the Bidder (or a Bidder Member) to the Department in the PQQ Response, Solution submission or Final Tender and/or to review the financial standing and/or technical or professional capacity and capability of any Bidder Member. As described above, the Department may (but is not obliged to) revise its assessment of the Bidder's PQQ Response, Solution or Final Tender, as the case may be, on the basis of the updated information.



## 8 Information Requirements for Final Tenders

### 8.1 Requirements

Bidders must submit their Final Tenders and participate in this Procurement subject to, and in accordance with, the requirements of this ISFT and in accordance with any other requirements communicated from time to time to Bidders by the Department.

Bidders are referred to section 6 of ISFT Volume 2 for compliance requirements in respect of the content of Final Tenders.

### 8.2 Final Tender Structure

Bidders must structure their Final Tenders in accordance with the instructions set out in the ISFT Volume 2 (Evaluation Methodology). The Final Tender should contain all of the information requested in volumes 1, 2 and 4 of this ISFT.

All Final Tenders must be in English and fully paginated with an index, annotated and cross-referenced as appropriate and submitted as set out in Section 8.4 below.

All prices must be presented in accordance with the requirements of ISFT Volume 4 (Financial Requirements) and must be exclusive of VAT and in Euro (EUR).

Bidders must ensure that their Final Tenders are complete. Failure to deliver all or part of the Final Tenders in the format requested may, subject to section 6 of the Evaluation Methodology, lead to a submission being rejected. See section 6 of the Evaluation Methodology.

Bidders are advised that supporting materials should not include general promotional materials prepared by the Bidder or, if the Bidder is a consortium, its individual Bidder Members.

### 8.3 Evaluation of Final Tenders

As explained in section 4.2 of this document, the Department will evaluate the Final Tenders against the evaluation criteria set out in ISFT Volume 2 (Evaluation Methodology).

### 8.4 Final Tender Submission

Bidders must submit their Final Tenders by the date and time notified by the Department via eTenders.<sup>7</sup> Final Tenders must, subject to the Evaluation Methodology, be delivered to the Department in accordance with the instructions set out in the ISFT Volume 2 (Evaluation Methodology).

### 8.5 Full information

Bidders must disclose all relevant and up-to-date information in their Final Tenders. Bidders which, or which attempt to, withhold any information that the Bidders knows or suspects to be relevant, or to mislead the Department may, at the Department's discretion, be rejected and eliminated from this Procurement. Without limiting or affecting Section 5.1.4 of ISFT Volume 2, the Department reserves the right (but is not obliged to), where appropriate, to independently verify information submitted to it in Final Tenders or otherwise as part of this competition.

If information or evidence provided in a Final Tender is out of date or known or suspected not to

<sup>7</sup> Any time stated in this regard is local Irish time.



accurately represent the situation or facts at the time of submission of the Final Tender, this must be clearly stated at the time. This applies, in particular, to any consortium and subcontractor information and any financial information.

If a Contract is awarded to a Bidder that has knowingly withheld relevant information or misled the Department, the Contract may, at the Department's discretion, be rendered null and void.





## Appendix 1 Conditions of Procurement

### Applicable Law

The ISFT documents and any matter or disputes related to or in any way connected with or arising out of the ISFT documents or the Procurement are governed by and construed in all respects in accordance with the laws of Ireland and subject to the exclusive jurisdiction of the Irish Courts of Ireland.

### Open Final Tenders

All Final Tenders must remain open and valid for sixteen (16) months from the date for submission of Final Tenders. No Final Tender may be withdrawn after the deadline for submission of Final Tenders. Bidders, by submitting Final Tenders, irrevocably agree to this.

Whilst Final Tenders are only required to remain open and valid for sixteen (16) months from the date for submission of Final Tenders, the Department may (but is not obliged to) request Bidders to extend the period for which they remain open for a longer period of time. If a Bidder refuses such a request, the Bidder will be deemed to have withdrawn its Final Tender (but the Department may continue to award the Contract(s) to any Bidders who have agreed to extend the validity of their Final Tenders).

### Specification of Standards

Where reference is made to an international, European, British or other national standard, then a Bidder may propose an equivalent to any of these, provided that its proposal offers equivalent guarantees of safety, suitability and fitness for purpose to those specified.

### Compliance with Law and Regulation

Bidders (and their Bidder Members, Shareholders, subcontractors and others involved in their bid) must comply with all relevant laws and regulations that are applicable to them in the context of this Procurement.

Any Bidder that fails to comply with such laws and regulations to the satisfaction of the Department may be treated as failing to comply with the conditions of this Procurement and may, at the discretion of the Department and subject to the Evaluation Methodology, be rejected and eliminated from this Procurement.

### Costs

Each party will be liable for its own costs and expenses arising out of or in relation to its participation in this Procurement, including the preparation and submission of any Solutions and/or Final Tenders and the conduct of any subsequent discussions with the Department during the competitive dialogue phase and the remainder of the Procurement. This applies in all cases whatsoever, including where the Procurement is terminated and/or errors are made in the running and decision making in the Procurement.

For the avoidance of doubt, the Department, Minister and its appointed advisers have no obligation whatsoever to reimburse any Bidder (or any of its Bidder Members, Shareholders, subcontractors, advisors) or others in respect of any costs, economic loss or other loss of profit (whether direct or indirect) incurred by it either in the preparation and submission of PQQ Responses, Solutions and/or Final Tenders made to the Department, or arising from clarifications and discussions with the Department in connection with the possible award of the Contract, or otherwise as a result of its participation in the Procurement, regardless of whether or not the Procurement results in the award of the Contract or is terminated in whole or in part (including where it is terminated in light of errors made in undertaking the Procurement).

### Bidder Eligibility

Bidders are reminded that the Pre-Qualification Minimum Requirements apply to the Procurement at all times (including up to and including the Preferred Bidder stage). The Department may treat a Bidder as ineligible and reject it and/or decide not to permit a Bidder to continue to participate in the Procurement process:

- on any one of the grounds set out in the European Communities (Award of Public Authorities'



Contracts) Regulations 2006; or

- if the economic and financial standing or technical and professional capability of the Bidder (or a Bidder Member) deteriorates during the Procurement process to such an extent that the Bidder no longer has the requisite economic and financial standing or technical and professional ability for the award of the Contract.

The Department reserves the right, at its sole discretion, to re-assess the eligibility, economic and financial standing and technical and professional capability of any Bidder (or Bidder Member) at any point(s) throughout this Procurement (including at Preferred Bidder stage) to ensure that the Bidder continues to remain eligible and have the requisite economic and financial standing and technical and professional capability for the award of the Contract.

#### Capacity to contract

Bidders (or in the case of consortia each Bidder Member of the Bidder) are to confirm when submitting their Final Tenders, in accordance with the requirements set out in the Evaluation Methodology, that they have the legal capacity and are not otherwise constrained (including constraints imposed by funders and/or other stakeholders) in relation to their ability to enter into a contract for the Project and to fulfil their role in the delivery of the Project.

#### Warranty

The publication of the ITPD, ISDS, ISRDS or ISFT documents does not warrant or imply that any Bidder will be awarded the Contract or Contracts or that any Bidder will be appointed as Preferred Bidder or awarded or invited to enter into the Contract or Contracts on any particular conditions.

#### The Department's rights

The Department reserves the right for any reason whatever at its absolute discretion, to:

- extend any or all timelines set out in the ISFT documents (either unilaterally or in response to a request from a Bidder to do so);
- reject any and all Final Tenders;
- not to select any Bidder, Preferred Bidder and/or Final Tender;
- not to proceed to any subsequent stage of the Procurement process;
- not to award any Contract;
- not to implement any arrangement contemplated by the ITPD, ISDS, ISRDS or ISFT documents;
- not to provide a Bidder with any additional information;
- to update this document or any other document at any time;
- to amend the scope of the Project or Procurement;
- to amend, refine, adjust, change or remove existing requirements or introduce new requirements with respect to the Project, Contract, Procurement or otherwise;
- to identify certain parts of the Service Requirements as being optional with other parts being mandatory;
- to amend the ISFT documents or other documents;
- not to proceed with the Procurement or Project;
- to withdraw from any discussions;
- to suspend the Procurement or any other discussions (and re-commence it subsequently no matter how long the suspension in which case it may re-commence with those Bidders that agree to continue in the Procurement even if all Bidders do not so agree);



- to re-visit / re-run earlier stages of the Procurement process, with the same or amended requirements, scope and/or criteria;
- to terminate, at its absolute discretion, the ITPD, ISDS, ISRDS or ISFT documents and/or the Procurement at any time and without reason; and/or
- to procure and award the subject matter of this Procurement and the Project in whole or in part by other means.

The Department is under no obligation to award any Contract to the best priced, most economically advantageous or any Final Tenders it may receive. The Department may award a Contract for some Lots, but not other Lots.

### Canvassing

Direct or indirect canvassing by any Bidder, Consortium Member, Bidder Member or their suppliers or advisers in relation to the Project or the Procurement or any attempt to obtain information from any of the agents or employees of the Department, its political representatives or its appointed advisers concerning another Bidder or a Solution or Final Tender or the Procurement is prohibited.

Bidders must not offer, give or agree to give to any member of the Department (or its advisers or evaluation team) any gift, or consideration of any kind as an inducement or reward in relation to the obtaining or execution of any Contract.

Any breach of this section will entitle the Department to immediately disqualify the Bidder concerned from the Procurement and/or cancel and terminate the Contract or any existing contracts that the Bidder has with the Department. The Department may recover any loss of expense resulting from any such termination.

### Conflict of Interest

Bidders are reminded of the conditions in respect of conflicts of interest, as set out in section 10 of the PIM.

Bidders should also note that sections 5.4, 5.5, 5.6, 5.8 of the PIM (and any related clarifications issued by the Department) continue to apply unless and until notified by the Department to the contrary.

### Collusion

Collusion or any attempt by any interested party, Bidder, its Bidder Members or their suppliers or advisers to collude with any other person in order to influence the Procurement in any way will result in disqualification from further participation in the Procurement. For example, Bidders and their Bidder Members and their suppliers and advisers shall not directly or indirectly at any time:

- fix or adjust the amount or content of any Final Tenders in accordance with any agreement or arrangement with any other person, other than in good faith where such other person is a proposed Bidder Member or a supplier, adviser or provider of finance to the Bidder or Bidder Member;
- communicate to any person other than the Department, or seek or obtain from such other person, information about the amount or content of any Final Tenders, other than in good faith to obtain quotations for supplies, services or finance;
- enter into any agreement or arrangement with any other person that will result in such a person refraining from submitting a Final Tender;
- enter into any agreement or arrangement with any other person as to the form, content, scope or amount of any Final Tender; or
- offer or pay a sum of money, incentive or valuable consideration to any person proposing to effect changes in or omissions from any Final Tender.

Any Bidder that fails to comply with this section to the satisfaction of the Department may be treated as failing to comply with the conditions of this Procurement and may, at the discretion of the Department, be rejected and eliminated from this Procurement.



## Errors

If a Bidder discovers any error or omissions or discrepancy, ambiguity or lack of clarity in the ITPD, ISDS, ISRDS or ISFT documents, the Bidder must immediately notify the Department in writing of such error, omission, discrepancy, ambiguity or lack of clarity. The Department upon receipt of such will notify Bidders of its ruling in relation to the matter concerned.

## Compliant and Unqualified Tenders

Bidders must submit a fully compliant Final Tender which is not qualified in any way.

## Confidentiality

The Bidder agrees to keep confidential the contents of the ITPD, the Invitation to Submit Detailed Solutions, the Invitation to Submit Refined Detailed Solutions, the Invitation to Submit Final Tender, all information which relates to the business and affairs of the Department (and its suppliers, service providers, agents, professional advisers and representatives) and all information which the Bidder receives or obtains as a result of its involvement in the Procurement and all other information which has either been designated as confidential by the Department in writing or that ought to be considered confidential (“**Confidential Information**”). Confidential Information extends to all aspects of the Procurement, including timescales. Bidders’ confidentiality obligations continue throughout and following conclusions of the Procurement, including following each Bidder’s participation in it.

The confidentiality requirements of the ITPD, ISDS, ISRDS or ISFT do not apply where (i) the disclosure of Confidential Information is a requirement of Irish or EU law placed upon the Party making the disclosure and (ii) any disclosure is required by the Department to comply with or discharge its statutory or government requirements or functions or in furtherance of its entitlements under the ITPD, ISDS, ISRDS or ISFT, provided that in each case any disclosure shall, to the extent possible and permitted by law, be made on the basis that the disclosure is subject to a confidentiality obligation for the recipient(s). The confidentiality requirements of the ITPD, ISDS, ISRDS or ISFT also do not prohibit Bidders from discussing details of their high speed broadband roll-out plans (whether urban or rural) with the European Commission.

Accordingly, the release of the Confidential Information to the Bidder (or its Bidder Members or other relevant people) during the Procurement is conditional upon:

- the Bidder taking all steps necessary to prevent the Confidential Information from being disclosed to the public or any third party or coming by any means into the possession of any third party;
- this confidentiality undertaking being binding upon the Bidder and its Bidder Members and others involved in its participation in the Procurement, including participation in dialogue, the Solutions and Final Tender and all of their respective associated companies and associates and all of their respective officers, employees, servants, agents or professional advisers (together “**Relevant Persons**”);
- the Bidder using the Confidential Information solely for the purpose of evaluating whether or not to enter into an agreement with the Minister in relation to the Project or to perform any obligations which the Bidder may undertake or has undertaken with the Minister or Department relating to the Project and neither the Bidder nor any Relevant Person shall use any of the Confidential Information for any other purpose whatsoever;
- the Bidder and Relevant Persons not using or disclosing or permitting the disclosure by any person of any of the Confidential Information for the benefit of any third party;
- the Confidential Information and its circulation shall be restricted to circulation and disclosure to individuals whose access to such Confidential Information is strictly necessary for the purpose as set out above;
- the Bidder and Relevant Persons keeping all materials containing Confidential Information in a secure place and returning them to the Department, or destroying them, immediately on termination of the discussions relating to this Procurement or upon the request of the Department; and
- the Bidder undertaking to indemnify and keep the Department and Minister at all times fully



indemnified from and against any loss, actions, proceedings, claims, demands, costs, (including, without prejudice to the generality of this provision, legal costs of the Department), awards and damages howsoever arising directly or indirectly as a result of any breach or non-performance by the Bidder or any Relevant Persons of any of the obligations in the ITPD and/or the ITPD, ISDS, ISRDS or ISFT.

In the event that the Bidder is unable to comply with the foregoing, the Bidder must notify the Department immediately following receipt of the ITPD, ISDS, ISRDS or ISFT and, in the event of any inability by the Bidder and the Department to agree confidentiality terms, the Department shall be entitled to require the Bidder to withdraw from this Procurement.

This provision shall not apply to any Confidential Information received by the Bidder from the Department: (a) which is or becomes public knowledge (otherwise than by a breach of this provision or other obligation of confidentiality); or (b) which was in the possession of the Bidder, without restriction on its disclosure, before receiving it from the Department; or (c) which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure; or (d) is independently developed without access to the Confidential Information.

The Department may require the Bidders to enter into further confidentiality undertakings from time to time during the Procurement.

Nothing in the ITPD, ISDS, ISRDS or ISFT documents or the disclosures envisaged by the Contract shall (except as expressly agreed otherwise) operate to transfer or operate as a grant of any licences, to any intellectual property rights in the Confidential Information.

The Bidder acknowledges that damages alone would not be an adequate remedy for breach of confidentiality. Accordingly the Department shall be entitled, without proof of special damages, to seek an injunction or other interim measures.

The Department may exclude a Bidder from this Procurement for the Bidder's failure to comply with this section, in addition to any other remedies it may have.

### Freedom of Information

The Department is subject to the Freedom of Information Act 2014. Unless an exemption provided for under the Freedom of Information Act is applicable in relation to any particular information, the Department will disclose that information in response to a request made under the Freedom of Information Act 2014. Bidders should note that this can include price information (and also that information disclosed to unsuccessful Bidders may include price information).

The Department is not liable or responsible under any circumstances whatever for any loss, damage or suffering of any kind suffered as a result of the disclosure of any information in good faith purportedly pursuant to the Freedom of Information Act 2014 before, during or after this Procurement.

Bidders are asked to consider if any of the information supplied in the course of this Procurement should not be disclosed because of its sensitivity.

Bidders must complete the "Freedom of Information Statement" contained in the ITPD, ISDS, ISRDS or ISFT identifying which information is considered commercially sensitive, specify the reasons for its sensitivity and specify the period for which the information will remain sensitive. The Department will endeavour to consult with a concerned Bidder about sensitive information before making a decision on any Freedom of Information requests received.

The final decision on any Freedom of Information request rests with the Department, subject to applicable law. Bidders should seek their own legal advice on the application of freedom of information legislation.

The Department will take into account statements of confidentiality and commercial sensitivity that are provided by Bidders and will endeavour to consult with Bidders about sensitive information before making a decision on any Freedom of Information request received but the Department will make its own assessment and decision on these issues.

### Copyright



Bidders are reminded that the copyright in the Procurement documentation and any other materials supplied by the Department and/or its advisers during this Procurement, in whatever format, belongs to the Department and its appointed advisers. Such documentation and materials may not either in whole or in part be copied, reproduced, distributed or otherwise made available to any other third party or used without the prior written consent of the Department except in relation to the preparation of a Response and /or subsequent Solutions and/or Final Tenders in the Procurement. All documentation supplied by the Department in relation to this Procurement must be returned on demand, without any copies being retained by the Bidder.

### Disqualification

A Bidder that contravenes any of the terms and conditions set out in the ITPD, ISDS, ISRDS or ISFT documents may, at the sole discretion of the Department, be disqualified and prohibited from any further participation in the Procurement. The disqualification of a Bidder will not prejudice any other civil or legal remedies available to the Department and will not prejudice any criminal liability that such conduct by the Bidder may attract.

### Publicity

No publicity in relation to the Project, the selection of the long or short list of Bidders, the appointment of the Preferred Bidder, the Lots being tendered for, the award of the Contract or the Procurement in general is permitted unless and until the Department has given express prior written consent to the relevant communication. In particular, no statements should be made to the press or other similar organisations regarding the nature of any Response, Solution or Final Tender, their contents or Lots or any solutions relating thereto without the express prior written consent of the Department. This extends to decisions to withdraw from the Procurement.

The Department retains the right to publicise or otherwise disclose to any third party, information in relation to the Project, the selection of the long or short list of Bidders (including details of their respective Bidder Members, subcontractors, representatives, advisers, consultants, servants or agents), the Procurement in general or the award of the Contract at any time. Bidders should note that debrief letters to unsuccessful Bidders may, at the Department's absolute discretion, include price related information.

### Solicitation

Bidders are required to undertake that whilst the competitive dialogue process is continuing in respect of the Project and for a period of twelve months subsequent to the award of the Contract they will not solicit the Department Key Personnel with a view to offering them work or employment. The identity of the Department Key Personnel are defined section 4.7 of this ISFT Volume 1 (Instructions to Bidders).

### Third Parties

Nothing in the ITPD, ISDS, ISRDS or ISFT documents is intended to or does confer any rights on any third party.

### Disclaimer

This Procurement should not be regarded as an investment recommendation made by the Department or its appointed advisers.

The ITPD, ISDS, ISRDS and ISFT documents are issued by way of guidance only and do not purport to be in any way comprehensive in respect of all matters relevant to the Department's requirements in respect of the Project or to have been independently verified.

Bidders 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 Procurement, this document, Contract, Project, and all information provided or made available to them, at their own cost and expense.

Each Bidder must rely on its own enquiries and on the terms and conditions set out in the Contract as and when finally executed, subject to such limitations and restrictions as may be specified in such a Contract. Neither the issue of any documentation in the Procurement nor any of the information



presented in it should be regarded as a commitment or representation on the part of the Department or Minister or any other person to enter into a contractual arrangement.

Although it is currently anticipated that the remainder of the Procurement will take place broadly in line with what is described in the ISDS, ISRDS and the ISFT, the Department reserves the right (subject to the requirements of public procurement law) to vary or amend the Procurement (or anything said in the Procurement documents) at any time or to terminate the Procurement by notice in writing.

Under no circumstances will the Minister, Department or its appointed advisers accept or have any liability whatever in respect of any liability, damage or loss (including, without limitation, bid costs, loss of opportunity, loss of profit or damage to reputation) suffered or incurred by a Bidder, Bidder Member or anyone else arising out of or in respect of or in connection with the Procurement, and all parts of the Procurement (including the documentation relating to the Procurement, the procedure adopted for the Procurement, the award procedure, or any variation or amendment to the procedure), even where caused due to errors in the Procurement and process or the termination of the Procurement process (in whole or in part). This paragraph operates to the fullest extent permitted by applicable law.

Neither the Minister, Department nor any of its appointed advisers will be liable or responsible for any opinion, statement, or conclusion contained in, or any omission from, the ITPD, ISDS, ISRDS or ISFT documents or for any other written or oral communication transmitted or otherwise made available to any Bidder during the Procurement. No representation or warranty is made in respect of such statements, opinions or conclusions, and neither the Minister, Department nor its appointed advisers shall accept any liability for any loss or damage (other than in respect of fraudulent misrepresentation) arising as a result of or in connection with any reliance upon such statements, opinions or conclusions. In the absence of any express written warranties or representations as provided for in the Contract neither the information in the ITPD, ISDS, ISRDS or ISFT documents nor any other information provided by the Department or its appointed advisers shall be deemed to constitute a contract for the Project or be used in construing any such contract.

The only information that shall have any legal effect or on which any person may rely will be the information specifically and expressly represented or warranted in writing to NBPCo in the Contract when it is executed, subject to its terms.

Nothing contained in the ITPD ISDS, ISRDS or ISFT documents or any information supplied by or on behalf of the Department during the Procurement is, or shall be relied on as, a representation of fact or promise as to the future. Any summaries or descriptions of documents or contractual arrangements set out in any part of the Pre-Qualification Documents, Invitation to Participate in Dialogue, Invitation to Submit Detailed Solution or Invitation to Submit Final Tender cannot be and are not intended to be comprehensive, nor any substitute for the underlying documentation (whether already existing or to be drafted in the future), and are in all respects qualified by reference thereto.

The Minister and Department makes no commitment to award the Contract or any contract as a result of this Procurement or otherwise, nor to accept the lowest priced or any tender. Nothing in this Procurement shall be deemed or construed to constitute a warranty or representation or contract that the Procurement will be conducted in accordance with the timetable or procedures set out in the Pre-Qualification Documents or subsequently during the Procurement.

### Legal obligations

The ITPD, ISDS, ISRDS or ISFT documents do not impose or result in the imposition of any legal or contractual obligations on the part of the Department or Minister but they do confer legally enforceable rights on the Department and Minister. Legal and contractual obligations are imposed on Bidders who download or respond to the ITPD, ISDS, ISRDS or ISFT documents and the Department reserves the right to enforce such obligations.

For the avoidance of doubt, no legal obligations on the part of the Minister will arise unless and until the Contract has been entered into with the successful Bidder and any conditions precedent to such document's effectiveness have been fulfilled. In this case, only the terms of the Contract as and when it is executed and taken effect will have any legal effect in connection with the matters to which this Procurement relates.

