

National Broadband Plan – Contract Synopsis

Department of Communications, Climate Action and Environment

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1 Introduction

The NBP agreement (“**Agreement**”) sets out the contractual framework pursuant to which NBPco is required to deliver the project.

The Agreement is a very detailed contract tailored specifically for the unique requirements of the National Broadband Project (“**NBP**”). The starting point for the initial version of the Agreement was the agreement used for the Broadband Delivery UK (BDUK) Project¹ in the UK. However, the agreement was tailored specifically for the NBP and a variety of additional clauses were included beyond those contained in the BDUK agreement (including from Irish Public Private Partnership agreements as well as the agreement for the Irish National Broadband Scheme).

The Agreement has been subject to detailed and extensive dialogue with Bidders over the past 3 years, resulting in a number of revised versions being issued.

This document summarises at a high-level some of the key elements of version 4.1 of the Agreement. As an agreement running to over 1,500 pages, it is not an exhaustive outline of all the principles underpinning the Agreement.

2 NBPco

The company that will enter into the Agreement will be a new designated activity company limited by shares incorporated specifically for the project (“**NBPco**”). The Shareholders in NBPco are required to capitalise NBPco to a defined level at or prior to contract signing. NBPco is required to provide two separate bonds:

- A Deployment Bond. This is put in place at the date the Agreement is signed.
- A Terminal Value Claw back Bond over the last three years of the Agreement or until the final Terminal Value Clawback amount is paid. This is put in place at the start of Contract Year 23.

The Minister will take security over the Assets of NBPco as well as the shares in NBPco. This is security against, in particular, liabilities (e.g. Claw-Back) and obligations potentially owed by NBPco to the Minister under the Agreement and is also relevant to where ownership of NBPco’s Assets or shares is to transfer to the Minister (or his nominee) in certain termination scenarios (discussed in sections 24 and 25 below). The Minister will also have a special share in NBPco which has certain defined rights attaching to it. The Minister is also a party to a Shareholders Agreement with the other Shareholders.

There is no guarantee from, or recourse to, the Shareholders in respect of NBPco’s performance of its obligations (except, as mentioned above, to require them to make any deferred equity commitments up to the level originally committed).

3 Buildco

NBPco is appointing Buildco to undertake the deployment of the Network. Buildco will be a new company specifically incorporated for the project and engaged by NBPco as a Key Subcontractor. This Key Subcontract will mirror the main Agreement with respect to deployment providing for an

¹ Broadband Delivery UK (BDUK) Project, part of the Department for Digital, Culture, Media and Sport in the UK, is delivering superfast broadband and local full fibre networks to the UK (<https://www.gov.uk/guidance/broadband-delivery-uk>)

appropriate flow down of obligations, subject to certain agreed exceptions. Buildco will, in turn, engage a number of Key Subcontractors for the purposes of deployment of the Network.

As outlined in section 4, Buildco will enter into a Key Subcontractor Direct Agreement with the Minister. This includes an obligation imposed on Buildco in favour of the Minister to pay any Claw-Back payable by Buildco. In addition to warranties in respect of the quality and delivery of the works / services provided by Buildco, there are certain additional provisions in the Buildco Key Subcontractor Direct Agreement designed to give the Minister additional assurance that Buildco will comply with the Buildco Key Subcontract in place between Buildco and NBPco.

The Minister will also have a special share in Buildco which has certain defined rights attaching to it. The Minister is also a party to a Shareholders Agreement with the other Buildco Shareholders.

4 Subcontractors

NBPco will depend upon a number of Key Subcontractors to deliver the project, in addition to Buildco. These relate to:

- deployment of the Network;
- provision of certain technology;
- provision of operational services; and
- provision of access to passive and active infrastructure.

The Minister is not a party to the Key Subcontracts. However, the Minister will be a party to Key Subcontractor Direct Agreements with each of the Key Subcontractors.

NBPco will appoint Buildco to undertake deployment of the Network. The Key Subcontracts for operations and infrastructure access will also be between the Key Subcontractors and NBPco.

NBPco and Buildco are required to ensure that certain specific provisions are included in the Key Subcontracts. These provisions are designed to ensure that NBPco is able to comply with any obligations due to be passed down to Key Subcontractors.

The Infrastructure Access Agreements are particularly important. This is because NBPco is significantly reliant upon the passive and active infrastructure made available to it under these agreements and the final terms of the Infrastructure Access Agreements will be agreed in advance of execution of the Agreement.

The Key Subcontractors are required to enter into a Key Subcontractor Direct Agreement with the Minister. The Key Subcontractor Direct Agreements entitle the Minister to require the Key Subcontracts to be transferred to the Minister (or his nominee) in circumstances where the Minister (or his nominee) takes ownership of NBPco's or Buildco's Assets.

The Agreement contains provisions for the benchmarking and, in certain cases, market testing of certain Key Subcontractors during the term of the Agreement.

Where a Key Subcontractor relied upon the resources of another entity to demonstrate its capability at the Pre-Qualification Stage, the relevant third party provides a guarantee in respect of the obligations owed by the Key Subcontractor to the Minister under the relevant Key Subcontractor Direct Agreement. This only arises in limited cases.

There are provisions in the Agreement which restrict the replacement or substitution of the Key Subcontractors unless a technically and financially capable replacement is proposed. The Key

Subcontractors have freedom to further subcontract the works and services they are required to provide.

5 Appointment

The deployment and service period under the Agreement run for 25 years, but the term of the Agreement covers a further period for the purposes of providing post service period protections.

NBPco and the Minister are entitled by agreement to extend the term of the Agreement by up to a period of 5 years. The term of the Agreement may also be proportionately extended in the event of a Force Majeure Event.

The Agreement requires NBPco to deploy the Network and provide the Services over a 25 year period in accordance with detailed technical requirements and Performance Levels set out in the Schedules of the Agreement.

NBPco is not entitled to any funds or other support from the Minister, except the Subsidy payable pursuant to the provisions of the Agreement.

NBPco owns and exploits the Network and Services on its own behalf (except that, as mentioned in section 26 below, ownership of NBPco and Buildco or their Assets may transfer to the Minister or his nominee in certain termination scenarios).

NBPco takes the risk of deploying the Network and providing the Services, subject to limited relief events under the Agreement.

NBPco takes revenue risk in providing the Services and Network and, subject to the provisions regarding Claw-Back, is entitled to retain revenues generated by it over the term of the Agreement.

The Minister's consent will be required to a change in NBPco's business (which is defined as providing the Services, Wholesale Products and Network in the Intervention Area and owning the Assets subject to, and in accordance and compliance with the Agreement).

6 Payment of Subsidy and Accounting Separation

NBPco is paid Subsidy in respect of incurred eligible expenditure. These payments are split into three different types:

- Deployment Milestone Payments: These are paid based upon achievement of specific Milestones during the Deployment Period.
- Ongoing Capital Payments: These are paid during the Operational Period of the Agreement.
- Connection Milestone Payments: These are paid during the Operational Period based upon connections to Premises.

The Agreement contains detailed provisions and requirements that must be satisfied before NBPco is paid any Subsidy. In addition, there is specific accounting separation rules designed to ensure transparency regarding the finances of NBPco.

7 Deployment Period

NBPco is required to deploy the Network during the Deployment Period. The Agreement sets out specific Milestones and corresponding Milestone Dates that must be met by NBPco in undertaking

the deployment. There are detailed provisions in the Agreement which set out the criteria and process for determining whether a particular Milestone is achieved. NBPco is not entitled to be paid any Subsidy until it has been verified that specific Milestones have been Achieved.

There is also a right to terminate the Agreement if completion of deployment is not achieved by the Longstop Date.

There are reductions to the Subsidy as a result of certain Delays.

8 Operational Period

During the Operational Period, NBPco is required to perform the Services in accordance with detailed requirements set out in the Schedules of the Agreement and defined Performance Levels. If it does not achieve these Performance Levels, the level of Subsidy payable is reduced by the deduction of Performance Credits.

The Minister's remedy for failure by NBPco to perform the Services in accordance with the Agreement is limited to the Performance Credits, subject to certain other express remedies set out in the Agreement such as the indemnities mentioned in section 222 below, step-in and termination (including, in certain cases, to acquire ownership of the Assets or shares of NBPco and Buildco). However, this does not limit the Minister's right to seek specific performance or injunctive relief.

9 Non-discrimination

NBPco is required to treat all Service Providers on a non-discriminatory basis in connection with the Services and Network.

10 Governance

There are detailed rules regarding the governance of NBPco set out in the Agreement. In addition, the Constitution of NBPco and the Shareholders Agreement are to include provisions consistent with the Agreement regarding:

- the principal object of NBPco being to design, build, operate and maintain an ultrafast broadband network across the Republic of Ireland in accordance with the Agreement;
- the appointment to the board of directors of NBPco and Buildco of a non-executive director appointed directly by the Minister; and
- the appointment and rotation of the board of directors of NBPco and Buildco, and compliance with the agreed governance protocol and the relevant non-discrimination principles.

11 Reporting and Auditing

NBPco is required to provide a variety of detailed reports to the Minister over the term of the Agreement. The Minister also has audit rights under the Agreement including the right to undertake spot checks and audits of NBPco and Key Subcontractors to verify NBPco's compliance with its obligations under the Agreement. In addition, the Minister is entitled to require an Independent Assurance Review in respect of certain matters, including progress of Network Deployment, NBPco reporting, effectiveness of Demand Stimulus and other matters related to NBPco's compliance with its obligations under the Agreement.

12 Financial Distress

NBPco is required to inform the Minister in the event that it, Buildco or certain Critical Key Subcontractors reach certain Financial Distress metrics which is designed to provide an early

warning to the Minister of possible solvency issues. NBPco is then required to engage with the Minister in order to put in place a Financial Distress Service Continuity Plan in an attempt to resolve any issues and facilitate service continuity.

13 Relief and Force Majeure Events

NBPco is entitled to additional time and other relief where it is prevented from carrying out an obligation under the Agreement due to the occurrence of certain defined Relief Events. These include occurrences like floods, fire, material vandalism, strikes affecting a significant portion of the telecommunications industry, delays above a certain threshold by competent authorities (e.g. local authorities) in providing consents and the discovery of Archaeological Objects.

NBPco is also entitled to relief where a Force Majeure Event occurs. If a Force Majeure Event occurs, this may ultimately entitle either the Minister or NBPco to partially or fully terminate the Agreement.

14 Change in Law

NBPco takes the risk for Changes in Law, except Qualifying Changes in Law. In simple terms, a Qualifying Change in Law is one which only applies to the project (and not similar projects) or NBPco and not other persons. If a Qualifying Change in Law occurs, NBPco is entitled to relief which may include additional Subsidy.

15 Compensation Events

NBPco is entitled to financial compensation and other relief where certain defined Compensation Events (essentially certain breaches of the Agreement by the Minister) occur.

16 Claw-Back

The Minister is entitled to Claw-Back of some of the Subsidy in certain defined circumstances.

17 Control of Pricing

The Agreement contains detailed rules designed to control the prices that NBPco is entitled to charge to Service Providers in the Intervention Area for Wholesale Products.

18 Wholesale Product Benchmarking

The Agreement contains detailed rules related to the benchmarking of the Minimum Required Wholesale Products and Additional Required Wholesale Products offered by NBPco as against the equivalent wholesale products offered by commercial operators outside the Intervention Area.

19 Future Proofing of Network

The Agreement sets out requirements for NBPco to develop and maintain a future proofed Technology Roadmap and Wholesale Products Roadmap. In addition, it is required to continuously identify, assess, evaluate and, where required pursuant to a Change made pursuant to the Change Control Procedure set out in the Agreement, implement new or potential improvements to the Services, Network, Operational Environment and Wholesale Products. The Agreement also contains a mechanism allowing the Minister to identify market leading products not provided by NBPco in the Intervention Area and a process pursuant to which the Minister can, pursuant to a Change made pursuant to the Change Control Procedure set out in the Agreement, require NBPco to introduce those products in the Intervention Area where it is determined they perform significantly better than those currently provided by NBPco in the Intervention Area.

20 Change in Ownership

The Agreement provides certain protections to the Minister in relation to a change in ownership of NBPco or its Shareholders. There are restrictions on a change of ownership that apply from the date of the Agreement up until the date that is 12 months after completion of deployment. However, the Minister cannot unreasonably withhold his consent in this regard.

The above restrictions on change of ownership of NBPco are reflected in the Agreement and are to be reflected in the Constitution of NBPco.

21 Insurance

NBPco is required to take out insurance, though where certain risks become Uninsurable the Minister may insure NBPco in that regard or terminate the Agreement, subject to certain detailed provisions.

22 Indemnities and liability

NBPco agrees to indemnify the Minister in respect of any claims against the Minister arising out of:

- damage or loss to the Minister's or third party property;
- breach of statutory duty;
- death or personal injury;
- third party claims

subject to certain limited exceptions.

Similar to the BDUK agreement and NBS agreement, the Agreement contains a cap on NBPco's aggregate liability for breach of the Agreement. However, this cap does not apply in a number of respects including in respect of:

- the indemnities mentioned above;
- IPR claims, breach of confidentiality or data protection;
- Claw-Back; and
- compensation payable to the Minister on termination under the Compensation on Termination regime.

The Minister's aggregate liability over the Contract Term is subject to a financial cap.

Neither the Minister nor NBPco is liable for indirect or consequential losses (except this does not apply under any indemnities given by NBPco to the Minister or in respect of any third party claim against the Minister which includes a claim for indirect or consequential loss).

23 Remediation and Agreement Step-In

There is a Remediation Plan Process which contains a detailed process for agreeing remedial actions with respect to recurring or material issues. This is designed to prevent their continued reoccurrence.

The Minister has the right to temporarily step-in (including by taking total or partial management and control of NBPco) where an Emergency (as defined in the Agreement) has arisen or where,

following expiration of a defined cure period, a default by NBPco is materially preventing or delaying the provision of the Minimum Required Wholesale Products or Additional Required Wholesale Products. This right of step-in is limited to the duration necessary to address the relevant circumstance. The Minister is responsible for any damage it does to the Network or otherwise during the step-in period, subject to certain exceptions.

24 Termination

There are detailed provisions addressing termination.

The Minister has the right to terminate:

- unilaterally for convenience; and
- if an 'NBPco Termination Event' occurs.

If a Force Majeure Event occurs, either party can, as appropriate, partially or fully terminate the Agreement. If a Change in Law renders illegal or impossible all or substantially all of NBPco's obligations under the Agreement, this may also result in termination.

NBPco is entitled to terminate the Agreement if a 'Minister Default' occurs.

In all cases, except Force Majeure, there is no ability to partially terminate the Agreement.

25 Compensation on termination

If the Agreement is terminated in any of the above scenarios, NBPco is entitled to be paid compensation in principle. There are detailed rules regarding the amount of compensation payable. The amount of compensation payable to NBPco varies depending on whether it is termination for:

- convenience by the Minister;
- Minister default;
- an NBPco Termination Event; and
- a Force Majeure Event or Change in Law;

26 Transfer of ownership

If the Agreement is terminated for:

- a Minister Default;
- an NBPco Termination Event; or
- a Force Majeure Event, Change in Law or Uninsurable Risk;

the Minister is entitled to take ownership of either NBPco and Buildco or their Assets. There is no additional money payable by the Minister in this regard over and above the compensation payable under the Compensation on Termination regime mentioned in section 255.

If the Agreement is partially terminated for Force Majeure, the Minister is entitled (but not obliged) to purchase the impacted Assets of NBPco and Buildco for market value.

27 Changes

There are detailed provisions included in the Agreement to address changes to the scope of the Services, Network and increases and decreases to the Intervention Area. NBPco is only entitled to reject a Change request in limited and proportionate circumstances.

28 Assignment

There are provisions in the Agreement permitting the transfer of the Agreement to another Minister of the State. If the Minister wishes to transfer the Agreement to a public body or local authority, it must obtain NBPco's consent to the transfer

29 Disputes

There is a detailed dispute resolution process set out in the Agreement. This includes internal escalation, non-binding mediation and arbitration. However, the Minister is entitled, at his choice, to prevent a matter from being resolved through arbitration so that, instead, the matter must be resolved through the Courts in the normal manner.