

Smart Metering Implementation Programme

Government response to the Consultation on the draft DCC Licence Application Regulations

28 September 2012

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1. Executive Summary

The Government's vision is for every home in Great Britain to have smart energy meters, giving people far better information about, and control over, their energy consumption than they have today. Businesses and public sector users should also have smart or advanced energy metering suited to their needs. The rollout of smart meters will play an important role in Great Britain's transition to a low-carbon economy, and help us meet some of the long-term challenges we face in ensuring an affordable, secure and sustainable energy supply.

The communications and data transfer and management required to support smart metering is to be organised by a new central communications body – the Data and Communications Company (“the DCC”). The DCC will be a new licensed entity regulated by the Gas and Electricity Markets Authority (otherwise referred to as “the Authority”, or “Ofgem”). A single organisation will be granted a licence under each of the Electricity and Gas Acts (there will be two licences in a single document, referred to as the “DCC Licence”) to provide these services within the domestic sector throughout Great Britain. The DCC Licence will be granted for a fixed term through an open and transparent competitive tender application process, the regulatory framework for which will be provided through a Statutory Instrument – the Electricity and Gas (Competitive Tenders for Smart Meter Communication Licences) Regulations 2012 (“the Regulations”^a). The Regulations set out the procedural steps of the competitive tender application process for the DCC Licence^b, to be used on each occasion it is awarded.

In April 2012 the Government consulted on the DCC Licence Conditions and on detailed proposals and legal drafting for the Regulations (“the April 2012 consultation”)^c. The April 2012 consultation sought views on the proposed competitive tender application process for the DCC licence and associated Regulations under which such a process would be run. Views were also sought on the Government's proposed approach in the event of an incumbent DCC having its licence revoked. Respondents were invited to comment on whether the draft Regulations effectively implemented the proposed competitive application process. This document is the Government's response to the contributions received in respect of the relevant questions in the April 2012 consultation and sets out the approach that will be taken to implement the application process. The Government laid the Regulations in Parliament on 21 September 2012.

2. Policy Context

The strategic aim of the Smart Metering Implementation Programme is to roll out 53 million smart electricity and gas meters to all domestic properties and smart or advanced meters to small and medium non-domestic sites in Great Britain by 2019. This will affect approximately 30 million premises.

The rollout must be achieved in a cost effective way, optimising the benefits to consumers, energy suppliers, network operators and other providers of energy services to deliver environmental and other

^a Previously referred to as Licence Application Regulations (LARs)

^b The regulations call this process the ‘tender exercise’, which it defines as a process carried in accordance with the Regulations with a view to determining the person to whom both an electricity and a gas smart meter communication licence are to be granted.

^c <http://www.decc.gov.uk/assets/decc/11/consultation/smart-metering-imp-prog/4937-cons-draft-dcc-licence-smart-meters.pdf>

policy goals. Smart meters will provide consumers with better information on energy usage to encourage energy efficiency, enable the transition to a low-carbon Britain, and contribute to ensuring the supply of energy which is secure, affordable, efficient and sustainable. Whilst Government plays an important enabling role, smart metering is a programme led by industry.

The rollout of smart metering will involve a total present value cost estimated at around £11.5bn over the next twenty years, delivering total present value benefits of over £18.6bn, and resulting in an overall net benefit to Great Britain of around £7.2bn. Taking into account all costs and benefits, the average dual fuel household will see bill savings of £25 per annum by 2020, rising to £40 by 2030. For small and medium businesses, average annual bill savings are expected to be approximately £190 by 2020, rising to over £200 per year by 2030.

Realising this policy goal will be a major undertaking. Regulatory obligations will help make sure gas and electricity suppliers do what is necessary to deliver the rollout in a way that meets the Government's objectives, and a comprehensive package of changes to the existing regulatory framework will be necessary to implement the Government's policies in relation to smart meters.

The regulatory framework for the DCC includes the Electricity and Gas (Smart Meters Licensable Activity) Order 2012, which amends the Gas Act 1986 and the Electricity Act 1989 to create the licensable activity of the DCC; the DCC Licence; and the Smart Energy Code, which will be a new industry code defining the contractual relationships between the DCC and its users.

3. Overview of Consultation

Communications with smart meters and the transfer and management of data will be organised by a new central communications body, the DCC. The DCC will be a new licensed entity within the electricity and gas regulatory frameworks. There will be one active licensee at any one time and its licence will be granted for 12 years. On 5 April 2012 the Government published a consultation on DCC Licence Conditions and proposed Licence Application Regulations. This document is concerned with the latter, which sought views on the competitive process to award the DCC Licence. The consultation covered:

- The drafting of the Licence Application Regulations;
- The proposed four-stage approach for the competitive tender process, including changes incorporated in light of the responses to the September 2011 consultation^a; and
- A number of related policy issues, in particular:
 - The Government's intention to apply the "best and final offer" (BAFO) stage in all circumstances (it had been designated an optional stage in the September consultation); and
 - Proposals on how best to appoint a successor DCC if the incumbent DCC were to have its licence revoked.

Sixteen responses were received to this section of the consultation, all of which came from industry stakeholders. This included electricity and gas suppliers, electricity distribution companies, other industry parties and consumer groups. No responses were received from individual members of the public.

^a DECC, A consultation on the detailed policy design of the regulatory and commercial framework for DCC, September 2011

4. Competitive Approach to the Awarding of the DCC Licence

The DCC Licence will be granted following a competitive tender application process designed to be fair, transparent and consistent. The proposed approach consists of a competition run over a defined number of stages, with each stage designed to be contested by a declining number of participants until a single successful applicant is selected to receive the grant of the DCC Licence.

This approach draws on best practice over a number of years from comparable competitive tender processes in the energy sector, including the Authority's tender process for offshore transmission licences. It also draws on other precedents, including the Government's Private Finance Initiative, Ofcom's experience in mobile spectrum auctions, and the Department for Transport's rail franchising model.

The intention is to re-compete the DCC Licence periodically, so the Regulations provide an application process suitable not only for the initial DCC Licence application but also for subsequent DCC Licence applications. For these later competitions the following requirements have been taken into account:

- the process may be run by the Authority rather than the Secretary of State;
- there will be an incumbent DCC in place;
- there will be service providers with contracts in place;
- the nature and scope of the DCC's obligations may change;
- the type of organisation needed to fulfil an evolving DCC role may change; and
- the evaluation criteria will likely need to be amended and updated for each tender to match the evolving role of the DCC.

To achieve the flexibility to manage these factors in future competitions:

- the timetable and information to be published will be specific to each tender, and will be contained in the application documentation published at that time;
- the evaluation criteria will be specific to each tender, and will be contained in the application documentation for each stage of the competition rather than in the Regulations; and
- the Regulations will contain provisions determining who runs the tender process.

5. Next Steps

The Government laid the Regulations in Parliament on 21 September 2012, after the successful passage of the Electricity and Gas (Smart Meters Licensable Activity) Order through Parliament and its coming into effect. The Regulations will be subject to the negative resolution procedure, and it is intended that they will come into force 21 days after laying, after which point the tender process will formally commence.

6. Government responses

The Government set out its general approach to the regulatory design of the DCC in the September 2011 consultation. The April 2012 consultation provided further detail and legal drafting in respect of the process for applying for the DCC Licence. The Government's conclusions in respect of those aspects of the April 2012 consultation related to the application process are set out below. The response on matters relating to the DCC Licence will be published separately later this year.

Process stages

In the April 2012 consultation the Government signalled its intention to introduce regulations reflecting the four-stage competitive tender process that had been outlined in the September 2011 consultation and widely supported by respondents. Specific details of each of the stages had been further refined to reflect the views of respondents and to improve the overall process. The changes were intended to address issues of clarity, practicality, consistency, transparency and effectiveness, with a view to achieving the best competitive outcome.

The draft Regulations set out in the April 2012 consultation included a description of the four stages of the competitive tender process for awarding the DCC Licence:

1. Qualification^a: The first stage of the process is designed to eliminate any applicants who are not qualified to fulfil the role of Licensee, and to enable a selection of those who are most qualified to be taken into the next phase. Bidders who meet the criteria are called 'qualifying bidders'.

2. Proposal^b: Qualifying bidders will be invited to submit detailed proposals for how they would establish and run the DCC against the service requirements defined in the application documentation. A short list of 'selected qualifying bidders' will progress to the BAFO stage, if required; otherwise a preferred applicant (and one or two reserve applicants, if appropriate) will be selected.

3. Best and Final Offer (BAFO): This optional third stage opens with detailed dialogue with the selected qualifying bidders shortlisted from the 'proposal' stage, who will then be asked to submit a best and final offer. The objective is to select, against pre-defined evaluation criteria, a 'preferred applicant' and up to two 'reserve applicants'.

4. Preferred Applicant. Once any outstanding issues have been addressed with the preferred applicant or, if required, a reserve applicant, the Government (and in future the Authority) will nominate a single 'successful applicant^c' to be granted the DCC Licence.

^a This stage was previously called 'pre-qualification' in the September 2011 consultation.

^b This stage was previously called 'invitation to apply' in the September 2011 consultation.

^c The regulations define 'successful applicant' as meaning a preferred applicant who becomes the successful applicant in accordance with regulation 18(1).

In the April 2012 consultation the Government proposed that the BAFO stage should be applied to the initial licence application in all circumstances, to ensure that the final bid reflects the rapidly developing context at this point, but that in subsequent application processes the BAFO stage would be optional. The Government asked respondents to indicate whether they agreed that the BAFO stage should be mandatory for the initial licence application, given the complexity of the first licensing competition and the start-up obligations on the first licensee.

Nearly all respondents supported the intention to apply the BAFO stage for the initial application process. Two respondents suggested keeping a BAFO stage optional in the event that the Government achieves what it requires after the proposal stage. Two respondents commented that whilst a BAFO stage was advisable for the initial application process, in all future application processes it must remain optional and only be used if absolutely necessary. Here some concern was raised that certainty of a BAFO stage to follow can sometimes have the effect of causing bidders to hold back at proposal stage. One respondent, whilst recognising the benefits, commented that a BAFO stage would mean further expense to those who are selected, making it important that all possible information regarding position or ranking in the process be shared with bidders. Another emphasised that all key elements required for submission must be clarified in advance of the process.

A small number of respondents expressed views about the timescales set out in the April 2012 consultation. One commented that the five-week period for submission of BAFO may be longer than necessary given the ten-week dialogue process preceding it, which will allow bidders to enhance their submissions. It was suggested that this time may better be used as establishment time later in the process. Conversely another respondent welcomed the extra time allotted to these phases.

The Government has concluded that it is likely that the BAFO stage will be applied in all foreseeable circumstances for the initial application. This reflects the complexities of the licence and the risks associated with the changing requirements for the initial licence application process. The Regulations do not mandate its use for any tender exercise, including the first, so the decision will be taken with reference to the particular circumstances at the time. This means that the stage will be optional in future DCC Licence application competitions.

The majority of respondents were content with the Government's general approach to the proposed competitive application process. One noted that there were still areas under discussion between DECC and Ofgem that could affect the eventual licence conditions and, as such, bidders are likely to be asked to enter into a tendering exercise where there is less certainty than would ideally be the case. The Government consulted on a full draft of the Licence alongside these Regulations, and a more developed draft will be made available to applicants. This respondent also commented on the tendering exercises for the DCC's data service providers (DSPs), and communications service providers (CSPs, which are not covered by these Regulations.

A number of respondents commented that industry involvement in the evaluation process was advisable given the potential impact that the successful bidder would be likely to have both on the GB energy industry and on the individual commercial interests of its users. The Government's view is that evaluation criteria will be discussed with industry stakeholders but for commercial reasons it is not considered appropriate for industry to be directly involved in the evaluation of licence applications.

Appointing a successor DCC

The September 2011 consultation proposed that, in the event that the incumbent DCC has its DCC Licence revoked, a fast-track application process should be considered to appoint an interim DCC licensee. After further consideration of this issue and assessment of the responses received, the Government proposed in the April 2012 consultation that a special administration regime (SAR),

delivered through primary legislation, or an intervention regime (as provided for in the draft DCC Licence) to address failings in an incumbent DCC would offer advantages in comparison to a fast-track application process.

Such regimes would keep an existing DCC operational and delivering the principal services to users while a full application process to appoint a successor was undertaken within normal timescales.

No provision for a fast-track appointment process for a temporary DCC was included in the draft Regulations in the April 2012 consultation. This found general support, with nearly all respondents preferring an SAR or intervention regime to a fast-track replacement application process. Comments highlighted drawbacks with a fast-track scheme in that it had the potential to delay the appointment of an enduring successor, to make that process more expensive and to deter some bidders from applying.

The Government has concluded that it should not provide for a fast-track appointment process for a temporary DCC in the Regulations.

Statutory Instrument

The April 2012 consultation invited comments on the draft statutory instrument. Respondents were broadly content with the draft Regulations and no common areas of concern emerged from the comments received.

Ofgem commented on the need for future discretionary powers for the Authority to recover the costs of running future application processes. However, the first application process will be administered by the Secretary of State, who will not reclaim the costs of running the process from applicants. The Regulations do not provide for cost recovery but will need to be amended in due course to allow for cost recovery in subsequent processes (which are unlikely to take place until towards the end of the first 12-year licence period).

Following the consultation and further consideration the Government has decided that, in line with the overall competitive approach, the list of events that could permit cancellation of the competitive application process should be expanded to include the situation where only one applicant remained in the process.

The Regulations have been finalised in broadly the same form as that consulted on and were laid in Parliament on 21 September 2012. The statutory instrument and accompanying explanatory memorandum are reproduced in Annex B.

Annex A: Digest of Consultation Questions

15.	For the initial licence application, do you agree with the Government's intention to apply the BAFO stage in all circumstances, so as to mitigate the risks associated with the changing requirements and improve the competitive outcomes?
16.	Do you have any comments on the proposed competitive application process for the DCC Licence and, in particular, on the Government's stated intention to operate an extensive 'best and final offer' stage for the first licence competition?
17.	Do you agree with the proposal not now to include a fast-track process to appoint a temporary DCC, but instead to rely upon the provisions for intervention to keep the DCC's service functioning whilst a standard licensing application process is conducted to appoint an enduring successor DCC?
18.	Do you have any comments on the draft DCC Licence application regulations and, in particular, whether they effectively implement the proposed competitive application process described in this consultation document?

Annex B: The Regulations

STATUTORY INSTRUMENTS

2012 No. 0000

ELECTRICITY

GAS

The Electricity and Gas (Competitive Tenders for Smart Meter Communication Licences) Regulations 2012

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	12th October 2012

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 56FC and 60 of the Electricity Act 1989^(a), and sections 41HC and 47 of the Gas Act 1986^(b).

PART 1

Introductory

Citation and commencement

1. These Regulations may be cited as the Electricity and Gas (Competitive Tenders for Smart Meter Communication Licences) Regulations 2012 and shall come into force on 12th October 2012.

Interpretation

2. In these Regulations—

“best and final offer” means a submission by a qualifying bidder to the competent authority in response to the best and final offer documentation;

“best and final offer documentation” means the documentation in respect of the best and final offer stage of a tender exercise issued in accordance with regulation 13(3);

^(a) 1989 c. 29. Section 56FC was inserted by section 91 of and Schedule 4 to the Energy Act 2008 (c. 32). Section 60 was amended by section 3(2) of the Utilities Act 2000 (c. 27).

^(b) 1986 c. 44. Section 41HC was inserted by section 91 of and Schedule 4 to the Energy Act 2008 (c. 32). Relevant amendments to section 47 were made by section 3(2) of the Utilities Act 2000 (c. 27) and section 10(1) of the Gas Act 1995 (c. 45).

“bidder” means any person or bidder group that submits a qualification questionnaire to the competent authority in accordance with these Regulations;

“bidder group” means two or more persons acting together for the purposes of any submission to the competent authority in accordance with these Regulations;

“competent authority”, in relation to a tender exercise, means the person determined in accordance with regulation 5;

“confidentiality agreement” means the standard form agreement between the competent authority and a qualifying bidder in respect of confidential information disclosed in connection with a tender exercise after the qualification stage;

“electricity smart meter communication licence” means a smart meter communication licence as that term is defined in section 6(1)(f) of the Electricity Act 1989^(a);

“first reserve applicant” means a reserve applicant determined as first reserve applicant in accordance with regulation 16(4) in relation to the best and final offer stage or in accordance with regulation 12(6) in any other case;

“gas smart meter communication licence” means a smart meter communication licence as that term is defined in section 7AB(1) of the Gas Act 1986^(b);

“preferred applicant” means a qualifying bidder determined as preferred applicant in accordance with regulation 16(1) in relation to the best and final offer stage or in accordance with regulation 12(1) in any other case;

“proposal” means a submission by a qualifying bidder to the competent authority in response to the proposal documentation;

“proposal documentation” means the documentation in respect of the proposal stage of a tender exercise issued in accordance with regulation 10(1);

“qualification documentation” means the documentation in respect of the qualification stage of a tender exercise issued in accordance with regulation 8(1);

“qualification questionnaire” means a questionnaire of that description published by the competent authority in accordance with regulation 8(1);

“qualifying bidder” means a bidder determined as a qualifying bidder in accordance with regulation 9(1);

“regulated business information” means information relating to the—

- (a) regulatory requirements; and
- (b) commercial arrangements,

which will apply to the person to whom the gas smart meter licence and the electricity smart meter licence are granted;

“reserve applicant” means a qualifying bidder determined as a reserve applicant in accordance with regulation 16(2) in relation to the best and final offer stage or regulation 12(4) in any other case;

“second reserve applicant” means a reserve applicant determined as second reserve applicant in accordance with regulation 16(4) in relation to the best and final offer stage or regulation 12(6) in any other case;

“selected qualifying bidder” means a qualifying bidder who is selected to be invited to participate in a best and final offer stage in accordance with regulation 13(1);

“smart meter communication service” means the activities described in section 4(3G) of the Electricity Act 1989^(c) and section 5(11) of the Gas Act 1986^(d) that are to be performed by the person to whom an electricity smart meter communication licence and a gas smart meter communication licence is granted, in accordance with the conditions of those licences;

^(a) 1989 c. 29. Section 6(1)(f) was inserted by S.I. 2012/2400.

^(b) 1986 c. 44. Section 7AB was inserted by S.I. 2012/2400.

^(c) 1989 c. 29. Section 4(3G) was inserted by S.I. 2012/2400.

^(d) 1986 c. 44. Section 5(11) was inserted by S.I. 2012/2400.

“successful applicant” means a preferred applicant who becomes the successful applicant in accordance with regulation 18(1);

“tender exercise” means a process carried out in accordance with these regulations with a view to determining the person to whom both an electricity smart meter communication licence and a gas smart meter communication licence are to be granted; and

“tender participant” means a bidder, qualifying bidder (including a qualifying bidder who is also a selected qualifying bidder), preferred applicant, reserve applicant or successful applicant.

PART 2

Scope of and requirement for a tender exercise

Scope of Regulations

- 3.—(1) These regulations apply in respect of any grant of a relevant licence.
- (2) In this regulation, a relevant licence means—
- (a) an electricity smart meter communication licence; or
 - (b) a gas smart meter communication licence.

Scope of a tender exercise and consideration of submissions to the competent authority

- 4.—(1) A tender exercise must only be used to determine the person to whom both an electricity smart meter communication licence and a gas smart meter communication licence are to be granted.
- (2) At all stages of a tender exercise, the competent authority must have regard to the suitability of a tender participant for being granted both an electricity smart meter communication licence and a gas smart meter communication licence.

PART 3

Conduct of a tender exercise

Conduct of a tender exercise

- 5.—(1) Subject to paragraph (2), the Secretary of State is the competent authority with respect to a tender exercise.
- (2) The Authority is the competent authority with respect to a tender exercise where either the condition in paragraph (3) or the condition in paragraph (4) is satisfied.
- (3) The condition in this paragraph is satisfied where the tender exercise is commenced on or after 2nd November 2018.
- (4) The condition in this paragraph is satisfied where on or before 1st November 2018 the Secretary of State directs that in respect of a particular tender exercise, the Authority is to be the competent authority.
- (5) A direction under paragraph (4) may only be given prior to the publication of the notice required under regulation 7(2).
- (6) Where a direction under paragraph (4) is given—
- (a) regulation 7(1)(a) does not apply with respect to the Authority and the tender exercise to which the notice refers;
 - (b) the Authority must conduct that tender exercise; and
 - (c) the Authority may conduct that tender exercise in any manner which is in accordance with these Regulations.

PART 4

Stages of a tender exercise

Stages of a tender exercise

6. A tender exercise to be held in accordance with these Regulations shall comprise the following stages—
- (a) a qualification stage in order to determine which bidders shall become qualifying bidders and be invited to participate in a proposal stage;
 - (b) a proposal stage in order to determine which qualifying bidders shall be selected to become preferred applicants or reserve applicants;
 - (c) if the competent authority considers that it is unable to determine a preferred applicant after the proposal stage or that it is otherwise necessary or appropriate in the circumstances, a best and final offer stage; and
 - (d) a preferred applicant stage in order to determine the successful applicant to whom the electricity smart meter communication licence and the gas smart meter communication licence are to be granted.

PART 5

Commencement of a tender exercise

Commencement of a tender exercise

- 7.—(1) The competent authority may determine—
- (a) whether to hold a tender exercise; and
 - (b) the date of commencement of any such exercise.
- (2) Where a tender exercise is to be held, the competent authority must publish a notice stating that such an exercise is to be held and stating the day on which the qualification stage is to be commenced (the “commencement date”), being—
- (a) a date specified in the notice; or
 - (b) where no other date is specified, the date of the notice.
- (3) The competent authority must include in the notice given under paragraph (2) such information as the competent authority may determine is necessary in relation to—
- (a) the proposal to grant an electricity smart meter communication licence and a gas smart meter communication licence; or
 - (b) the tender exercise.

PART 6

Qualification stage

Qualification and confidentiality

- 8.—(1) The competent authority must commence the qualification stage on the commencement date by publishing the qualification documentation, which must include the information specified in Schedule 1.
- (2) Prior to the publication of the qualification documentation, the competent authority may determine that each qualifying bidder will be required to sign a confidentiality agreement before the proposal documentation is issued to that qualifying bidder.
- (3) Where the competent authority so determines, the competent authority must publish the form of the confidentiality agreement with the qualification documentation on the commencement date.
- (4) In this regulation “commencement date” has the meaning determined in accordance with regulation 7(2).

Determination of qualifying bidders at the qualification stage

9.—(1) The competent authority must evaluate each completed qualification questionnaire submitted to it by a bidder in accordance with the evaluation criteria set out in the qualification documentation, in order to determine which bidders are to become qualifying bidders and be invited to participate in the proposal stage in accordance with regulation 10.

(2) The competent authority may decline to consider a qualification questionnaire submitted to it by a bidder where the competent authority determines that the submitted qualification questionnaire does not comply in any material respect with the requirements specified in the qualification documentation.

(3) The competent authority must give notice to each bidder—

- (a) as to whether that bidder has or has not become a qualifying bidder in accordance with paragraph (1), and the reasons for that determination; or
- (b) where the competent authority has declined under paragraph (2) to consider the qualification questionnaire submitted by that bidder, the reasons for the determination that the questionnaire is non-compliant.

(4) Paragraph (5) applies where the competent authority has determined in accordance with regulation 8(2) that in respect of a tender exercise a qualifying bidder is required to sign a confidentiality agreement.

(5) Where this paragraph applies, a notice given under paragraph (3) to a qualifying bidder must include information regarding the date, time and manner in which the signed confidentiality agreement is to be submitted to the competent authority.

PART 7

Proposal stage

Proposal stage

10.—(1) Subject to paragraph (2), the competent authority must issue the proposal documentation, which must include the information specified in Schedule 2, to each qualifying bidder.

(2) In respect of a tender exercise to which regulation 9(5) applies, the obligation in paragraph (1) to issue documentation to qualifying bidders does not apply in respect of a qualifying bidder who has not submitted a signed confidentiality agreement in accordance with the notice issued under that regulation.

(3) The competent authority must invite all qualifying bidders to whom the proposal documentation has been issued in accordance with this regulation to submit a proposal for providing a smart meter communication service in accordance with the requirements set out in the proposal documentation.

(4) The submission of a proposal by a qualifying bidder is an application for the grant of a gas smart meter communication licence and an electricity smart meter communication licence to that qualifying bidder where that qualifying bidder becomes the successful applicant in accordance with these Regulations.

(5) Where a qualifying bidder fails to submit a signed confidentiality agreement in accordance with the notice given in accordance with regulation 9(5), the competent authority may disqualify that qualifying bidder from that tender exercise where—

- (a) the competent authority gives that qualifying bidder a notice requiring it to submit the signed confidentiality agreement by a date specified in the notice, such date being not more than ten days from the date on which the notice is given; and
- (b) that qualifying bidder does not so submit the signed confidentiality agreement.

Proposal stage: first tender exercise

11.—(1) This regulation applies to a tender exercise in respect of the grant of the first electricity smart meter communication licence and the first gas smart meter communication licence to be granted after these Regulations come into force.

(2) The competent authority may give a notice providing further regulated business information, including—

- (a) information which modifies or supplements any information provided in the proposal documentation or in a previous notice given under this paragraph; or

- (b) an instruction to disregard any information provided in the proposal documentation or in a previous notice given under this paragraph.
- (3) A notice under paragraph (2) may be given—
- (a) after the competent authority has issued the proposal documentation; and
 - (b) prior to—
 - (i) the date and time specified in the proposal documentation for the submission of proposals to the competent authority; or
 - (ii) where a notice has previously been given under paragraph (2) and in accordance with paragraph (7) the date and time for submission of proposals to the competent authority has been modified, the modified date and time.
- (4) The competent authority must give a notice under paragraph (2) where it determines that—
- (a) the matters contained in the regulated business information provided in the proposal documentation have materially changed—
 - (i) since the issue of that documentation; and
 - (ii) during the period in which a notice under paragraph (2) may be given; and
 - (b) that the giving of the notice is necessary in order to ensure that the evaluation of proposals under regulation 12 is fair and equitable to all qualified bidders.
- (5) Subject to paragraph (10), a notice given under paragraph (2) in accordance with paragraph (4) must contain revised regulated business information reflecting the matters which have changed.
- (6) Where the competent authority intends to give a notice under paragraph (2), it must determine whether it is necessary in the circumstances to modify the date and time specified in the proposal documentation for the submission of proposals to the competent authority (or such time as modified by a previous notice under paragraph (2)).
- (7) Where the competent authority determines in accordance with paragraph (6) that it is necessary to make a modification, it must specify a new date and time for the submission of proposals to the competent authority in the notice given under paragraph (2).
- (8) The new date and time specified in accordance with paragraph (7) must not be earlier than—
- (a) the date and time specified in the proposal documentation; or
 - (b) where that date and time has been previously modified on one or more occasions in accordance with paragraph (7), the date and time specified in the most recent modification.
- (9) A qualifying bidder who has submitted a proposal prior to the giving by the competent authority of a notice under paragraph (2) may submit a modified proposal in accordance with—
- (a) the date and time requirements specified in the proposal documentation (or where applicable such date and time requirements as modified in accordance with paragraph (7)); and
 - (b) any other requirements specified in the proposal documentation.
- (10) The competent authority may withhold any information which it would be required to provide in accordance with paragraph (5) where the competent authority determines that the disclosure of such information—
- (a) would be contrary to law; or
 - (b) would prejudice the legitimate commercial interests of any person (except where that person is a qualifying bidder) and that person has not given their consent to it being disclosed.

Determination of preferred applicants at the proposal stage

12.—(1) The competent authority must evaluate each completed proposal submitted to it by a qualifying bidder in accordance with the proposal evaluation criteria set out in the proposal documentation, in order to determine, subject to paragraph (3), which qualifying bidder is to become the preferred applicant.

(2) The competent authority may decline to consider a proposal submitted to it by a qualifying bidder where the competent authority determines that the submitted proposal does not comply in any material respect with the requirements specified in the proposal documentation.

(3) The competent authority may hold a best and final offer stage in accordance with Part 8 of these Regulations to determine the preferred applicant where it considers—

- (a) that it is unable to determine the preferred applicant in accordance with paragraph (1); or
- (b) that it is otherwise necessary or appropriate in the circumstances.

(4) Where no best and final offer stage is to be held, the competent authority may evaluate each completed proposal submitted to it by a qualifying bidder in accordance with the proposal evaluation criteria set out in the proposal documentation, in order to determine which qualifying bidder is to become a reserve applicant.

(5) The competent authority may determine that up to two qualifying bidders become reserve applicants in accordance with paragraph (4).

(6) Where the competent authority determine that two qualifying bidders become reserve applicants in accordance with paragraph (5), it must, in accordance with the evaluation criteria set out in the proposal documentation, determine a first reserve applicant and a second reserve applicant.

PART 8

Best and final offer stage

Best and final offer stage

13.—(1) Where the competent authority has decided in accordance with regulation 12(3) that a best and final offer stage is to be held, the competent authority must determine in accordance with the proposal evaluation criteria set out in the proposal documentation, which qualifying bidders are to be the selected qualifying bidders who are invited to participate in a best and final offer stage.

(2) The competent authority must give notice to each qualifying bidder as to whether that qualifying bidder has or has not been invited to participate in a best and final offer stage.

(3) The competent authority must issue to each selected qualifying bidder the best and final offer documentation, which must include the information specified in Schedule 3.

(4) A best and final offer stage must include two phases—

- (a) the dialogue phase to be conducted in accordance with regulation 14; and
- (b) the final offer phase to be conducted in accordance with regulations 15 and 16.

Best and final offer stage: dialogue phase

14.—(1) The dialogue phase must commence on the date specified in the best and final offer documentation.

(2) During the dialogue phase the competent authority may, in accordance with the best and final offer documentation, discuss with each selected qualifying bidder—

- (a) any matter concerning the regulated business information;
- (b) any aspect of that selected qualifying bidder's proposal for providing a smart meter communications service.

(3) In respect of the dialogue phase, the competent authority—

- (a) must ensure fairness of treatment among all selected qualifying bidders and in particular must ensure that any information provided is provided in a non-discriminatory manner; and
- (b) must not reveal to a selected qualifying bidder solutions proposed or any confidential information communicated by any other such bidder without that other bidder's agreement.

Best and final offer stage: final offer phase

15.—(1) The competent authority must determine when the dialogue phase ends in accordance with any requirements set out in the best and final offer documentation.

(2) At the end of the dialogue phase, the competent authority must commence the final offer phase by giving the notice described in paragraph (3).

(3) The notice described in this paragraph is a notice to each selected qualifying bidder—

- (a) informing them that the dialogue phase is ended and that the final offer phase is commenced;

- (b) providing an updated statement of the regulated business information;
- (c) confirming or updating the evaluation criteria that were included in the best and final offer documentation; and
- (d) inviting them to submit a best and final offer in accordance with the requirements of the best and final offer documentation (including a confirmation of the date and time requirements for such submission).

Best and final offer stage: evaluation

16.—(1) The competent authority must evaluate each best and final offer submitted to it by a selected qualifying bidder in accordance with the evaluation criteria set out in the best and final offer documentation, in order to determine which selected qualifying bidder is to become the preferred applicant.

(2) The competent authority may evaluate each best and final offer submitted to it by a selected qualifying bidder in accordance with the evaluation criteria set out in the best and final offer documentation, in order to determine which selected qualifying bidder is to become a reserve applicant.

(3) The competent authority may determine that up to two selected qualifying bidders become reserve applicants in accordance with paragraph (2).

(4) Where the competent authority determines that two selected qualifying bidders become reserve applicants in accordance with paragraph (3), it must, in accordance with the evaluation criteria set out in the best and final offer documentation, determine a first reserve applicant and a second reserve applicant.

(5) The competent authority may decline to consider a best and final offer submitted to it by a selected qualifying bidder where the competent authority determines that the submitted best and final offer does not comply in any material respect with the requirements specified in the best and final offer documentation.

PART 9

Preferred applicant stage

Notification of preferred applicant and reserve applicant

17.—(1) As soon as reasonably practicable after the competent authority has determined the preferred applicant in accordance with regulation 12(1) or 16(1), it must give notice to the preferred applicant to that effect.

(2) A notice given under paragraph (1) must include—

- (a) the details of the matters to be resolved by the preferred applicant to the competent authority's satisfaction as specified in paragraph (3), before that preferred applicant becomes the successful applicant in accordance with regulation 18(1); and
- (b) a description of how those matters must be satisfied and by what date.

(3) The matters referred to in paragraph (2)(a) may include—

- (a) that the preferred applicant has established any arrangements to provide a smart meter communication service; and
- (b) any other matters,

which the competent authority determines must be established prior to the grant of the electricity smart meter communication licence and the gas smart meter communication licence.

(4) As soon as reasonably practicable after the competent authority has determined a reserve applicant in accordance with regulation 12(4) or 16(2), it must give notice of that fact to that reserve applicant, and where the competent authority has determined a first reserve applicant and a second reserve applicant, it must give notice to each reserve applicant as to whether that reserve applicant is the first reserve applicant or the second reserve applicant.

(5) A notice under paragraph (4) must—

- (a) specify the name and address of the preferred applicant; and
- (b) describe, in general terms, the matters to be resolved by the preferred applicant to the competent authority's satisfaction as specified in accordance with paragraph (3), before that preferred applicant becomes the successful applicant in accordance with regulation 18(1).

(6) The competent authority must give notice to any other qualifying bidder of the fact that it is not a preferred applicant or a reserve applicant, as applicable.

(7) Where—

- (a) the matters referred to in the notice given under paragraph (1) are not resolved by the preferred applicant in accordance with that notice to the competent authority's satisfaction;
- (b) the preferred applicant withdraws from the tender exercise in accordance with regulation 20; or
- (c) the preferred applicant is disqualified from the tender exercise in accordance with regulation 22,

the competent authority may withdraw the notice given under paragraph (1) by giving a further notice to that effect.

(8) Where the competent authority has given a further notice under paragraph (7), it must discontinue the tender exercise with the preferred applicant and, where a reserve applicant has been determined in accordance with regulation 12(4) or 16(2), may determine to treat—

- (a) the reserve applicant, where only one has been appointed; or
- (b) the first reserve applicant, where more than one has been appointed,

as if that reserve applicant were the preferred applicant.

(9) In circumstances where the competent authority determines to treat a reserve applicant as if it were the preferred applicant paragraphs (1) to (3) and (7) apply with references in those paragraphs (and in regulations 18 and 20) to the preferred applicant applying to such a reserve applicant.

(10) Paragraphs (11) and (12) apply where—

- (a) two reserve applicants have been appointed; and
- (b) in accordance with paragraph (8)(b), the first reserve applicant is being treated as if it were the preferred applicant.

(11) The competent authority must give the second reserve applicant a notice—

- (a) informing the second reserve applicant that the first reserve applicant is being treated as if it were the preferred applicant; and
- (b) including in that notice the information detailed in paragraph (5) in relation to the treatment of the first reserve applicant as if it were the preferred applicant.

(12) Where the competent authority gives a further notice in accordance with paragraph (7) to the first reserve applicant who is being treated as if it is the preferred applicant, it must discontinue the tender exercise with the first reserve applicant and may determine to treat the second reserve applicant as if that reserve applicant were the preferred applicant.

PART 10

Notification of successful applicant

Notification of successful applicant

18.—(1) Where the competent authority determines at any time that it is satisfied that the preferred applicant has resolved the matters described in the notice given in accordance with regulation 17(1), the preferred applicant becomes the successful applicant to whom an electricity smart meter communication licence and a gas smart meter communication licence are to be granted (notwithstanding that those grants may be subject to the fulfilment by the successful applicant of particular conditions).

(2) As soon as reasonably practicable after the determination in paragraph (1), the competent authority must publish a notice to that effect.

(3) A notice under paragraph (2) must specify the name and address of the successful applicant.

Information in respect of successful applicant

19.—(1) Subject to paragraph (3), the competent authority must as soon as practicable after a determination has been made in accordance with regulation 18(1), give notice to each qualifying bidder of its determination in relation to the successful applicant.

(2) Subject to paragraph (3), a notice under paragraph (1) must include—

- (a) the evaluation criteria applied by the competent authority in evaluating proposals and where appropriate best and final offers;
- (b) the reasons for the determination, including the characteristics and relative advantages of the successful proposal or where appropriate the successful best and final offer;
- (c) the name of the successful applicant;
- (d) the result obtained by—
 - (i) the qualifying bidder which is to receive the notice; and
 - (ii) the successful applicant; and
- (e) a statement of when the period specified in paragraph (5) is expected to end.

(3) The competent authority may withhold any information that would be otherwise required to be provided in accordance with paragraphs (1) or (2) where the disclosure of such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to law; or
- (c) would otherwise be contrary to the public interest.

(4) Where paragraph (1) applies, the competent authority must not grant an electricity smart meter communication licence or a gas smart meter communication licence to the successful applicant before the end of the period specified in paragraph (5).

(5) Where the competent authority gives notice to each qualifying bidder in accordance with paragraph (1), it must allow to elapse a period which ends not before midnight at the end of the tenth working day after the date on which the notices referred to in paragraph (1) are given.

(6) As soon as reasonably practicable after the end of the period specified in paragraph (5), the competent authority must—

- (a) determine whether to confirm the determination made pursuant to regulation 18(1) to grant an electricity smart meter communication licence and a gas smart meter communication licence to the successful applicant (including where those grants are subject to the fulfilment by the successful applicant of particular conditions); and
- (b) publish a notice stating its determination under sub-paragraph (a).

(7) Where the competent authority publishes a notice in accordance with paragraph (6)(b), the tender exercise is finished.

PART 11

Withdrawal

Withdrawal

20.—(1) A tender participant may withdraw from a tender exercise at any time and with immediate effect by giving notice in writing of that fact to the competent authority.

(2) A tender participant (“Participant A”) who withdraws from a tender exercise may only be re-admitted to that tender exercise in accordance with paragraphs (3) or (4).

(3) Participant A may be re-admitted to the tender exercise where, after the withdrawal of Participant A, the tender exercise is cancelled and re-run from—

- (a) the beginning; or

- (b) the beginning of a particular stage in accordance with regulation 21(3)(a), where Participant A participated in the equivalent stage of the cancelled tender exercise.

(4) Subject to paragraph (5), Participant A may be re-admitted to the tender exercise as a result of a change to the membership of a bidder group in accordance with regulation 22 which results in the incorporation of Participant A in that bidder group.

(5) Paragraph (4) does not apply where Participant A is a selected qualifying bidder, preferred applicant, reserve applicant or successful applicant.

PART 12

Cancellation

Cancellation

21.—(1) Where the competent authority is satisfied that one or more of the events in Schedule 4 are occurring or have occurred in respect of a tender exercise, it may, in the circumstances specified in paragraph (2), publish a notice cancelling that tender exercise.

(2) The circumstances in which the competent authority may publish a notice in accordance with paragraph (1) are that the competent authority has—

- (a) given seven days notice of its intention to cancel the tender exercise to each tender participant who is still participating in the tender exercise at that particular time; and
- (b) considered any representations which have been duly made in relation to the notice given in accordance with sub-paragraph (a), by a person to whom that notice was given.

(3) Where the competent authority has published a notice in accordance with paragraph (1), the competent authority may—

- (a) re-run that tender exercise, from the beginning or from the beginning of a particular stage of that tender exercise in accordance with these Regulations; or
- (b) determine that the tender exercise has failed and is finished.

PART 13

Disqualification from a tender exercise

Disqualification

22.—(1) Where the competent authority is satisfied that—

- (a) one or more of the events in Schedule 5 are occurring or have occurred in respect of a particular tender participant; and
- (b) that the occurrence would materially affect the outcome of the tender exercise,

it must disqualify that tender participant from the tender exercise by giving notice of that fact to that tender participant.

(2) Where the competent authority is satisfied that—

- (a) one or more of the disqualification events are occurring or have occurred in respect of a particular tender participant; and
- (b) paragraph (1)(b) is not satisfied in respect of the occurrence,

it may disqualify that tender participant from the tender exercise by giving notice of that fact to that tender participant.

PART 14

Miscellaneous

Bidder groups

23.—(1) Where a bidder is a bidder group—

- (a) the group must nominate one of the persons in that group as its leader at the time of the submission of that bidder group's qualification questionnaire; and
- (b) that person must remain the leader of that bidder group for the duration of that group's participation in the tender exercise.

(2) Subject to paragraphs (3) to (5) and to the restriction in regulation 20(5), the competent authority may permit a change to the membership of a bidder group after a qualification questionnaire has been submitted to the competent authority by that group.

(3) In determining whether to permit a change under paragraph (2) the competent authority must consider all the circumstances and in particular whether permitting that change would be unfair to any other tender participant.

(4) A change to a bidder group must not be permitted where, as a result of that change, the person nominated as the leader of a bidder group in accordance with paragraph (1) would no longer be a member of the bidder group.

(5) Where a confidentiality agreement has been submitted by a bidder group in accordance with a notice given in accordance with regulation 9(5), before making a determination under paragraph (2), the competent authority may require that a new signed confidentiality agreement is submitted by the bidder group (or by any person who, subject to the determination of the competent authority under paragraph (2), will become a member of that group if the change is permitted).

Changes to delivery of documents or actions

24.—(1) Any notice required to be published by the competent authority in accordance with these Regulations must be published in such manner as the competent authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

(2) Any notice required to be given by the competent authority to a particular person in accordance with these Regulations may be given in such manner as the competent authority considers appropriate.

(3) Paragraph (4) applies where the competent authority determines that it is impracticable—

- (a) for any document or notice which is to be delivered to, or published or given by, the competent authority in accordance with these Regulations, to be delivered given or published by the time, date or in the manner specified in accordance with these Regulations; or
- (b) for any action which is required to be undertaken in accordance with these Regulations, to be completed by the time, date or in the manner specified in accordance with these Regulations.

(4) Where this paragraph applies, the competent authority must take reasonable steps to give notice to any relevant tender participant that—

- (a) delivery or publication must be made by a different time or date or in a different manner; or
- (b) the action must be completed by a different time or date or in a different manner.

Date

Verma of Leicester
Parliamentary Under Secretary of State
Department of Energy and Climate Change

SCHEDULE 1

Regulation 8

Qualification stage

The information specified in this Schedule in relation to a particular tender exercise is as follows—

- (a) the instructions particular to the qualification stage of the tender exercise;
- (b) the qualification questionnaire;
- (c) the date, time and manner in which a completed qualification questionnaire is to be submitted to the competent authority;
- (d) the evaluation criteria to be applied by the competent authority in evaluating a completed qualification questionnaire submitted to the competent authority by a bidder;
- (e) an outline description of the regulated business information; and
- (f) any other such information in relation to the qualification stage of the particular tender exercise as the competent authority may determine is necessary.

SCHEDULE 2

Regulation 10

Proposal stage

The information specified in this Schedule in relation to a particular tender exercise is as follows—

- (a) the instructions particular to the proposal stage of the tender exercise;
- (b) a description of the information required by the competent authority for the submission of a proposal;
- (c) the date, time and manner in which a proposal is to be submitted to the competent authority;
- (d) the proposal evaluation criteria to be applied by the competent authority in evaluating a proposal submitted to the competent authority;
- (e) the regulated business information as at the point of the issue of the proposal documentation; and
- (f) any other such information in relation to the proposal stage of the particular tender exercise as the competent authority may determine is necessary.

SCHEDULE 3

Regulation 13

Best and final offer stage

The information specified in this Schedule in relation to a particular tender exercise is as follows—

- (a) the instructions particular to the best and final offer stage of the tender exercise, including—
 - (i) a description of the process to be followed during the dialogue phase; and

- (ii) a description of the process to be followed during the final offer phase;
- (b) the regulated business information as at the start of the best and final offer stage;
- (c) the date on which the dialogue phase is to commence;
- (d) the minimum duration of the dialogue phase and any other information as the competent authority considers necessary in relation to the duration, or the method of determining the duration, of the dialogue phase;
- (e) a description of the information required by the competent authority for the submission of a best and final offer;
- (f) the date, time (or a method of calculating these relative to the end of the dialogue phase) and manner in which a best and final offer is to be submitted to the competent authority;
- (g) the evaluation criteria to be applied by the competent authority in evaluating best and final offers; and
- (h) any other such information in relation to the best and final offer stage of the particular tender exercise as the competent authority may determine is necessary.

SCHEDULE 4

Regulation 21

Events of cancellation

The events in this Schedule are—

- (a) the competent authority does not receive any completed and compliant qualification questionnaires in accordance with regulation 9, or only receives one such questionnaire;
- (b) the competent authority determines that there are no bidders, qualifying bidders or, where appropriate, selected qualifying bidders, or that there is only one of any of these;
- (c) only one qualifying bidder or, where appropriate, selected qualifying bidder remains in the tender exercise after the disqualification or withdrawal of another qualifying bidder or selected qualifying bidder;
- (d) the competent authority does not receive any completed and compliant proposals in accordance with regulation 12;
- (e) the competent authority does not receive any compliant best and final offers in accordance with regulation 16;
- (f) the competent authority determines it is not appropriate to appoint a preferred bidder when evaluating the best and final offers in accordance with regulation 16;
- (g) a preferred applicant withdraws or is disqualified from a tender exercise and the competent authority has not determined a reserve applicant;
- (h) the matters referred to in accordance with regulation 17(2)(a) in the notice given under paragraph (1) of that regulation are not satisfied by a preferred applicant and the competent authority has not determined a reserve applicant;
- (i) the reserve applicant (where only one is appointed) withdraws or is disqualified from a tender exercise or both reserve applicants (where two are appointed) withdraw or are disqualified from a tender exercise after a preferred applicant has withdrawn or been disqualified from that tender exercise, or after a preferred applicant has failed to satisfy the matters referred to in accordance with regulation 17(2)(a) in the notice given under paragraph (1) of that regulation;
- (j) the matters referred to in accordance with regulation 17(2)(a) in the notice given under paragraph (1) of that regulation are not satisfied by a reserve applicant and the preferred applicant has withdrawn or been disqualified from that tender exercise, or the preferred applicant has failed to satisfy those matters;
- (k) a successful applicant withdraws from the tender exercise;
- (l) the competent authority determines that it would not be appropriate to grant a smart meter gas licence and a smart meter electricity licence to any qualifying bidder;

- (m) the competent authority determines that—
 - (i) the regulated business information has varied from the regulated business information—
 - (aa) which was provided in a previous stage of the tender exercise; or
 - (bb) issued at the beginning of a tender stage, where the variation occurs during that stage of the tender exercise but after the required date and time for the submission to the competent authority of, as the case may be in that stage, the qualification questionnaire, proposal or best and final offer;
 - and
 - (ii) the extent of that variation is such that continuing with the tender exercise would not be fair and equitable to any qualifying bidder or bidder;
- (n) the competent authority determines that the dialogue phase of the best and final offer stage is not likely to reach a satisfactory conclusion in accordance with the rules for that stage contained in the best and final offer documentation; or
- (o) the competent authority determines that—
 - (i) the tender exercise has been compromised by the act or omission of (or on behalf of) any tender participant; and
 - (ii) in the circumstances, a competitive determination of the person to whom a gas smart meter communication licence and an electricity smart meter communication licence are to be granted cannot be ensured by continuing with the tender exercise.

SCHEDULE 5

Regulation 22

Disqualification events

- 1.** The events in this Schedule are that a tender participant or any person acting on behalf of a tender participant—
- (a) causes or induces any person to enter into an agreement to collude in relation to any aspect of the tender exercise or to inform a tender participant of the detail of any other tender participant's competition document;
 - (b) submits any information to the competent authority which is false or misleading, unless the competent authority permits the submission of further information in order to correct the false or misleading information;
 - (c) engages in or attempts to engage in any anti-competitive behaviour in respect of a tender exercise, or allows or encourages any such anti-competitive behaviour by any other tender participant or person acting on their behalf;
 - (d) does anything which would constitute the commission of an offence under section 1, 2 or 6 of the Bribery Act 2010^(a);
 - (e) fixes or adjusts the detail of a competition document—
 - (i) by or in accordance with any agreement or arrangement with any other tender participant; or
 - (ii) by improperly using insider information;
 - (f) enters into any agreement or arrangement with any other tender participant that either tender participant shall refrain from submitting any competition document;

^(a) 2010 c. 23.

- (g) communicates to any person other than the competent authority the details of a competition document, except where the disclosure is made in confidence in order to obtain advice or information necessary for the preparation of that document;
- (h) where that tender participant is a bidder group, changes the membership of the bidder group other than in accordance with the approval of the competent authority; or
- (i) contacts any relevant person other than in a manner permitted in accordance with—
 - (i) any instructions particular to the conduct of the stage of the tender exercise during which the contact is made; or
 - (ii) any requirements specified in these Regulations.

2. In this Schedule, “competition document” means a document to be submitted or which has been submitted to the competent authority by a tender participant in accordance with these Regulations.

3. In paragraph 1(e), “insider information” means information which—

- (a) is used by a tender participant in the preparation of a competition document;
- (b) relates to any other tender participant, or to any matter concerning the competent authority’s consideration of competition document, or otherwise to the requirement to provide a smart meter communication service;
- (c) is relevant to the tender exercise; and
- (d) is not generally available to all the tender participants who are participating in the stage of the tender exercise to which the competition document relates.

4. In paragraph 1(i)—

- (a) “relevant person” means a person acting on behalf of the competent authority—
 - (i) with respect to the tender exercise; or
 - (ii) who is otherwise capable of influencing in any way the conduct of the tender exercise;
- (b) a reference to contacting a relevant person includes contact made for the purposes of discussing the possible transfer of such person to the employment of the tender participant.

5. A reference in this Schedule (other than in paragraph 1(h)), with respect to a tender exercise, to an action of or in relation to a tender participant includes a reference to an action of or in relation to a bidder, which occurs—

- (a) after the coming into force of these Regulations; and
- (b) prior to the time that the bidder submits a qualification questionnaire.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out the process for competitive tenders that will apply to the grant of smart meter communication licences under the Electricity Act 1989 and the Gas Act 1986.

Regulations 4 sets out that the tender exercise must be used to select the person to whom both a smart meter communication licence is to be granted under both the Electricity Act 1989 and the Gas Act 1986, and that the competent authority selecting that person must have regard to the need for the person awarded the licences to be suitable to be granted both.

Regulation 5 determines the which of the Secretary of State and the Authority is to run particular tender exercises (the “competent authority”).

Regulation 6 sets out the mandatory and discretionary stages of a tender exercise.

Regulation 7 gives the competent authority the discretion to determine when to hold a tender exercise, and requires the competent authority to publish a notice specifying the date on which the tender exercise will begin, or beginning it, including any additional information as is deemed necessary.

Regulations 8 and 9 describe the qualification stage of the tender exercise and how qualifying bidders will be determined. Schedule 1 sets out the information to be included in the qualification documentation.

Regulation 10 describes the proposal stage of the tender exercise, and Schedule 2 sets out the information to be included in the proposal documentation.

Regulation 11 describes additional procedure for the proposal stage of the tender exercise used to select the person to whom the first electricity and gas smart meter communication licences are to be granted. The procedure allows for the competent authority to change and update information during the stage.

Regulation 12 describes how the preferred applicant may be selected at the proposal stage, or allows the competent authority to hold a discretionary best and final offer stage to be held. The competent authority may also select up to two reserve applicants. Where two reserve applicants are selected, the competent authority must determine which is the first reserve applicant, and which is the second reserve applicant.

Regulation 13 describes the best and final offer stage of a tender exercise, including how the qualifying bidders who are to take part in it are selected. Schedule 3 sets out the information in the best and final offer documentation. The best and final offer stage has two phases: a dialogue phase where the applicants and the competent authority discuss the requirements of the licence holder and proposal of the applicant; and a final offer phase involving the submission by the applicant of bids.

Regulation 14 describes the dialogue phase of the best and final offer stage.

Regulation 15 describes the final offer phase of the best and final offer stage.

Regulation 16 describes how the preferred applicants are selected at the end of the best and final offer stage. The competent authority may also select up to two reserve applicants. Where two reserve applicants are selected, the competent authority must determine which is the first reserve applicant, and which is the second reserve applicant.

Regulation 17 requires the competent authority to publish a notice of its selection of a preferred applicant. The preferred applicant may be required to satisfy certain matters before it becomes the successful bidder. The reserve bidder may be treated as the preferred bidder if the original preferred bidder fails to satisfy the matters, withdraws or is disqualified from a tender exercise. Where there are two reserve applicants, the first reserve applicant is initially treated as the preferred bidder in preference to the second reserve applicant. The second reserve applicant may be treated as preferred bidder where the first reserve applicant fails to satisfy remaining matters that apply with respect to it becoming the successful applicant, or where it is disqualified or withdraws.

Regulation 18 requires the competent authority to publish a notice when it has selected the successful applicant.

Regulation 19 requires the competent authority to give details of the successful applicant to unsuccessful applicants and requires at least ten working days to elapse before the smart meter communication licences are granted to the successful applicant. The competent authority is required to publish a notice to confirm its determination to grant the licences to the successful applicant.

Regulation 20 provides for participants to withdraw from a tender exercise.

Regulation 21 provides for the competent authority to cancel a tender exercise in the circumstances described in Schedule 4. A tender exercise may be re-run from a particular stage until a successful applicant is identified or a tender exercise can be determined as failed.

Regulation 22 allows the competent authority to disqualify a participant from a tender exercise in the circumstances described in Schedule 5.

Regulation 23 describes the rules for changes to bidder groups.

Regulation 24 covers the requirements for publications, and allows the competent authority to notify a participant of any changes to the delivery of documents or actions required.

A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from Smart Meter Programme, Department of Energy and Climate Change, 3 Whitehall Place, London SW1A 2AW and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

Annex C: Explanatory Memorandum

EXPLANATORY MEMORANDUM TO

The Electricity and Gas (Competitive Tenders for Smart Meter Communication Licences) Regulations 2012

2012 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change (DECC) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Regulations set out the competitive application process to award licences for the provision of a service of communicating with smart energy meters on behalf of all licensed energy suppliers. The process under the Regulations will allow for a single person to be granted licences for this activity in respect of both electricity and gas smart meters after competition and to become a monopoly provider of communication services in Great Britain. The Regulations detail the required procedure for each of up to four stages of the tender exercise.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Regulations are the first use of powers in section 56FC of the Electricity Act 1989 and section 41HC of the Gas Act 1986. The Regulations provide for a competitive award process for the grant of licences concerning the new licensable activities that were inserted into the Electricity Act 1989 and the Gas Act 1986 by the Electricity and Gas (Smart Meters Licensable Activity) Order 2012. The Regulations are among a number of measures (including energy licence

modifications) that DECC is taking to provide the regulatory framework for the rollout of smart meters by the end of 2019.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 The Government's vision is for every home in Great Britain to have smart energy meters, giving people far better information about, and control over, their energy consumption than today. Businesses and public sector users should also have smart or advanced energy metering suited to their needs. The rollout of smart meters will play an important role in Great Britain's transition to a low-carbon economy, and help us meet some of the long-term challenges we face in ensuring an affordable, secure and sustainable energy supply.

7.2 This is a major programme and a Coalition Agreement commitment, which aims to support the rollout of some 53 million smart electricity and gas meters to domestic properties and smart or advanced meters to small and medium non-domestic sites in Great Britain by 2019. This will impact approximately 30 million premises and deliver a net benefit estimated at approximately £7 billion.

7.3 The communications, and the data transfer and management, required to support smart metering are to be organised by a new central communications body. This will be referred to as the Data and Communications Company and operate as a regulated monopoly. It will provide a service of remotely communicating with smart meters on behalf of parties including electricity and gas suppliers, electricity distribution companies, gas transporters and other third parties authorised by

the consumer, such as energy services companies. The DCC will not operate these services itself, but will contract with data and communications companies for their provision, following competitive tenders. This model delivers the necessary security and interoperability required for the smart meter system as well as facilitating market access for new entrants.

7.4 Regulatory control will be exerted over the DCC through the licences that it will be required to hold under both the Electricity Act 1989 and the Gas Act 1986, in order to be able to undertake its activities. The Government has also developed draft conditions for the DCC's licences, and draft content of a new industry code (the 'Smart Energy Code') setting out the more detailed working arrangements between the DCC and its users (these are available on the DECC website¹⁵). These and other regulatory measures will be introduced in due course to give effect to the Government's policies across the whole smart meter programme, including placing obligations on licensed energy suppliers to use the communication services offered by the DCC.

7.5 The Regulations provide for a competition to determine a person to whom both the DCC licences are to be granted, by way of a single competitive tender conducted over up to four distinct stages by either the Secretary of State or Ofgem (the Regulations set out the process for determining who conducts a particular exercise; the first will be conducted by the Secretary of State). The first licences are expected to be awarded in the summer of 2013, and will be retendered at regular intervals, normally 12 years.

7.6 The disciplines of a competitive process will be employed to ensure the openness and transparency of the tender exercise and to ensure value for money.

7.7 The Government has indicated that the DCC should be independent from its service providers. Separating the DCC from its service providers and letting service provider contracts via a competitive tender should also help ensure value for money.

8. Consultation outcome

8.1 The Government consulted on the detailed policy design of the regulatory and commercial framework for the DCC in September 2011. This consultation included a section seeking views on the design of the competitive process to award the DCC licences. The majority of respondents supported the Government's proposed approach. In general responses were received from the

¹⁵ http://www.decc.gov.uk/en/content/cms/consultations/cons_smip/cons_smip.aspx

energy industry, consumer groups and the regulator. There were few responses from the members of the public.

8.2 In April 2012 a further consultation was published which focused on the process for awarding the DCC licences. This included the Government's response to the relevant section of the September 2011 consultation and included draft regulations. Sixteen responses were received to this section of the consultation, all of which came from industry stakeholders. This included energy suppliers, network operators, other industry parties and consumer groups. No responses were received from individual members of the public.

8.3 Responses remained broadly supportive of the Government's approach.

9. Guidance

9.1 The Government does not intend to publish any guidance related to the Regulations.

10. Impact

10.1 The impact on the public sector is nil.

10.2 An Impact Assessment is attached to this memorandum and will be published alongside it on www.legislation.gov.uk.

11. Regulating small business

11.1 The regulations apply to small business. The regulations are designed to deliver a fair and appropriate tender exercise for the determination of the person to whom the licences will be granted. It is important that the regulations be followed by all potential tender participants, regardless of the size of the company applying for the DCC licences. The Government has therefore not exempted small businesses from the need to comply with the Regulations.

12. Monitoring & review

12.1 DECC will ensure that the smart metering implementation programme is subject to a comprehensive and integrated review and evaluation process, both during the initial stage and towards the end of the main rollout. Annex 4 of the Impact Assessment sets out further detail of the proposed approach, within which this Order should be considered.

13. Contact

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