

Use of Existing Infrastructure Code of Conduct

Introduction

1. The 2013 Broadband Guidelines require that *“Any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the tender, should fulfil the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid.”*
2. To meet this requirement, the UK will require that all bidders agree to the terms of this document, *Use of Existing Infrastructure Code of Conduct*.

(A) Infrastructure required to be made available

3. All bidders will be required to make available the physical infrastructure required under Directive 2014/61/EU *on measures to reduce the cost of deploying high-speed electronic communications networks* (the Civil Infrastructure Directive).
4. This physical infrastructure must be made available at ‘fair and reasonable’ terms and conditions, consistent with the Civil Infrastructure Directive, which includes provisions for reasonable access.
5. The detailed requirements on undertakings will be the same as those set out in the text of the Directive. DCMS has consulted on its proposals to implement the Directive; these proposals will be superseded by the implementing regulations and by guidance to be produced by Ofcom.
6. In the case where a bidder has been determined by Ofcom to have Significant Market Power, the regulatory remedies will continue to apply such that other bidders who do not own or control the regulated passive assets could request access (for example, access to ducts and poles in the form of BT’s Physical Infrastructure Access (PIA) product).
7. Before ordering the product, suppliers may have an accreditation process in place that infrastructure access seekers must go through (if they have not already done so). While bidders need not be accredited to access information on the infrastructure and to submit their bid, BDUK would advise them to investigate any relevant accreditation processes and timescales in the preparation of their bids.
8. Information must be provided for all relevant infrastructure that a bidder owns or controls (irrespective of whether it is actually used) for the target area (as identified in the Invitation to Tender).

(B) The level of detail of information that should be provided

9. By agreeing to the terms of this document, bidders undertake to list the types of infrastructure they own or control in the intervention area (to include masts, poles and ducts). Where access products relating to the infrastructure exist, the Terms of Reference for those access products must also be made available.
10. When a bidder submits a request for information to another bidder, the recipient of this request must make available: (1) geographic data that includes point locations for masts and poles and route data for ducts; (2) the capacity available where accurately known¹; and (3) the rental costs. The level of detail must be equivalent to the “existing plant utility location” prints that utilities apply for when undertaking road construction.²
11. For that detailed information, infrastructure operators can charge a fee towards the genuine resource cost of compiling that information for the intervention area. Where an infrastructure operator charges such a fee, it must be capped at [£500] per Intervention Area per bidder.

(C) The process by which the information is to be provided

12. At least six weeks before the deadline for ITT responses, Implementing Bodies must publish a list of all the bidders who have agreed to the terms of this document. This may be done through a Pre-Qualification Questionnaire, or through an Expression of Interest process.
13. A bidder has up to ten (10) days from publication of the bidder list to indicate to each infrastructure operator to whom the bidder could potentially wish to submit an access request, that: (1) they intend to request information on the infrastructure to inform the development of the bidder’s proposed solution; and (2) the type of infrastructure that they could seek access to. On receipt of this notification, the infrastructure operator can start to develop the Terms of Reference for access products where these do not already exist.
14. The infrastructure operators are required to respond to a follow-up specific request for information from another bidder within a maximum of ten (10) working days of the request. The information that must be provided is outlined in paragraph 10. If the bidder had not submitted an indication of interest within the first 10 days (as outlined in paragraph 13), the infrastructure operator has a maximum of twenty (20) working days to respond to the request.
15. Alternatively, bidders with infrastructure in the intervention area may choose to publish information on the available infrastructure in advance. In that instance they could provide the maps to the Implementing Bodies, who would host these in a data

¹ BDUK notes that not all infrastructure owners maintain records on infrastructure capacity and/or cannot offer assurances to access seekers about available capacity without physical surveys.

² BSI’s Publicly Available Standard 128: <http://www.pas128.co.uk/>

room (i.e. a secure extranet site that all bidders could access). Another possibility for standardising information requests is for infrastructure operators to identify areas where they own infrastructure on sites such as linesearchbeforeudig.co.uk and - if all of the relevant information is there - to direct enquirers to the site.

(D) The acceptable terms of a non-disclosure agreement (NDA)

16. The infrastructure operator may require the access seeker to sign a NDA.
17. A template NDA is at as Annex A. Infrastructure operators will need to attach their NDA to their signed code of conduct. The National Competence Centre (NCC) will need to check any non-template NDA to verify that they are non-prejudicial and compliant.

(E) Non-Compliance with the Use of Existing Infrastructure Code of Conduct

18. Where a bidder does not meet the terms of this document they will be excluded from the procurement.
19. A bidder can notify the NCC if it believes another bidder has breached the Code of Conduct.
20. Within 5 days of receiving the complaint, the NCC will attempt to resolve the case through arbitration (after consultation with Ofcom, if necessary.)
21. Where possible, the NCC will seek to resolve the case without the bidder being disqualified from a tender process. However, if a resolution cannot be reached through the arbitration process, the NCC would advise the Implementing Body that the bidder's actions would likely result in them being considered non-compliant with State aid rules (the 2016 Decision and the 2013 Broadband Guidelines).

(F) Non-bidders

22. Under the Civil Infrastructure Directive, any bidder could request information about existing physical infrastructure that may be relevant to their bid from a non-bidder. BDUK encourages *all* infrastructure operators, regardless of whether they are bidders, to meet the standards outlined in this document.

ANNEX A - Template Non Disclosure Agreement

IT IS AGREED as follows:

1. DEFINITIONS

1.1. In this Agreement unless the context otherwise requires the following words shall have the following meanings:

Agreement means the clauses of, and the Annex to, this agreement as amended by the Parties in accordance with Clause 8;

Confidential Information means the relevant information described in the second column of the table in the Annex to this Agreement, in whatever medium or form (including information conveyed in writing, orally, visually or electronically), whether belonging to the Discloser or a third party (other than the Recipient), which is directly or indirectly disclosed to the Recipient or any of its representatives by any agent or employee of the Discloser, or a third party owner at the Discloser's direction, in connection with the relevant Purpose;

Discloser means the Party which discloses the relevant Confidential Information as specified in the first column in the relevant row in the Annex to this Agreement;

Party means a party to this Agreement;

Purpose means the purpose for which the relevant Confidential Information is disclosed to the Recipient as specified in the third column in the relevant row in the Annex to this Agreement;

Recipient means the Party which receives the relevant Confidential Information from the Discloser; and

1.2. In this agreement, unless the context otherwise requires:

- 1.2.1. the singular shall include the plural and vice versa and one gender shall include the other;
- 1.2.2. a reference to any legislation shall include a reference to such legislation as amended, extended, consolidated or re-enacted from time to time;
- 1.2.3. any phrase introduced by the words 'including', 'includes', 'in particular', 'for example' or similar shall be construed as illustrative and without limitation to the generality of the related general words; and
- 1.2.4. references to Clauses shall, unless otherwise expressly provided, mean references to clauses in this Agreement.

2. **CONFIDENTIALITY UNDERTAKINGS**

- 2.1. In consideration of the Parties signing and agreeing to the terms of this Agreement and agreeing to disclose Confidential Information, the Recipient undertakes to the Discloser that, with respect to any and all Confidential Information disclosed to the Recipient or to any person on behalf of the Recipient by the Discloser or by any person on behalf of the Discloser, the Recipient shall:
 - 2.1.1. treat all Confidential Information as completely and strictly confidential and keep it in safe and secure custody (as is appropriate depending upon the form in which such information is recorded and stored and the nature of the Confidential Information);
 - 2.1.2. not disclose, copy, reproduce, publish or distribute the Confidential Information (or any part thereof) to any person save to the extent expressly permitted under this Agreement or otherwise authorised by the Discloser in writing;
 - 2.1.3. respect the Discloser's proprietary rights in the Confidential Information and maintain the Confidential Information as the Discloser's property;
 - 2.1.4. use the Confidential Information solely and exclusively for the Purpose;
 - 2.1.5. inform the Discloser immediately upon becoming aware or suspecting any unauthorised access, copying, use or disclosure in any form of Confidential Information; and
 - 2.1.6. not post any Confidential Information on any internet platform save to the extent expressly permitted under this Agreement or otherwise authorised by the Discloser in writing
- 2.2. Clause 2.1 shall not, or shall cease to, apply to the extent that any Confidential Information:

- 2.2.1. is or becomes generally known or available to the public (other than as a direct or indirect result of a disclosure in breach of this Agreement or any confidentiality undertaking given by any other person);
 - 2.2.2. is already known to the Recipient prior to disclosure by the Discloser or any other person on behalf of the Discloser and such prior knowledge can be evidenced by the written records of the Recipient;
 - 2.2.3. is or becomes known to the Recipient by disclosure from a third party (other than where such disclosure is itself in breach of an obligation of confidentiality);
 - 2.2.4. is not required to be treated as Confidential Information, as expressly confirmed by the Discloser in writing; or
 - 2.2.5. is required to be disclosed by any applicable law, governmental or regulatory authority, provided that the confidentiality obligations shall only be waived to the extent of the disclosure so required and provided further that where reasonably practicable and lawful, the Recipient shall:
 - (a) promptly (and where reasonably practicable, in advance) notify the Discloser of the required disclosure and upon the Discloser's request, provide such information as may be reasonably required by the Discloser to understand the basis and implications of such required disclosure; and
 - (b) upon the Discloser's request, provide such co-operation as may be reasonable in the circumstances taking into account the basis, manner, scope and timing of such required disclosure to challenge the basis or mitigate the implications of such required disclosure.
- 2.3. Each Party shall be entitled to disclose Confidential Information to its professional advisors (including consultants) to the extent necessary to enable it to take advice with respect to the relevant Purpose and/or to enforce its rights or obligations under this Agreement. The Recipient shall procure that any such professional advisor to whom Confidential Information is disclosed complies with the obligations of confidentiality and the terms and conditions of this Agreement as if such professional advisor were receiving such Confidential Information as a Recipient hereunder.
- 2.4. Where the Discloser has identified any Confidential Information as sensitive to a particular line of its business, the Recipient shall not disclose that

information to any of the Discloser's employees, agents, or contractors unless the Recipient knows that they are employed within or by the same line of business or unless with the Discloser's prior written consent.

3. DURATION

3.1. Notwithstanding termination or expiry of this Agreement, the obligations of confidentiality herein shall survive for a period of 5 years from disclosure of the relevant Confidential Information or, as the case may otherwise be, such other period as specified for the relevant Confidential Information in the fourth column of the relevant row of the table in the Annex to this Agreement.

4. RETURN/DESTRUCTION OF CONFIDENTIAL INFORMATION

4.1. Upon the Discloser's reasonable written request (not to be made while it is still participating in the procurement), the Recipient shall promptly:

4.1.1. return or destroy Confidential Information (including any copies), including any documents or other materials which incorporate Confidential Information; and

4.1.2. provide written confirmation to the Discloser that the relevant Confidential Information has been destroyed and/or that no copies of any Confidential Information have been retained by the Recipient.

5. THIRD PARTY RIGHTS

Nothing in this Agreement shall confer on any third party any benefits under the provisions of the Contracts (Rights of Third Parties) Act 1999. This does not affect any Party's rights or remedies, or the rights of any other person, which may exist or are available otherwise than by virtue of that Act.

6. WAIVER AND INVALIDITY

6.1. A waiver by any Party of any breach of, or default in, any term or condition of this Agreement shall not constitute a waiver of or any assent to any succeeding breach of, or default in, the same or any other term or condition.

6.2. If any provision of this Agreement is held to be invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions will continue in full force and effect as if the relevant provision had been deleted.

7. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement and understanding between the Parties in respect of the matters contained within this Agreement. Each Party acknowledges and agrees that it does not rely on and shall have no remedy in respect of any statement, representation, warranty or undertaking other than as expressly set out in this Agreement, provided that nothing in this Agreement shall operate to exclude any liability for fraud.

8. VARIATION

This Agreement may only be amended or varied by agreement of the Parties in writing.

9. COUNTERPARTS

This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, will be an original, and all the counterparts together will constitute one and the same instrument.

10. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with English law and the Parties irrevocably submit to the exclusive jurisdiction of the English courts in relation to any matters arising out of or in connection with this Agreement.