

Code of Conduct for Bidders – Use of Existing Infrastructure

Introduction

1. The 2013 Broadband Guidelines require that *“Any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the intervention 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, all Bidders must either agree to and comply with this Code of Conduct in respect of their corresponding infrastructure; or confirm that they have no infrastructure in the intervention area.

(A) Infrastructure required to be made available

3. All Bidders must grant access to the relevant infrastructure in accordance with the requirements of the *Communications (Access to Infrastructure) Regulations 2016*, which transpose into UK law Directive 2014/61/EU.
4. These require infrastructure operators to agree to provide access to physical infrastructure on fair and reasonable terms, except insofar as the request is unreasonable (based on objective, transparent and proportionate grounds).
5. Bidders should refer to Ofcom's *Guidance under the Communications (Access to Infrastructure) Regulations 2016* for further information.¹
6. Any regulatory remedies, including access obligations will continue to apply such that other Bidders could request access to relevant physical infrastructure. This includes access to ducts and poles in the form of Openreach's Physical Infrastructure Access (PIA) product.
7. Before providing access to infrastructure, the operator may apply a reasonable accreditation process in respect of the access seeker. Bidders will not need to be accredited to access information on the infrastructure or to submit a related bid (BDUK would, however, 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) in the intervention area (as identified in the Invitation to Tender (ITT)).

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

9. By agreeing to this Code of Conduct, Bidders undertake to list the types of infrastructure they own or control in the intervention area (to include masts, poles and ducts). Where

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0025/95191/Guidance-under-the-Communications-Access-to-Infrastructure-Regulations-2016.pdf

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, to the level of detail available²; 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.³ Should a Bidder seek an alternative format of the geographic data, e.g. in a form that can be used with a Geographic Information System (GIS) mapping tool, then the bidder will need to specify this on the initial request. It will be for the recipient of the request to advise whether this alternative format, beyond the existing information they hold, can be reasonably provided within the timescales set out under the Code of Conduct.
11. For that detailed information, a Bidder can charge a fee towards the genuine resource cost of compiling that information for the intervention area. Where a Bidder charges such a fee, it must be capped at £500 per intervention area per bidder.

(C) The timeframes in 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 this Code of Conduct. 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 any other Bidder to whom that 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 recipient can start to develop terms of reference for access products where these do not already exist.
14. Where an initial indication of interest has been received from a Bidder in accordance with paragraph 13 above, the recipient must respond to any follow-up specific request for information from the relevant Bidder within a maximum of ten (10) working days of the request. The information that must be provided is as set out in paragraph 10.
15. If a Bidder had not submitted an indication of interest within the first 10 days (as outlined in paragraph 13) to the operator concerned, the recipient has a maximum of twenty (20) working days to respond to any request for information.
16. Alternatively, Bidders with infrastructure in the intervention area may choose to publish or otherwise make available information on the available infrastructure in advance. For example, they could provide the maps to the implementing body, who would host them in a data 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

² 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.

³ BSI’s Publicly Available Standard 128: <http://www.pas128.co.uk/>

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)

17. The recipient of a request may require the Bidder to sign a NDA.
18. Template NDA text is provided at Annex A. Bidders 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 it is non-prejudicial and otherwise consistent with the aims and intent of the Code of Conduct.

(E) Non-Compliance with the Code of Conduct

19. Where a Bidder does not comply with this Code of Conduct in respect of relevant infrastructure, the ultimate consequence is that it will be excluded from the corresponding procurement, until such time as they comply with the requirements.
20. A Bidder can notify the NCC at stateaidforbroadband@culture.gov.uk if it believes another Bidder has breached the Code of Conduct.
21. From receipt of the complaint, the NCC will attempt to resolve the case through an informal dispute resolution procedure (after consultation with Ofcom, if necessary) as soon as reasonably practicable. At Annex B there is an indicative timeline for how the NCC will deal with complaints, with expected response periods from parties to the complaint.
22. 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 informal dispute resolution process, the NCC would expect to advise the implementing body that the Bidder's actions would be likely to result in them being considered non-compliant with State aid rules (the 2016 Commission Decision and the 2013 Broadband Guidelines) subject to any other regulatory mechanisms. It would be either (i) for the bidder who raised the complaint to decide whether they would wish to refer the dispute arising from their request to Ofcom formally via regulation 12(3) of the ATI Regulations should an informal resolution not be reached (where the complaint was raised in relation to regulation 4 of the ATI Regulations), or (ii) for the person to which the request was made to make such a referral.

(F) Non-Bidders

23. Bidders could request information about existing physical infrastructure that may be relevant to their bid from non-bidders under the Communications (Access to Infrastructure) Regulations 2016. BDUK encourages *all* infrastructure operators, regardless of whether they are bidders, to meet the standards outlined in this document.

Agreed for and on behalf of [insert organisation name]

By _____

Name _____

Position _____

Authorised signatory with the delegated authority of [*insert organisation name*]

ANNEX A - TEMPLATE NON DISCLOSURE AGREEMENT TEXT

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 this non-disclosure agreement;
Broadband Procurement	[identify the relevant local body procurement];
Confidential Information	means the information, 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 Purpose;
Discloser	means the Party by whom or on whose behalf the Confidential Information is disclosed;
Party	means a party to this Agreement;
Purpose	[means (i) the provision and use of information on physical infrastructure; and (ii) any subsequent access and use of such physical infrastructure, to achieve the aims and intent of the Code of Conduct entered into by the Parties as part of the Invitation to Tender process relating to the Broadband Procurement;] and
Recipient	means the Party which receives the relevant Confidential Information from the Discloser.

1.2 In this confidentiality undertaking, 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 other Party 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 subject to 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 the local body operating the Broadband Procurement and the Department of Culture, Media and Sport (DCMS), provided such disclosure is connection with the Broadband Procurement and/or the role of DCMS in overseeing and supporting that and related procurements.

2.4 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.

2.5 Except with the Discloser's prior written consent, and without prejudice to the Recipient's other obligations in this Agreement, the Recipient shall not disclose information the Discloser has identified as confidential to one line of business in the Discloser's organisation to employees, agents or contractors employed within the Discloser's organisation unless the Recipient knows that they are employed within or by the same line of business in the Discloser's organisation.

3. **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 other than by virtue of that Act.

4. **WAIVER AND INVALIDITY**

4.1 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.

4.2 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.

5. **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 not have any 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.

6. **VARIATION**

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

7. **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.

8. **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.

Annex B – Illustrative Complaint Timeline

	Activity	Day
1	Receive complaint	1
2	Acknowledge receipt of complaint via email and inform bidder that we will share it in its entirety with infrastructure provider	1
3	Share complaint with subject of complaint, seeking response to the complaint within 5 working days	1
4	Share complaint with Ofcom officials and DCMS lawyers	1
5	Share complaint with implementing body for fact-checking only	1
6	NCC consider complaint once subject's response has been received	5
7	Discuss complaint with Ofcom and DCMS lawyers and draft and agree detailed proposed resolution with reference: <ul style="list-style-type: none"> • to the original complaint; • the subject's response; and • Relevant Documents (below) 	8
8	Contact complainant and subject of complaint to share proposed resolution, with request to respond formally by following day as to whether they are content with it. Share suggested resolution with implementing body.	8
9	If agreement reached, case treated as resolved. If agreement not reached, then it is for the parties to provide NCC in writing any outstanding areas of disagreement.	11
10	If agreement not reached NCC to convene meeting with parties to seek resolution of the outstanding areas of disagreement	12
11	If no remaining areas of disagreement following meeting, case treated as resolved.	12
12	If agreement still not reached, draft and issue NCC advice to the implementing body whether the bidders actions are compliant with State aid rules (the 2016 Decision and the Broadband Guidelines).	12

Selection of Relevant Documents:

- BDUK State aid [2016 Decision](#);
- [DIRECTIVE 2014/61/EU, on measures to reduce the cost of deploying high-speed electronic communications networks](#)
- Ofcom's [Guidance](#) under the Communications (Access to Infrastructure) Regulations 2016

