

Appendix 5 – Draft Consultancy Agreement

Note to Tenderers:

The following is a draft Commission consultancy agreement that is proposed to be used by the Commission for the project and **must** be reviewed by Tenderers.

As set out in Section 9.4 of the ITT, Tenders will be evaluated on the nature and extent of a Tenderer's proposed variations to the draft Consultancy Agreement.

If a Tenderers wishes to propose variations to the terms and conditions, then the Tenderer **must** provide a version of the draft Consultancy Agreement with all proposed variations to same with their Tender. Should a Tenderer not wish to propose any variations, then the Tenderer **must** make this clear in its Tender.



Commission for
Communications Regulation

DRAFT CONSULTANCY AGREEMENT

Document No:	10/16A
Date:	04 March 2010

**(1) The Commission for
Communications Regulation (the
'Commission')**

(2) [XX] (the 'Consultant')

**DRAFT: SUBJECT TO EXECUTED
CONTRACT**

DATED THE [XX]th DAY OF [MONTH] 2010

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CONSULTANCY AGREEMENT dated the 4th day of December 2009

BETWEEN

- (1) The Commission for Communications Regulation, as established in accordance with the Communications Regulation Act, 2002 and having its offices at Block DEF, Abbey Court, Irish Life Centre, Lower Abbey Street, Dublin 1 (“the Commission”, which expression shall include its successors and assigns)

AND

- (2) [XX], a private limited company registered under the laws of [XX] (Registered no. [XX] and its offices registered at [XX]) (“the Consultant”, which expression shall include his successors and assigns).

WHEREAS

- (A) The Commission requires the performance of certain Consultancy Services, as hereinafter defined and wishes to engage the Consultant to perform the Consultancy Services.
- (B) By an Invitation to Tender the Commission invited the submission of a proposal to provide Consultancy Services as further specified in this Agreement and its Schedules and the Consultant’s Tender has been chosen as the most economically advantageous after an evaluation process.
- (C) The Consultant has agreed to perform the Consultancy Services on the terms and conditions contained in this Agreement and its Schedules.

NOW IT IS HEREBY AGREED

1 INTERPRETATION

- 1.1 In this Agreement, unless the context otherwise suggests:-

‘**Agreement**’ means the provisions of this Agreement, including the Schedules as may from time to time be varied in accordance with Clause 26;

“**Auction**” means the Commission’s auction for the award of spectrum rights of use in the 900 MHz band;

“**Authorised Undertaking**” means an authorised undertaking as defined in the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003;

“**Best Industry Practice**” means the exercise of the degree of skill and care which would reasonably and ordinarily be expected of a skilled and experienced person engaged to carry out services similar to the Consultancy Services under the same or similar circumstances seeking in good faith to comply with its contractual obligations and complying with all laws and codes of practice;

“Change of Control” means a change in the possession, whether directly or indirectly, of the power to direct or cause the direction of the Consultant’s management or policies, whether through ownership of shares, by contract, or by any other means;

“Charges” means the Charges described in Schedule 2 and payable in accordance with Clause 5 and Schedule 2;

“Commencement Date” means the effective date of this Agreement specified in Clause 4.1;

“Confidential Information” means all information of whatever nature relating to the Consultancy Services which is disclosed before or after the Commencement Date by the Commission to the Consultant, its officers, employees, advisers, agents, representatives, contractors, sub-contractors or consultants or to which the Consultant is given access after the date hereof, whether in, written, oral, visual, graphic, photographic, electronic, digital or in any other tangible form whatsoever, including, but not limited to all know-how, intellectual property, ideas, experience, drawings, designs, diagrams lists, computer programs, algorithms, engineering data, economic data, statistical data, formulae, specifications and all other technical or other tangible information in the possession or procurement of the Commission and any other matters relating to the Consultancy Services, whether pursuant to written communication, or correspondence with the officers, management, employees, contractors or sub-contractors of the Commission, or the advisers or consultants to or agents or representatives of the Commission. Confidential Information also includes analyses, compilations, studies, notes, reports, presentations and any other documents or records of whatsoever nature in whatever form prepared by the Consultant and/or his officers, employees, advisers, agents, representatives, contractors, sub-contractors or consultants with respect to the Consultancy Services;

“Conflict of Interest” means an interest that the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services) has, which (a) would actually compromise the independence of the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services) in its performance of the Consultancy Services or (b) would or could create the perception that the independence of the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services) in its performance of the Consultancy Services might be so compromised. A Conflict of Interest includes, but is not limited to the following:

- (i) a pecuniary interest (whether by way of a shareholding or otherwise) in an Authorised Undertaking;
- (ii) a contract (whether oral or written) with an Authorised Undertaking; or
- (iii) a position of employment, directorship (whether executive or non-executive) or any position of emolument with an Authorised Undertaking; and
- (iv) includes for the avoidance of doubt any work undertaken since 1 January 2009 on behalf of any Authorised Undertaking;

“Consultancy Services” means the services to be provided by the Consultant to the Commission as described in Schedule 1 and any other services which can reasonably be inferred as being required for the proper execution of same;

“Contract Documents” means this Agreement, the ITT and the Response;

‘Eur’ and **‘euro’** mean the lawful currency of Ireland;

“Intellectual Property Rights” means without limitation, copyrights (including copyright in computer software and source code), database rights, patents, registered or unregistered trademarks, know-how, service marks, business methods, utility models, design rights (whether registered or unregistered) trade secrets and all other industrial or intellectual property rights of whatever nature whether registered or unregistered in any application for such rights and any similar proprietary rights;

“Invitation to Tender (ITT)” means the invitation to submit a proposal for the provision of Consultancy Services issued by the Commission in connection with the Auction on [...] 2010 and the Pre-qualification Questionnaire document (“PQQ”) which was issued in conjunction with the ITT and all amendments and clarifications issued by the Commission in relation to same;

‘Parties’ means the Commission and the Consultant and **“Party”** means each of them;

“Response” means the response to the ITT submitted by the Consultant on [...] which includes the Tender and completed PQQ;

‘Scheduled Personnel’ means the person(s) referred to in Schedule 2 whom the Consultant has identified as key personnel in the ITT;

‘Software’ means the software described in Schedule 1 and any other software to be provided by the Consultant to the Commission as part of the Consultancy Services along with any documentation relating to such software;

“Source Code” means in respect of software the base programming code in that software that is intelligible to and can be interpreted by a computer programmer who is experienced in and understands that programming code;

“Tender” has the meaning set out in the ITT;

“Tax Clearance Certificate” means a tax clearance certificate issued by the Irish Revenue Commissioners.

1.2 In this Agreement (except where the context otherwise requires or unless otherwise specified):

1.2.1 any reference to a Clause, Schedule, sub-clause or paragraph is to the Clause, Schedule, sub-clause or paragraph of or to this Agreement and any reference to a sub-clause or paragraph is to the relevant sub-clause or paragraph of the Clause or Schedule in which it appears;

1.2.2 the index and clause headings are included for convenience only and shall not affect the interpretation of this Agreement;

1.2.3 the use of the singular includes the plural and vice versa;

1.2.4 the use of any gender includes the other genders;

- 1.2.5 a reference to any statute or statutory provision includes a reference to that statute or statutory provision as amended, extended or re-enacted and to any regulation, order, instrument or subordinate legislation under the relevant statute or statutory provision; and
 - 1.2.6 references to persons in this Agreement include bodies corporate, unincorporated associations or partnerships and any reference to a person includes a reference to that person's legal personal representatives, successors and lawful assigns.
 - 1.2.7 Where the words "include(s)", "including" or "in particular" are used in this Agreement, they are deemed to have the words "without limitation" following them and where the context permits, the words "other" and "otherwise" are illustrative and shall not limit the sense of the words preceding ; and
 - 1.2.8 Any obligation in this Agreement on a person not to do something includes an obligation not to agree, allow, permit or acquiesce in that thing being done.
- 1.3 The Schedules to this Agreement form part of this Agreement and shall have effect as if set out in full in the body of this Agreement and any reference to this Agreement includes the Schedules to this Agreement.
- 1.4 In the event of any conflict between the Contract Documents, then the following order of precedence shall apply:
- i. this Agreement (other than the Schedules to this Agreement);
 - ii. the Schedules to this Agreement;
 - iii. the ITT; and
 - iv. the Response.

2 ENGAGEMENT

- 2.1 In consideration for the Charges, the Consultant shall provide the Consultancy Services subject to and in accordance with the Contract Documents and in accordance with all laws and Best Industry Practice.

Subject to this Clause, the Commission agrees to engage the Consultant to perform the Consultancy Services and the Consultant agrees to perform the Consultancy Services on the terms and conditions contained in this Agreement.

The following shall be conditions precedent to this Agreement coming in to force:

- i. The completion by the Commission of any due diligence in relation to the Consultant (and any third party engaged by it to assist in the provision of the Consultancy Services). Any such due diligence may have regard to the financial status of the Consultant and its ability and capacity to perform the Consultancy Services. However any due diligence by the Commission, in relation to the Consultant, shall not in any way limit or relieve the Consultant of its liabilities and obligations under this Agreement, unless as otherwise expressly provided for under Agreement.

- ii. The Consultant (and any third party engaged by it to assist in the provision of the Consultancy Services) providing the Commission with a declaration to the effect that it and its personnel have no Conflicts of Interest and the Consultant otherwise fulfilling all the requirements required of it pursuant to the Invitation to Tender, the Response and associated documents; and
 - iii. The Consultant providing the Commission with documentary proof that it possesses a Tax Clearance Certificate and appropriate and adequate insurance cover. However the supply to the Commission of a Tax Clearance Certificate or any draft or final insurance policy or insurance certificate shall not imply acceptance by the Commission that the terms of the Tax Clearance Certificate are satisfactory or that extent of the insurance cover is sufficient, or that its terms are satisfactory, nor does it serve to otherwise limit or relieve the Consultant of its liabilities and obligations under this Agreement, unless as otherwise expressly provided for under Agreement.
- 2.2 The Consultant shall render and perform, and shall procure that any third party engaged by it to assist in the provision of the Consultancy Services renders and performs, the Consultancy Services to the best of its skill and ability, in a timely manner and in accordance with the description of the requirements of the Consultancy Services, so as to give to the Commission the full and complete benefit of the Consultant's experience and expertise.
- 2.3 The Consultant shall exercise, and shall procure that any third party engaged by it to assist in the provision of the Consultancy Services exercises, that standard of skill, care and diligence reasonably to be expected of a properly qualified consultant with suitable experience in providing services comparable in type, scope, complexity and purpose to the Consultancy Services.
- 2.4 The Consultant shall allocate appropriate personnel with appropriate qualifications, levels of experience and seniority to perform the Consultancy Services. For the avoidance of doubt, no extra monies or Charges shall be owed or payable by Commission to such personnel, and any monies or Charges payable by Commission under this Agreement shall be those as now set out at Clause 5 and Schedule 2 herein payable to the Consultant.
- 2.5 The Consultant shall, if requested by the Commission, agree in advance with the Commission the dates upon which it or any Scheduled Personnel will take scheduled annual leave. The taking of any such leave shall be such as to cause the least possible inconvenience with respect to the performance of the Consultancy Services.

3 CONSULTANT WARRANTIES

- 3.1 The Consultant represents and warrants to the Commission:
- i. The accuracy and truthfulness of all representations and/or statements made by the Consultant in the Response;
 - ii. That it will perform the Services with all due care, skill, professionalism and diligence and in accordance with Best Industry Practice;
 - iii. Neither it, the Scheduled Personnel or any third party engaged by it to assist in the provision of the Consultancy Services has a Conflict of Interest (or Conflicts of Interest have been disclosed to the Commission but have been

declared acceptable by the Commission in writing);

- iv. That it shall not place itself or permit any of the Scheduled Personnel to place themselves in a position of a Conflict of Interest during the term of and for a period of twelve (12) months following the expiration of this Agreement;
 - v. That it (and any third party engaged by it to assist in the provision of the Consultancy Services) have the experience, qualification, training and necessary ability to undertake the Consultancy Services;
 - vi. That it is a limited liability company duly incorporated and validly existing under the laws of the country in which it was established and has the legal right and full power and authority to carry on its business as currently carried on and to own its property and assets;
 - vii. That it has the legal right and full power and authority to execute, deliver and perform all its obligations under the Contract Documents and to exercise its rights under all of them;
 - viii. That it has all necessary power and authority to execute, deliver and perform its obligations under this Agreement;
 - ix. The execution, delivery and performance by it of this Agreement has been authorised by all necessary action on its part;
 - x. That it understands each of the obligations under this Agreement constitute legally binding obligations;
 - xi. There are no actions, suits or proceedings or regulatory investigations pending or, to the Consultant's knowledge, threatened against or affecting the Consultant before any court or administrative body or arbitration tribunal that might affect the ability of the Consultant to perform its obligations under this Agreement;
 - xii. That it has satisfied itself as to the requirements, demands, obligations and all risks assumed by it under this Agreement;
 - xiii. That it agrees it is responsible for the management and organisation of the Consultancy Services; and
 - xiv. That all Intellectual Property Rights provided by the Consultant to the Commission under or in connection with this Agreement, including all Intellectual Property Rights in and to the Software, do not and will not infringe any third party Intellectual Property Rights.
- 3.2 The representations, warranties and undertakings of the Consultant shall be deemed to be repeated on each payment date with respect to the facts and circumstances existing at that time, as if made at that time; and
- 3.3 The representations, warranties and undertakings of the Consultant shall survive the execution of this Agreement.

4 COMMENCEMENT AND TERMINATION

- 4.1 The Commencement Date shall be the date of execution of this Agreement. This Agreement shall terminate on the date of satisfactory completion of the Consultancy Services as notified by the Commission to the Consultant, (or such earlier date as may be agreed between the Commission and the Consultant) unless terminated earlier in accordance with the provisions of this Agreement.
- 4.2 The Commission may, without prejudice to any other right or remedy, terminate this Agreement by giving the Consultant five (5) days' written notice thereof if the Consultant:
 - 4.2.1 Abandons this Agreement or commits a material breach of any of its obligations under this Agreement which is incapable of remedy or which, if capable of remedy, is not remedied within fifteen (15) days of receiving notice from the Commission to remedy such breach;
 - 4.2.2 Its employees, servants or agents or any of them commit any act of grave misconduct or gross default or any conduct tending to bring either the Consultant or the Commission into disrepute or affecting the business of the Commission;
 - 4.2.3 Through its employees, servants or agents or otherwise is in default or neglect in the discharge of its obligations under this Agreement or is, by reason of the ill health of its employees, servants or agents or otherwise unable to fulfil its obligations under this Agreement to the satisfaction of the Commission;
 - 4.2.4 Becomes bankrupt, or makes any composition or arrangement with, or conveyance or assignment for the benefit of his creditors, or any application is made under any bankruptcy act for the time being in force for a sequestration of his estate, or a trustee is granted by him on behalf of his creditors, or if the Consultant, being a company, enters into voluntary or compulsory liquidation (except for the purpose of reconstruction or amalgamation), or if a receiver, receiver manager or administrator, or examiner of any of its assets is appointed; or
 - 4.2.5 Undergoes a Change of Control and the Commission does not give its prior written consent to such Change of Control on the basis that the Change of Control would represent result in the Consultant having a Conflict of Interest or which would otherwise have a negative effect of the Consultant's performance of its Consultancy Services.
- 4.3 The sustained absence of any of the Scheduled Personnel in providing the Consultancy Services, or any approved replacement thereof, or failure on their part to work the number of days required (if specified) shall be considered as grounds for the immediate termination of this Agreement.
- 4.4 The Commission may terminate this Agreement if the Auction process is delayed, abandoned or suspended by the Commission for any reason.
- 4.5 If the Commission is not satisfied with the standard of any part of the Consultancy Service performed by the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services), it may by written notice require the Consultant

to remedy any defective work within a period of seven (7) days of the receipt of such a notice. The Commission may terminate this Agreement with immediate effect if it is not satisfied with the standard of any such remedial work undertaken by the Consultant.

- 4.6 If conditions arise because of a change in Government policy or the passing of any law, which in the opinion of the Commission, makes it advisable or necessary to dispense with the Consultancy Services under this Agreement, the Commission may terminate this Agreement upon five (5) days' written notice to the Consultant. Such a termination shall be effected in the manner specified in the said notice and shall be without prejudice to any accrued claims which either Party may have against the other under this Agreement. In the event of such termination by the Commission, the Commission shall pay to the Consultant such Charges as are properly owing to the Consultant for Consultancy Services performed up to the date of such termination.
- 4.7 If this Agreement is terminated for any reason, the Consultant shall only be entitled to payment directly attributable to the proportion of the Consultancy Services properly completed in accordance with this Agreement, prior to such termination of this Agreement. Any prepaid charges for the Consultancy Services to be completed after such termination shall forthwith, upon termination, be refunded to the Commission.
- 4.8 The Commission shall not be liable to the Consultant (or any third party engaged by it to assist in the provision of the Consultancy Services) for any loss of profit, contracts, goodwill, business opportunity or anticipated saving suffered or incurred by the Consultant arising out of or in connection with this Agreement for any reason.
- 4.9 Termination of this Agreement shall be without prejudice to the accrued rights and remedies of either Party in relation to any negligence, omission or default of the other Party prior to termination.
- 4.10 Notwithstanding termination of this Agreement, the provisions of this Agreement shall continue to bind the Parties insofar as and for as long as may be necessary to give effect to their respective rights and obligations hereunder.
- 4.11 On termination of this Agreement, the Consultant shall execute and deliver all documentation prepared by the Consultant and all other documentation in its custody or control relating to the Consultancy Services to the Commission and shall take further steps as the Commission may reasonably require for the purpose of fully vesting in the Commission all rights and benefits of the Consultant arising therefrom.
- 4.12 The Commission's rights to terminate this Agreement as provided for in this Clause 4 are in addition to any other rights of termination provided for in this Agreement.
- 4.13 If the Commission terminates this Agreement because of a material breach of this Agreement it may rely on a single material breach, a number of material breaches or repeated material breaches.
- 4.14 Upon termination of this Agreement for any reason, the Commission may procure substitute Consultancy Services from another supplier. Except in the case of termination under Clauses 4.4 and 4.5, the costs of procuring an alternative supplier of the Consultancy Services shall be reimbursed to the Commission by the Consultant.

5 CHARGES

- 5.1 In consideration of the provision of the Consultancy Services in accordance with this Agreement, the Commission shall pay to the Consultant the Charges for the amounts and at the times set out in **Schedule 2**.
- 5.2 The Commission shall pay the Consultant all amounts due and owing within 30 days of the receipt of a valid invoice from the Consultant unless the Commission disputes any portion of an invoice, in which case the Commission shall notify the Consultant of the amount in dispute and the reasons therefor. Invoices shall be supported by a written report and time analysis in respect of the work undertaken by the Consultant.
- 5.3 Invoices with respect to any Charges additional to those out in Schedule 2 shall not be submitted to the Commission unless the Commission has provided prior written approval.
- 5.4 The Consultant agrees that neither it (nor any third party engaged by it to assist in the provision of the Consultancy Services) is or shall become an employee or agent of the Commission or be entitled to any fee, salary, pension, bonus, or other fringe benefits from the Commission and it is agreed that the Consultant shall be responsible for the deduction of income tax liabilities and pay related social insurance (P.R.S.I.) or similar contributions, if applicable, arising from the payment of the Charges to the Consultant under this Agreement. The Consultant agrees to indemnify and hold harmless the Commission against any claims or demands that may be made by any relevant authority in respect of income tax, P.R.S.I., penalties or interest relating to such payments in respect of the provision of the Consultancy Services.
- 5.5 Where a Tax Clearance Certificate expires during the course of this Agreement, the Consultant must immediately procure a renewed Tax Clearance Certificate. The Charges are only payable where the Consultant maintains and is in possession of a valid and current Tax Clearance Certificate. All Charges will be subject to withholding tax in acceptance with law and Revenue Commissioners guidelines and regulations.
- 5.6 If the Commission is not satisfied with the standard of any part of the work carried out by the Consultant and requires the Consultant to rectify any defective work in accordance with Clause 4.5, such remedial work as may be required shall be carried out by the Consultant at its own expense and it shall not be entitled to any Charges in respect of such remedial work.

6 ASSIGNMENT OF SCHEDULED PERSONNEL

- 6.1 The Consultant may not change any of the Scheduled Personnel without the prior written consent of the Commission. If the Commission becomes dissatisfied with the performance of any of the Scheduled Personnel assigned by the Consultant for any reason whatsoever, the Commission may request the Consultant to immediately remove the said person and to replace him or her.
- 6.2 If any of the Scheduled Personnel become incapacitated through accident, ill health, unsound mind, are convicted of any criminal offence or are otherwise unable to undertake the Consultancy Services or part thereof, the Commission may request the Consultant to immediately remove the said person and to replace him or her. The prior written agreement of the Commission must be obtained before any replacement is employed. If the Consultant fails to nominate a replacement who is acceptable to the Commission, acting reasonably, within ten (10) days after the relevant Scheduled

Person becomes incapacitated, the Commission may immediately terminate this Agreement by notice in writing.

- 6.3 If any of the Scheduled Personnel are unable to perform the Consultancy Services or any part thereof, they shall not be replaced without the prior written approval of the Commission. If any of the Scheduled Personnel are replaced, any such replacement(s) shall, to the satisfaction of the Commission, possess qualifications and experience equal to or greater than the Scheduled Personnel who are being replaced.

7 ACCESS TO INFORMATION, REPORTING OBLIGATION, CO-OPERATION

- 7.1 The Commission shall make available to the Consultant and its servants or agents any information reasonably required by the Consultant to enable it to fulfil its obligations under this Agreement.
- 7.2 The Consultant shall appoint a competent and appropriately qualified and experienced manager for the Consultancy Services for the purposes of overseeing and co-ordinating the timely and proper establishment of the Consultancy Services who shall be available for consultation with the Commission during normal business hours during the Agreement.
- 7.3 The Commission and its representative and the Consultant and its representative shall liaise and co-operate with each other with a view to achieving, *inter alia*, the most effective and efficient achievement of the Consultancy Services.
- 7.4 The Consultant shall report to the Commission on all matters referred to the Consultant under this Agreement in such form and with such frequency and within such time periods as are reasonably specified by the Commission and the Commission shall be entitled to have full and free access to all papers, results and data generated by the Consultant in the performance of the Agreement and Consultancy Services.
- 7.5 The Consultant shall submit to the Commission reports at such times as the Commission shall reasonably require and in such format as the Commission shall reasonably require (including electronic format) so as to be capable of audit. Records and reports and other materials shall be kept in good order and in safe storage.
- 7.6 Without prejudice to any legal requirement, all records and reports shall be retained for a period of 3 years following completion of the Consultancy Services.

8 CONFIDENTIAL INFORMATION AND ANNOUNCEMENTS

- 8.1 Subject to Clause 8.2, during the term of this Agreement and at any time after the termination or expiry of this Agreement (for any reason) the Consultant:
- i. may not use any Confidential Information for any purpose other than in the performance of its obligations under this Agreement;
 - ii. may not disclose any Confidential Information to any person except with the prior written consent of the Commission or in accordance with Clause 8.2; and
 - iii. shall use all reasonable endeavours to prevent the use or disclosure of Confidential Information, including by any third party engaged by it to

assist in the provision of the Consultancy Services.

- 8.2 The Consultant may disclose information which would otherwise be Confidential Information if and to the extent that:
- i. it is required by law;
 - ii. the information has come into the public domain or in to the knowledge of the Consultant, otherwise than through a breach of this Clause 8 (or any other confidentiality agreement) with the Commission by the Consultant);
 - iii. it is required by existing contractual obligations of which the Commission is made aware prior to the Commencement Date of this Agreement;
 - iv. it is required by a regulatory or governmental body in Ireland to which it is subject; or
 - v. the disclosure is to its professional advisers, other officers, employees and sub-contractors (“a Recipient”) to the extent that disclosure is reasonably necessary for the purposes of this Agreement.
- 8.3 The Consultant shall ensure that a Recipient is made aware of and complies with the Consultant’s obligations of confidentiality under this Agreement as if the Recipient was a Party to this Agreement.
- 8.4 On termination or expiry of this Agreement, the Consultant shall within one (1) month of the date of termination or expiry:
- i. return to the Commission all Confidential Information insofar as it is in tangible form together with all copies thereof, provided however that in such case the Consultant shall be entitled to retain one copy of same for professional indemnity purposes which copy shall only be used for such purposes; and
 - ii. provide a signed statement to the Commission certifying that all Confidential Information has either been delivered to the Commission or destroyed.
- 8.5 The Consultant acknowledges that the Commission may be required to grant access to records held by the Commission in relation to the Consultancy Services (including Confidential Information) to members of the public pursuant to the provisions of the Freedom of Information Acts 1997–2003 and the Consultant shall provide the Commission with copies of any relevant records (for the purpose of the Freedom of Information Acts 1997–2003) held by it within five (5) days of a request being made by the Commission.
- 8.6 The Consultant acknowledges that prior to the execution of this Agreement it has familiarised itself with and is aware of the provisions of the Freedom of Information Acts 1997–2003 and the Commission’s procedures in relation thereto which are published on the Commission’s website at www.comreg.ie
- 8.7 Subject to this Clause 8, no public announcement concerning this Agreement, the Consultancy Services or any ancillary matter shall be made by the Consultant, without the prior written consent of the Commission. The Consultant shall not therefore communicate directly or indirectly with the print or broadcast media or any agency nor shall it publish any articles or similar relating to this Agreement.

- 8.8 Clause 8.7 does not apply to a public announcement, communication or circular to be made or sent by the Consultant, if it is required by law, or any regulatory or governmental body, to which it is subject.
- 8.9 The Commission reserves the right at its sole discretion to publish information about the Agreement. Where the Consultant (acting reasonably) notifies the Commission that financial and/or economic information supplied by it to the Commission is confidential or commercially sensitive information, the Commission will take account of such representations in considering whether to disclose the relevant information.

9 INTELLECTUAL PROPERTY RIGHTS

- 9.1 Subject to Clause 9.6, all proprietary rights to any works in which Intellectual Property Rights subsist which are created by the Consultant in the performance of the Consultancy Services shall be the property of and shall automatically vest on creation in the Commission. The Consultant shall have no Intellectual Property Rights or other interest therein and shall take all such actions and execute all such documents as reasonably may be required from time to time by the Commission to vest such Intellectual Property Rights in the Commission (where such rights do not vest automatically) and to secure all relevant protection for such Intellectual Property rights. The Commission may publish in its own name the whole or any part of any report of the Consultant produced in connection with the Consultancy Services.
- 9.2 The Consultant shall indemnify the Commission, its officers, employees and agents against any action, claim or demand, costs (including legal costs), liabilities, damages or expenses arising from or incurred by reason of any infringement of any third party's Intellectual Property Rights in respect of the performance of the Consultancy Services and/or the Commission's receiving of the Consultancy Services.
- 9.3 If any claim is made or brought against the Commission in respect of the matters referred to in Clause 9.2, the Consultant shall be immediately notified thereof and may, with the assistance of the Commission, if required, but at the sole expense of the Consultant, conduct all negotiations for the settlement of the same, or any litigation that may arise therefrom, provided before undertaking the conduct of such negotiations or litigation the Consultant shall have given to the Commission such security as shall reasonably be required to cover any compensation, damages, expenses and costs which might become payable or be incurred by the Commission in respect of or as a result of such negotiations or litigation.
- 9.4 The Consultant agrees on request at any time to give the Commission or any person authorised by the Commission access to the Intellectual Property and to provide copies of same at its own expense.
- 9.5 The Consultant grants to the Commission an irrevocable, non-exclusive, perpetual, royalty-free licence of the Software, together with the right to sublicense the Software to third parties, including bidders in the Auction and any parties engaged by the Commission to verify the results of the Auction, for use by those third parties in connection with the Auction. While it is not envisaged that the Commission or its sublicensees of the Software will require the Source Code in the Software, the Consultant agrees to provide such Source Code to the Commission or its sub-licensees where circumstances arise which require the Commission or its sub-licensees to access the Source Code in the Software for validation purposes. The Commission agrees to put appropriate security in place in the event of such a release of Source Code being required.

- 9.6 The Commission acknowledges that all Intellectual Property Rights in and to the Software whether developed during, before or after the Commencement Date shall vest in the Consultant and that, other the licence described at Clause 9.5, nothing in this Agreement shall be construed as giving the Commission any rights or interest in or to the Software.
- 9.7 The provisions of this Clause 9 will continue to apply notwithstanding the termination of this Agreement for any reason and notwithstanding the completion of the performance of the Consultancy Services.

10 COMPLIANCE WITH LAWS

- 10.1 The Consultant shall comply with and shall procure that its employees, agents and servants, sub-contractors or any other third parties engaged to provide the Consultancy Services, comply with all relevant laws and the requirements of any statutory authority, regulatory or government body in performing the Consultancy Services.

11 VARIATION OF CONSULTANCY SERVICES

- 11.1 The Commission may by written notice require the Consultant to vary the nature, scope or timing of the Consultancy Services or to provide additional Consultancy Services.
- 11.2 Where the Commission requires additional Consultancy Services and such additional Consultancy Services would materially affect the scope of the Consultancy Services, the Parties shall, if necessary, negotiate a variation of the Charges and the time for completion of the Consultancy Services, but otherwise the variation of the Consultancy Services shall be on the same terms and conditions as contained in this Agreement. If the Parties cannot agree the variation of the Charges and the time for completion of the Consultancy Services, this Agreement shall continue unaffected and unchanged. The Consultant shall continue to provide the Consultancy Services to the Commission during the period of any negotiations described in this clause 11.

12 SUSPENSION OF CONSULTANCY SERVICES

- 12.1 The Commission may by notice require the Consultant to suspend the progress of the whole or any part of the Consultancy Services for a specified period upon receipt of such a notice.
- 12.2 Unless such suspension is necessary by reason of some default of or breach of this Agreement by the Consultant for which it is responsible, the following provisions shall apply:
- i. the Consultant shall be entitled to an extension of time for performance of the obligation(s) to which the suspension relates; and
 - ii. the Consultant shall be reimbursed by the Commission in respect of any increased costs reasonably incurred by the Consultant by reason of such suspension.
- 12.3 Following any such period of suspension referred to in this Clause, the Commission may by notice require the Consultant to immediately recommence work on all or any part of the suspended Consultancy Services.

13 INDEMNITY AND LIMITATION OF LIABILITY

- 13.1 The Consultant acknowledges that the Commission will be relying on the Consultant's skill, expertise and experience in providing the Consultancy services. The Commission will also be relying on the accuracy of all representations or statements made by the Consultant in its response to the Invitation to Tender (ITT) as more particularly set out in Schedule 4 herein, and the advice given by the Consultant in connection with the provision of the Consultancy Services. Accordingly the Consultant hereby agrees to indemnify and hold harmless the Commission and the Commission's officers, employees and agents against all losses, damages, costs (including legal costs) and professional and other expenses of any nature whatsoever incurred or suffered by the Commission, whether arising (directly or indirectly) under contract, tort, statute or otherwise, including the Consultant's breach of any of the obligations or the warranties contained in this Agreement or arising out of the Consultant's negligence in providing the Consultancy Services.
- 13.2 Nothing in this Agreement excludes or limits the liability of either Party in respect of death or personal injury to any person arising as a result of the negligence or wilful acts or omissions of a Party, its employees, agents, approved sub-contractors or any other person for which that Party has responsibility.
- 13.3 Except where the Consultant is in breach of Clauses 8 or 9, the Consultant shall not be liable to the Commission for any indirect or consequential losses suffered by the Commission arising out of or in connection with this Agreement. Despite any other provisions of this Agreement, the Commission shall not be liable to the Consultant for any indirect or consequential losses suffered by the Consultant arising out of or in connection with this Agreement

14 INSURANCE

- 14.1 The Consultant shall obtain and maintain, at its own expense, for the duration of the Consultancy Services and for a period of 6 years following completion or termination of same, the insurance policies set out in Schedule 3 in order to meet any liabilities which it may have to the Commission or third parties arising out of or in connection with this Agreement. The interest of the Commission must either be noted on such insurance policies or an indemnity to principals clause contained on the policies.
- 14.2 The Consultant shall at the request of the Commission, or its insurance broker, furnish a certificate from its insurers confirming that the policies referred to in Clause 14 and Schedule 3 are in place and the amounts of cover which are provided for. The supply to the Commission of any draft or final insurance policy or certificate or other evidence of compliance with this Clause 14 shall not, however, imply acceptance by the Commission that the extent of insurance cover is sufficient or that its terms are satisfactory.
- 14.3 The Consultant shall anytime at the request of the Commission, or the Commission's insurance broker, furnish a certificate from its insurers confirming that the policies are in place. The Consultant shall notify the Commission immediately in the event that any insurance ceases to be available or maintained.
- 14.4 At the Commission's reasonable request the Consultant shall increase the agreed insurance limits or obtain additional coverage.

- 14.5 If the Consultant fails to provide the insurance cover now specified the Commission may do so for the whole or part of the period for which such cover is required, without being under any obligation so to do, and may deduct any costs it incurs in obtaining such cover from any Charges due to the Consultant under this Agreement, or otherwise recover such sums from the Consultant.
- 14.6 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Consultant of its liabilities and obligations arising under this Agreement.

15 JOINT AND SEVERAL LIABILITY

- 15.1 If the Consultant is comprised of more than one legal entity, unless expressly provided otherwise, all representations, warranties, indemnities, undertakings, covenants, agreements and obligations made, given or entered into in this Agreement by the Consultant are made, given or entered into jointly and severally by each of the persons that constitute the Consultant.
- 15.2 If the Consultant is comprised of more than one legal entity the Commission may take action against any one or more of the Consultant members and/or may release or compromise in whole or in part the liability of any one or more of the Consultant members under this Agreement or grant any time or other indulgence without affecting the liability of the other persons that constitute the Consultant under this Agreement.

16 NON-SOLICITATION

- 16.1 During the term of this Agreement and for a period of six (6) months following its termination, the Consultant shall not and shall procure that its employees, servants and agents shall not, directly or indirectly solicit, seek or procure the services of any employees, servants or agents of the Commission without the prior written consent of and upon such terms specified by the Commission.

17 FORCE MAJEURE

- 17.1 If a Party (the “Affected Party”) is prevented, hindered or delayed from or in performing any of its obligations under this Agreement by a Force Majeure Event:
- 17.1.1 the Affected Party’s obligations under this Agreement are suspended while the Force Majeure Event continues and to the extent that it is prevented, hindered or delayed;
 - 17.1.2 as soon as reasonably possible after the start of the Force Majeure Event the Affected Party shall notify the other Party in writing of the Force Majeure Event, the date on which the Force Majeure Event started and the effects of the Force Majeure Event on its ability to perform its obligations under this Agreement;
 - 17.1.3 if the Affected Party does not comply with Clause 17.1.2 it forfeits its rights under Clause 17.1.1; and
 - 17.1.4 the Affected Party shall make all reasonable efforts to mitigate the effects of the Force Majeure Event on the performance of its obligations under this

Agreement and immediately after the end of the Force Majeure Event the Affected Party shall notify the other Party that the Force Majeure Event has ended and resume performance of its obligations under this Agreement.

- 17.2 If the Force Majeure Event continues for more than three (3) months starting on the day the Force Majeure Event starts, a Party may terminate this Agreement by giving not less than thirty (30) days written notice to the other Party.
- 17.3 In Clause 17, a “Force Majeure Event” means an act of God, war, riot, civil commotion, malicious damage, compliance with a law or governmental order, rule, regulation or direction, fire, flood and storm.

18 ASSIGNMENT AND SUB-CONTRACTING

- 18.1 This Agreement is personal to the Parties and neither of them may without the written consent of the other, assign, sub-contract, mortgage, charge (otherwise than by floating charge), create an interest in any trust over, or dispose of any of its rights or obligations under this Agreement.
- 18.2 The Consultant shall not sub-contract or otherwise engage any third party to provide all or any part of the Consultancy Services without obtaining the prior written consent of the Commission. If the Consultant wishes to apply for the consent of the Commission to appoint or change a sub-contractor, the Consultant shall give the Commission not less than fourteen (14) days’ notice of:
- i. the intended appointment of the sub-contractor or other relevant third party, with detailed particulars which shall include its relevant experience; and
 - ii. the intended commencement date and scope of the sub-contractor’s or relevant third party’s work.
- 18.3 If the Consultant has obtained the consent of the Commission referred to in Clause 18.2, the consent shall:
- i. not operate as an authority to transfer responsibility to the sub-contractor or relevant third party for the proper and due performance of the obligations of the Consultant contained in this Agreement; and
 - ii. not relieve the Consultant from any of its obligations or liabilities under this Agreement and the Consultant shall be responsible for the acts or defaults of any sub-contractor or relevant third party, their agents or employees, as if they were the acts or defaults of the Consultant.
- 18.4 A change in the legal status of the Commission shall not affect the validity of this Agreement.

19 FURTHER ASSURANCE

- 19.1 Each Party shall, at its own cost, from time to time and being required to do so by the other Party, now or at any time in the future, do or procure the doing of all such acts and/or execute or procure the execution of all such documents in a form satisfactory to the other Party as the other Party may reasonably consider necessary, to give full effect to this Agreement.

20 RELATIONSHIP OF PARTIES

- 20.1 Nothing in this Agreement and no action taken by the Parties pursuant to this Agreement shall create, or be interpreted or construed as creating a partnership, association, or joint venture or other co-operative entity between the parties, nor establish a relationship of agency between the Parties.
- 20.2 The Parties acknowledge that nothing in this Agreement or in any other agreement between the Parties shall give rise to the relationship of employer/employee between the Commission and the Consultant and any Scheduled Personnel and any replacement or any other persons supplied to the Commission by the Consultant in respect of the Consultancy Services to be performed under this Agreement.
- 20.3 Neither Party shall have any right, power or authority to enter into any agreement, or act on behalf of, or to act as or to be an agent or representative of, or to otherwise bind the other Party unless expressly provided otherwise in this Agreement.

21 ENTIRE AGREEMENT

- 21.1 This Agreement constitutes the entire agreement and understanding between the Parties with respect to the Consultancy Services and supersedes any previous agreements, negotiations and discussions between the Parties.
- 21.2 Each of the Parties acknowledges and agrees that in entering into this Agreement, and the documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly contained in this Agreement. Nothing in this Clause 22 shall, however, operate to limit or exclude any liability for fraud or fraudulent misrepresentation.

22 WITHHOLDING TAX

- 22.1 All payments to be made pursuant to this Agreement shall be subject to professional services withholding tax under the provisions of Part 1a of the Taxes Consolidation Act, 1997 at the prevailing rate.

23 NOTICES

- 23.1 Invoices for payment in respect of the Consultancy Services should be sent to:

**The Finance Manager
Commission for Communications Regulation
Blocks D, E, F
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1
Ireland.**

- 23.2 Any notice or other communication given or made under this Agreement shall be in writing, and may be delivered to the relevant Party or sent by pre-paid registered post to the address of that Party specified in this Agreement, or such other address as may be notified hereunder, by that Party from time to time for this purpose and shall be effective notwithstanding any change of address not so notified.
- 23.3 Unless the contrary is proved, each notice or communication for the purposes of this Agreement shall be deemed to have been given or made and delivered (if by post) forty eight (48) hours after posting or (if delivered by hand) when left at the relevant address.

24 WAIVERS AND REMEDIES

- 24.1 The failure to exercise or delay in exercising a right or remedy provided by this Agreement or by law shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement shall not constitute a waiver of any other breach or default and shall not affect the other terms of this Agreement. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement shall not prevent a Party from subsequently requiring compliance with the waived obligation.
- 24.2 The rights and remedies provided by this Agreement are cumulative and (subject to what is otherwise provided in this Agreement) are not exclusive of any rights or remedies provided by law.

25 VARIATION

- 25.1 A variation of any of the terms of this Agreement shall not be valid unless it is in writing and signed by or on behalf of each of the Parties.

26 SEVERABILITY

- 26.1 If any provision of this Agreement shall be found by any court, arbitrator or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of this Agreement which shall remain in full force and effect.

27 COUNTERPARTS

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

28 COSTS

- 28.1 The Parties shall be responsible for their respective legal and other costs incurred in relation to the preparation of this Agreement.

29 RESOLUTION OF DISPUTES

- 29.1 The Parties shall make a good faith effort to settle amicably any dispute which may arise between them under this Agreement. Any dispute which the parties are unable to settle amicably after such effort shall be decided, pursuant to Clause 31 herein, by the courts of Ireland in accordance with Irish law.

30 GOVERNING LAW AND JURISDICTION

- 30.1 This Agreement shall in all respects be governed by, construed and take effect in accordance with the laws of Ireland.
- 30.2 The Parties irrevocably agree that the courts of Ireland shall have exclusive jurisdiction to hear and decide any suits, actions or proceedings and to settle any disputes which may arise out of or are in connection with this Agreement.
- 30.3 The submission to the jurisdiction of the courts of Ireland does not limit the Commission's right to take proceedings against the Consultant in another court of competent jurisdiction, nor does the taking of proceedings by the Commission in any one or more jurisdictions preclude the Commission taking proceedings in another jurisdiction (whether concurrently or not) if and to the extent permitted by applicable law.

Given under the common seal of the Communication for Communications Regulation this [..] day of [...] 2010

PRESENT when the common seal of the Commission for Communications Regulation was affixed hereto

Alex Chisholm

**Chairperson
For and on behalf of the Commission for Communications Regulation**

PRESENT when the Common Seal of Consultant was affixed hereto

Director

Director/Secretary

SCHEDULE 1

THE CONSULTANCY SERVICES

The Consultant shall provide the Commission with the Consultancy Services outlined below.

Pre-auction Consultancy Services

- 1 The provision of auction implementation algorithms, particularly auction winner and price determination algorithm/s, to give effect to the Commission's post-Consultation 09/99 decision/s on the Auction format. The Commission is likely to require such algorithms and explanatory material to be made publicly available;
- 2 The provision of computer software (and any necessary computer hardware or other equipment) for Auction implementation and verification (such as that based on the auction implementation algorithms described above). Such software should have the facility to produce an accurate audit trail report that is suitable for publication by the Commission and would be independently verifiable (the "**Software**").
- 3 The provision of detailed Auction rules that would give effect to the Commission's post-consultation decision/s on the Auction format (including other auction details and processes, having regard to the Commission's statutory functions, objectives and duties. All proposed Auction rules and mechanics should be set out and documented in a detailed, clear and logical manner suitable for publication in the Commission's associated information memorandum ("**Information Memorandum**") on the Auction;
- 4 The provision of assistance to the Commission in the publication of an Information Memorandum and other material in relation to the Auction rules and process and to assist the Commission in addressing any queries raised in relation to Auction implementation;
- 5 The provision of an auction logistics plan which should:
 - i. ensure that all computer software and hardware to be used in Auction implementation is suitable and secure in terms of its reliability, the physical robustness of the Information Technology (IT) system, its redundancy and back-up systems;
 - ii. ensure that the method chosen for bidders to communicate bids is secure, efficient and is not subject to tampering or other interference;
 - iii. seek to ensure that the potential for anti-competitive behaviour (such as collusion and gaming) is minimised before and during the auction; and
 - iv. ensure that the computer software to be used in Auction implementation has an accurate audit process and that such data reports, if required by the Commission, is suitable for publication.

- 6 The provision of assistance to the Commission in its validation of the Auction implementation algorithms, computer software, auction rules and Auction logistics plans;
- 7 The provision of assistance to the Commission in its conduct of one or more pre- Auction stakeholder workshop/s and live mock auction/s for the benefit of prospective bidders and other interested stakeholders;
- 8 The provision of assistance to the Commission throughout the Auction implementation process (including but not limited to addressing any queries raised in relation to same);

Conduct of Auction - Consultancy Services

- 9 The provision of assistance to the Commission in the conduct of the auction which would include, but is not limited to, the following:
 - i. carrying out a secure analysis of bids received to determine the results of each stage of the Auction;
 - ii. at the conclusion of each relevant stage of the Auction, securely notifying the results to the Commission and providing an audit trail report by which the Commission can verify the results of each stage of the auction. The audit trail report should be produced in such a form that it can be made publicly available¹ and be independently verifiable; and
 - iii. reporting any suspected breaches of the Auction rules to the Commission in a prompt and detailed manner and providing assistance to the Commission in any actions which may be taken by it in relation to such breaches;

Post-Auction Consultancy Services

- 10 The provision of assistance in relation to any post-auction review and verification process determined by the Commission;
- 11 The provision of assistance to the Commission in any litigation involving the Commission in relation to the subject matter of the ITT; and

Ancillary Consultancy Services

- 12 The provision of assistance in relation to ancillary or related tasks as may be determined by the Commission.

Reports to be Submitted

- 13 The Consultant shall submit regular reports to the Commission during the term of the Agreement at times and in a format which will be notified to it by the Commission.

¹ In line with the Commission's guidelines on the treatment of confidential information as set out in Commission document 05/24.

- 14 In relation to these reports, the Consultant would be required to submit:
- All electronic reports in both Microsoft Word and Adobe PDF formats using a template as agreed in advance with the Commission;
 - A back-up electronic copy of the final reports on an appropriate electronic storage device (e.g. CD-ROM or memory stick); and
 - A printed and bound copy of each final report.
- 15 The provision of the Consultancy Services must be in English and all deliverables must be submitted in English.

SCHEDULE 2

CHARGES AND SCHEDULED PERSONNEL

The Charges for the Consultancy Services shall be fixed (to include all necessary expenses) at the sum of **€XXX,000** euro (exclusive of Value Added Tax)

Scheduled Work Name	Daily Rate (excl VAT) €	No of Days	Total €
Total Cost €			XXX,000
Add VAT			XXX 000
Total Cost (including VAT)			XXX 000

Payment of Charges

The Charges will be payable upon completion (to the satisfaction of the Commission) of the Consultancy Services detailed in Schedule 1 and in accordance with Clause 5 of this Agreement.

The Charges are fixed at **€XXX,000** (exclusive of Value Added Tax.) This fixed amount includes all costs associated with the provision of the Consultancy Services including the preparation and, if necessary, the presentation of written reports to the Commission, as well as any travel and accommodation costs.

SCHEDULED PERSONNEL

[XXX]

[XXX]

[XXX]

SCHEDULE 3

INSURANCES

The Consultant undertakes for the benefit of the Commission to take out and maintain at all times during the term and for a period of 6 years following completion of the Consultancy Services sufficient insurances, including the following:

1. Professional Indemnity Insurance with a limit of not less than Euro five million (**€5,000,000**) in respect of any one claim or series of claims arising from one event, in connection with the Agreement; and
2. Employers Liability insurance with a limit of not less than Euro eleven million (**€11,000,000**) in respect of any one claim or series of claims arising from one event, in connection with the Agreement.