

## INCA RESPONSE TO BDUK CONSULTATION:

### National Broadband Scheme Market Engagement on Procurement Approach

25 January 2016

#### Summary table of questions asked within Market Engagement document

Section	Question Reference	Question	Response Provided
A. Respondent Information	A1	Your organisation's name	Yes
	A2	Your organisation's address	Yes
	A3	Your name	Yes
	A4	Position	Yes
	A5	Contact telephone number	Yes
	A6	Email address	Yes
	A7	Please provide a short summary of your historic and future interest in public sector interventions in provision of broadband infrastructure and associated services.	Yes
B. Project design and market consultation	B1	Do you agree that these are the factors that Implementing Bodies should consider when determining the appropriate delivery/funding model? If you disagree, what changes would you propose?	Yes
	B2	Do you agree with the proposed approach for Implementing Bodies to determine intervention scale? If you disagree, what changes would you propose?	Yes
	B3	Is there a <i>minimum scale of intervention area</i> that would be unsuitable for your organisation? Is there a <i>maximum scale of intervention area</i> that would be unsuitable for your organisation? Is there a <i>maximum number of intervention areas</i> that would be unsuitable for your organisation? (Please provide justification.)	Yes

	B4	Do you agree with the proposed choices for Implementing Bodies to aggregate lots through a procurement process? If you disagree, what changes would you propose?	Yes
C. Technical approach and requirements	C1	Are there any significant impacts for your organisation in ensuring the availability of the specific forms of access for open and/or reduced access?	Yes
	C2	Is the reasonable demand test appropriately designed to provide new forms of access where suitable?	Yes
	C3	Do you agree that pricing principles set out above (and explained in further detail in the guidance published on BDUK's website) are appropriate?	Yes
	C4	Do you agree that bidders should be able to include the regulated Physical Infrastructure Access (PIA) product in their bids?	Yes
D. Procurement strategy	D1	Do you agree with the proposed choice of procurement procedures for Implementing Bodies? If you disagree, what changes would you propose?	Yes
	D2	Are there any significant impacts for your organisation in requiring bidders to adhere to the proposed Code of Conduct?	Yes
	D3	How does the cascading procurement approach impact your organisation's incentives for participating in a procurement? Do you agree that the proposed steps of the cascading procurement are implementable? If you disagree, what changes would you propose that still meets the objective of prioritising open access bids?	Yes
E. Selection and evaluation strategy	E1	Do you agree with the proposed set of <i>PQQ selection criteria</i> that would apply when a pre-qualification questionnaire is used as part of the chosen procurement procedure? If not, what changes would you propose?	Yes
	E2	Do you agree with the proposed set of <i>bid minimum threshold criteria</i> that would be used as part of Implementing Bodies' decisions to cascade from the open access stage of a procurement to the reduced access stage? If not, what changes would you propose? For	Yes

		example, should there be other criteria, or combinations of criteria, for which it would be appropriate for an Implementing Body to reject an open access bid?	
	E3	Do you agree with the proposed principles and steps for the value for money threshold specific to each intervention area? If not, what changes would you propose?	Yes
	E4	Do you agree with the proposed set <i>bid evaluation scored criteria</i> and individual evaluation elements that would be used to evaluate whether open access or reduced access bids? If not, what changes would you propose?	Yes

## Specific Responses to each questions within Market Engagement document

### Respondent Details

- A1. INCA
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- A7. Trade and User Association promoting, enabling and encouraging alternative digital communications infrastructure and networks in the UK. Actively representing the interests of providers, public sector 'facilitators and contractors' and community users, along with the associated suppliers, customers and funders of the 'altnets'.

## B. Projects Design and Market Consultation

- B1. Do you agree that these are the factors that Implementing Bodies should consider when determining the appropriate delivery/funding model? If you disagree, what changes would you propose?

INCA agrees that Implementing Bodies (IBs) should consider a full range of delivery and funding models and use evidential analysis as the basis for determining the most suitable approach for their needs. The factors outlined are comprehensive and appropriate. However, in our members' experience, there are still significant numbers of local authorities and other Implementing Bodies who lack the knowledge, competency and resources to effectively make this determination.

We would suggest the following actions to overcome these challenges:

- BDUK consider how to continue providing support, education and awareness building activities for IBs, to help them understand the options and their implications fully. INCA is prepared to work with BDUK in providing this support and would welcome continuing to develop the discussion held thus far.
- Education on the full value and purpose of using both an Open Market Review and a Soft Market Review to help identify the current and near future local market conditions. INCA is happy to assist in encouraging and educating altnet operators and providers to respond effectively to both OMRs and SMRs, in order to help provide a full picture.
- IBs should be encouraged to consider the full set of guidance and 'How To' notes contained in the EU Guide to High Speed Broadband Investment in their determination. This Guide contains support on comparing the models described in your consultation notes.

- B2. Do you agree with the proposed approach for Implementing Bodies to determine intervention scale? If you disagree, what changes would you propose?

We agree with and welcome the approach, as well as the drive from BDUK and the Commission for the intervention scale to be much more variable by local conditions and determined by the IBs.

When choosing between approaches, IBs should take into account the varying models of altnets and other operators in their region (see the response to B3 below). These can be identified through a Soft Market Review exercise.

- B3. Is there a *minimum scale of intervention area* that would be unsuitable for your organisation? Is there a *maximum scale of intervention area* that would be unsuitable for your organisation? Is there a *maximum number of intervention areas* that would be unsuitable for your organisation? (Please provide justification.)

Procurement in smaller Lots will be welcomed by many altnet members. However, the ability to aggregate Lots or respond to a 'Super Lot' would also encourage competition. Altnets have differing optimum scales, based on the primary technology they deploy at the access layer and also their financing and investment structure. Therefore, the minimum and maximum scales will vary by altnet member.

Similarly, the absolute values on scale for an altnet (as for other operators) will be impacted as mentioned by local conditions also such as premises dispersion and topography etc.

We would recommend that these questions be directly addressed to altnets by an IB in the Soft Market Review stage.

- B4. Do you agree with the proposed choices for Implementing Bodies to aggregate lots through a procurement process? If you disagree, what changes would you propose?

We agree with the three approaches proposed. However, the 'devil' will be in the detail of comparative evaluation whilst remaining within PCR 2015 regulations. We would recommend considering providing advice on the use and encouragement of Variant Bid submissions to enable the value of Aggregation and Super Lots to be considered alongside individual 'Compliant' lot submissions.

## C. Technical Approach and Requirements

- C1 Are there any significant impacts for your organisation in ensuring the availability of the specific forms of access for open and/or reduced access?

The majority of INCA members will welcome the obligation for a subsidised network to be Open Access. There may be differing opinion on the level and extent to which they both require and provide this Open Access. However, in all cases, the application of a 'fair and reasonable' price basis would be largely accepted.

INCA contends that definition and application of the forms of Open Access and Reduced Access must be done identically across all market operators. For example, if BT claim Open Access for other operators at the Active layer through BT Wholesale, then other operators can similarly claim the provision of a wholesale offering to BT as Open Access.

INCA also has the following general observations/ comments on C1:

- The definition of Reduced Access must include the provision of service for adjacent markets. In particular, the Business connectivity market is a key component in most altnet commercial models. Limiting the scope is a

protectionist approach for the leased line market. The view that Leased Lines form a separate market needing protection against disruption from NGA is historic and obsolete. Business customers do not differentiate between leased lines and NGA- and take the service that is most effective for their requirements for either ‘market’. NGA is providing a natural technology disrupter to the leased line market. Failure to take this into consideration inhibits market evolution. The Reduced Access definition should at least be widened to include ANY business connectivity.

- Open (or Reduced only where necessary) Access must be provided at ALL levels proposed and not just one; i.e. provision of Wholesale Access does not mitigate the obligation for Passive layer access to be offered.
  - Passive Access must be made available at ALL Points of Flexibility mentioned (i.e. exchange, cabinet, node etc). Otherwise, other operators will be at an economic disadvantage in comparison to the access provider.
  - We recognise the challenge of mitigating against excessive construction cost borne out of the need for additional capacity that other operators may never use (e.g. in cabinets). However, this can be overcome by a requirement on operators using a public subsidy to publish deployment plans in advance of rollout, so that other operators can legitimately and reasonably declare a need for capacity. Other operators wishing to make use of access on the planned infrastructure should then be obliged to take it up within a reasonable timeframe.
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- Ensuring Open Access on wireless systems, especially masts, will require a new set of obligations placed on organisations that are not formally operators or providers as otherwise considered by subsidised procurements (e.g. Arqiva). There needs to be a mechanism for extending the obligation to them.
  - Antenna sharing may require Ofcom to adopt a modified or new role in relation to spectrum management. This should be explored at an early stage.
  - It is essential to avoid using ‘Bitstream’ as the defining mechanism in the active layer. It is a definition derived from a BT product spec. A better approach would be to define Active Access in terms of EU/ ETSI technical guidelines against ISO Layer 2 and 3 Active service definitions.

C2. Is the reasonable demand test appropriately designed to provide new forms of access where suitable?

The reasonable demand tests proposed are appropriately designed overall. INCA would contend that point 4 on Reduced Access is again an inappropriate protectionist mechanism for an obsolescent Leased Line market view- and should be removed.

The use of OfCom and in particular the Office of the Telecoms Adjudicator for any

necessary arbitration is welcomed.

- C3. Do you agree that pricing principles set out above (and explained in further detail in the guidance published on BDUK's website) are appropriate?

We agree they are appropriate and welcome the use of UK and non-UK benchmarks. Full transparency of Operating Expenditure will be critical in ensuring fairness. This will need to be mandated in some way wherever subsidy is applied, as true Opex and Cost of Sale can still be manipulated in a vertically-integrated operator (despite current regulation) if structural separation is not adopted.

The inclusion of stranded asset costs should not be borne by the access seeker or the Implementing Body. Otherwise, this condition could be used to damage rollout adoption using more cost-effective means.

For example, a Fixed Wireless Access provider could require the cost of a new transit backhaul product using LLU (exchange) or SLU (cabinet). It could be argued that this would leave assets in an FTTC cabinet 'stranded' and hence they could be built into a charge. This would be unreasonable, as the provider could still offer FTTC to customers if it was competitive against the FWA access charges. Assets are not 'stranded' if the reasons for their disuse are commercial.

Such assets would remain the property of the provider until such time as they choose to dispose of them- and hence they will always have some residual value. The provider can always choose to offer them to access seekers or IBs, who may purchase them for a reasonable sum outside of the operating charges incurred for a new product/ service.

- C4. Do you agree that bidders should be able to include the regulated Physical Infrastructure Access (PIA) product in their bids?

Yes. Further, PIA should be amended to include business use, particularly for transit/ backhaul. This is again an unnecessary protection of the leased line market. INCA members are pleased that the Ofcom Strategic Review has recognised the need to provide better access to BT's ducts and poles.

## D. Procurement Strategy

- D1. Do you agree with the proposed choice of procurement procedures for Implementing Bodies? If you disagree, what changes would you propose?

INCA agrees and is enthusiastic about the choice and approach regarding procurement procedures. In the experience of our members, the new Competitive Procedure with Negotiation approach would be favoured over Competitive Dialogue; the tender requirements are well known and variations in the economic advantage of different approaches can be suitably compared and considered through Negotiation.

- D2. Are there any significant impacts for your organisation in requiring bidders to adhere

to the proposed Code of Conduct?

INCA would welcome a Code of Conduct. We stress our belief that it should be applied equally to Bidders AND Existing Providers in the area under procurement scope. This would enable full transparency of the opportunities for Open Access and sharing in a timely and appropriate manner to be effective for bids.

INCA acknowledges that will place a greater burden on our members when tendering for these procurements- and on them as existing providers. For this reason, INCA is fully prepared to assist BDUK and Ofcom in developing the Code of Conduct to make it easy to use as well as effective. We will also offer training and support to altnet members in adopting and abiding by the Code of Conduct. We initiated plans for a Quality Marque for INCA members during the early phases of the BDUK programme. This can form a useful contribution to the code of conduct (see E2 below). We have also initiated plans to create a Wireless Special Interest Group, with a code of conduct as key topic for discussion.

- D3. How does the cascading procurement approach impact your organisation's incentives for participating in a procurement? Do you agree that the proposed steps of the cascading procurement are implementable? If you disagree, what changes would you propose that still meets the objective of prioritising open access bids?

INCA believes the cascading approach will impact on altnet participation in a highly positive way. We believe from our comprehensive understanding of EU procurement directives and interpretation/ enactment through PCR15, that they are entirely implementable. We agree that the Two Stage approach is compliant and can be implemented successfully, using the minimum threshold approach and criteria below.

However, education and support may be required by Implementing Bodies. INCA is happy to assist in this using our procurement specialist advisors.

## E. Selection and Evaluation Strategy

- E1. Do you agree with the proposed set of *PQQ selection criteria* that would apply when a pre-qualification questionnaire is used as part of the chosen procurement procedure? If not, what changes would you propose?

We agree in principle with the selection criteria. 'Minimum turnover' should be considered carefully against the size/ scale of Lots. Careful positioning of the minimum turnover and company history will encourage and enable a greater number of bidders from eligible altnets, particularly offering FWA.

We have offered comments on other criteria under the Minimum Threshold considerations at E2 below.

- E2. Do you agree with the proposed set of *bid minimum threshold criteria* that would be used as part of Implementing Bodies' decisions to cascade from the open access

stage of a procurement to the reduced access stage? If not, what changes would you propose? For example, should there be other criteria, or combinations for criteria, for which it would be appropriate for an Implementing Body to reject an open access bid?

Comments on particular aspects are given below:

- ‘Contract Compliance’. In our members’ experience, many Implementing Bodies may need further support in determining what is truly non-negotiable versus what can be negotiated. This applies to interpretation of the 2013 Guidelines and to other aspects of the contract.
- ‘Technical Suitability’. We believe it would be highly advantageous to IBs and bidders if BDUK (NCC?) publish a set of Guidelines or even Minimum Standards, including those that effectively define Open (and Reduced) Access.
- INCA is very willing to work with BDUK in the production, publication and education of parties in these standards. We would like to offer the INCA Quality Marque as a starting point for the production of these standards. This can be found at the following link:

<https://dl.dropboxusercontent.com/u/73692562/INCA%20Quality%20Marque%20Qualification%20Criteria%20v4.pdf>

The Quality Marque encompasses many of the other standards mentioned in the document but also sets out SLAs and fix times which are not mentioned.

E3. Do you agree with the proposed principles and steps for the value for money threshold specific to each intervention area? If not, what changes would you propose?

‘Value for Money’. NCC should be asked to consider equivalent benchmarks from a network and infrastructure that is capable of complying with Open Access at every level as defined earlier in your consultation. i.e. an FTTC solution with wholesale access only will not be compliant; but with acceptable access at Points of Flexibility could provide a cheaper threshold from an ‘efficient operator’.

Component 3. ‘Re-use’ should include for example, cost savings in the provision of transit/ backhaul to Access at cabinet level through SLU, derived from the existing provision of BT’s own transit fibre delivery to that cabinet for FTTC. This may sound obvious but at present it is rarely (if ever) considered in the cost calculations. It is however, an apparently principle ‘plank’ in infrastructure re-use.

E4. Do you agree with the proposed set *bid evaluation scored criteria* and individual evaluation elements that would be used to evaluate whether open access or reduced access bids? If not, what changes would you propose?

INCA agrees with the Price criteria and individual elements (i) to (iv). We would also suggest that as part of the Price evaluation, the comparative percentage of Aid intensity be considered as well as the absolute value of subsidy requested by the bid.

INCA also agrees in principle with the ‘Quality’ criteria and has the following specific comments and suggested changes:

- (i) Solution Outcomes. It is essential, especially for the ‘final’ procurements to provide ubiquitous NGA coverage that is compliant with the DAE targets, that both planned and actually provided performance be recorded at premises level. Actually recorded performance is obviously ‘post award’ but should be evidentially demonstrated through planned vs actual data from previous directly comparable contracts.

This performance data must meet DAE targets as a minimum. Very explicit ‘clawback’/ recovery processes should be included in the contract for failure of subsequent actual performance to meet the planned performance.

- (v) Contract mark-up. These can also be accommodated and evaluated fairly within a Competitive Procedure with Negotiation approach. It is also possible to ‘score’ variance from the base terms and conditions in Restricted and Open Procedures but in a more limited way. As stated earlier, INCA’s members would in general prefer Competitive Procedure with Negotiation or Competitive Dialogue, as these enable a wider view of acceptable solutions (including contract conditions) to be explored, with the intention of arriving at the optimum solution for local needs.