

**2012 No. 2414**

**ELECTRICITY**

**GAS**

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

<i>Made</i>	- - - -	<i>19th September 2012</i>
<i>Laid before Parliament</i>		<i>21st September 2012</i>
<i>Coming into force</i>	- -	<i>12th October 2012</i>

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

**PART 1**

**Introductory**

**Citation and commencement**

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

**Interpretation**

2. In these Regulations—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“regulated business information” means information relating to the—

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

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

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

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

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

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

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

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

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

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

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

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

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

## PART 2

### Scope of and requirement for a tender exercise

#### Scope of Regulations

3.—(1) These regulations apply in respect of any grant of a relevant licence.

(2) In this regulation, a relevant licence means—

- (a) an electricity smart meter communication licence; or
- (b) a gas smart meter communication licence.

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

4.—(1) A tender exercise must only be used to determine the person to whom both an electricity smart meter communication licence and a gas smart meter communication licence are to be granted.

(2) At all stages of a tender exercise, the competent authority must have regard to the suitability of a tender participant for being granted both an electricity smart meter communication licence and a gas smart meter communication licence.

## PART 3

### Conduct of a tender exercise

#### Conduct of a tender exercise

5.—(1) Subject to paragraph (2), the Secretary of State is the competent authority with respect to a tender exercise.

(2) The Authority is the competent authority with respect to a tender exercise where either the condition in paragraph (3) or the condition in paragraph (4) is satisfied.

(3) The condition in this paragraph is satisfied where the tender exercise is commenced on or after 2nd November 2018.

(4) The condition in this paragraph is satisfied where on or before 1st November 2018 the Secretary of State directs that in respect of a particular tender exercise, the Authority is to be the competent authority.

(5) A direction under paragraph (4) may only be given prior to the publication of the notice required under regulation 7(2).

(6) Where a direction under paragraph (4) is given—

- (a) regulation 7(1)(a) does not apply with respect to the Authority and the tender exercise to which the notice refers;
- (b) the Authority must conduct that tender exercise; and
- (c) the Authority may conduct that tender exercise in any manner which is in accordance with these Regulations.

## PART 4

### Stages of a tender exercise

#### **Stages of a tender exercise**

6. A tender exercise to be held in accordance with these Regulations shall comprise the following stages—

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

## PART 5

### Commencement of a tender exercise

#### **Commencement of a tender exercise**

7.—(1) The competent authority may determine—

- (a) whether to hold a tender exercise; and
- (b) the date of commencement of any such exercise.

(2) Where a tender exercise is to be held, the competent authority must publish a notice stating that such an exercise is to be held and stating the day on which the qualification stage is to be commenced (the “commencement date”), being—

- (a) a date specified in the notice; or
- (b) where no other date is specified, the date of the notice.

(3) The competent authority must include in the notice given under paragraph (2) such information as the competent authority may determine is necessary in relation to—

- (a) the proposal to grant an electricity smart meter communication licence and a gas smart meter communication licence; or
- (b) the tender exercise.

## PART 6

### Qualification stage

#### **Qualification and confidentiality**

8.—(1) The competent authority must commence the qualification stage on the commencement date by publishing the qualification documentation, which must include the information specified in Schedule 1.

(2) Prior to the publication of the qualification documentation, the competent authority may determine that each qualifying bidder will be required to sign a confidentiality agreement before the proposal documentation is issued to that qualifying bidder.

(3) Where the competent authority so determines, the competent authority must publish the form of the confidentiality agreement with the qualification documentation on the commencement date.

(4) In this regulation “commencement date” has the meaning determined in accordance with regulation 7(2).

### **Determination of qualifying bidders at the qualification stage**

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

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

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

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

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

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

## **PART 7**

### **Proposal stage**

#### **Proposal stage**

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

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

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

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

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

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

**Proposal stage: first tender exercise**

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

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

- (a) information which modifies or supplements any information provided in the proposal documentation or in a previous notice given under this paragraph; or
- (b) an instruction to disregard any information provided in the proposal documentation or in a previous notice given under this paragraph.

(3) A notice under paragraph (2) may be given—

- (a) after the competent authority has issued the proposal documentation; and
- (b) prior to—
  - (i) the date and time specified in the proposal documentation for the submission of proposals to the competent authority; or
  - (ii) where a notice has previously been given under paragraph (2) and in accordance with paragraph (7) the date and time for submission of proposals to the competent authority has been modified, the modified date and time.

(4) The competent authority must give a notice under paragraph (2) where it determines that—

- (a) the matters contained in the regulated business information provided in the proposal documentation have materially changed—
  - (i) since the issue of that documentation; and
  - (ii) during the period in which a notice under paragraph (2) may be given; and
- (b) that the giving of the notice is necessary in order to ensure that the evaluation of proposals under regulation 12 is fair and equitable to all qualified bidders.

(5) Subject to paragraph (10), a notice given under paragraph (2) in accordance with paragraph (4) must contain revised regulated business information reflecting the matters which have changed.

(6) Where the competent authority intends to give a notice under paragraph (2), it must determine whether it is necessary in the circumstances to modify the date and time specified in the proposal documentation for the submission of proposals to the competent authority (or such time as modified by a previous notice under paragraph (2)).

(7) Where the competent authority determines in accordance with paragraph (6) that it is necessary to make a modification, it must specify a new date and time for the submission of proposals to the competent authority in the notice given under paragraph (2).

(8) The new date and time specified in accordance with paragraph (7) must not be earlier than—

- (a) the date and time specified in the proposal documentation; or
- (b) where that date and time has been previously modified on one or more occasions in accordance with paragraph (7), the date and time specified in the most recent modification.

(9) A qualifying bidder who has submitted a proposal prior to the giving by the competent authority of a notice under paragraph (2) may submit a modified proposal in accordance with—

- (a) the date and time requirements specified in the proposal documentation (or where applicable such date and time requirements as modified in accordance with paragraph (7)); and
- (b) any other requirements specified in the proposal documentation.

(10) The competent authority may withhold any information which it would be required to provide in accordance with paragraph (5) where the competent authority determines that the disclosure of such information—

- (a) would be contrary to law; or
- (b) would prejudice the legitimate commercial interests of any person (except where that person is a qualifying bidder) and that person has not given their consent to it being disclosed.

### **Determination of preferred applicants at the proposal stage**

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

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

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

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

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

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

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

## **PART 8**

### **Best and final offer stage**

#### **Best and final offer stage**

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

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

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

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



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

**Best and final offer stage: dialogue phase**

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

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

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

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

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

**Best and final offer stage: final offer phase**

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

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

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

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

**Best and final offer stage: evaluation**

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

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

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

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



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

## PART 9

### Preferred applicant stage

#### **Notification of preferred applicant and reserve applicant**

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

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

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

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

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

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

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

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

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

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

(7) Where—

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

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

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

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

as if that reserve applicant were the preferred applicant.

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

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

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

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

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

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

## PART 10

### Notification of successful applicant

#### **Notification of successful applicant**

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

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

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

#### **Information in respect of successful applicant**

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

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

- (a) the evaluation criteria applied by the competent authority in evaluating proposals and where appropriate best and final offers;
- (b) the reasons for the determination, including the characteristics and relative advantages of the successful proposal or where appropriate the successful best and final offer;
- (c) the name of the successful applicant;

- (d) the result obtained by—
  - (i) the qualifying bidder which is to receive the notice; and
  - (ii) the successful applicant; and
- (e) a statement of when the period specified in paragraph (5) is expected to end.

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

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

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

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

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

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

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

## PART 11

### Withdrawal

#### **Withdrawal**

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

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

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

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

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

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

## PART 12

### Cancellation

#### **Cancellation**

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

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

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

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

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

## PART 13

### Disqualification from a tender exercise

#### **Disqualification**

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

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

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

(2) Where the competent authority is satisfied that—

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

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

## PART 14

### Miscellaneous

#### **Bidder groups**

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

- (a) the group must nominate one of the persons in that group as its leader at the time of the submission of that bidder group's qualification questionnaire; and

(b) that person must remain the leader of that bidder group for the duration of that group's participation in the tender exercise.

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

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

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

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

### **Changes to delivery of documents or actions**

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

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

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

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

(b) for any action which is required to be undertaken in accordance with these Regulations, to be completed by the time, date or in the manner specified in accordance with these Regulations.

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

(a) delivery or publication must be made by a different time or date or in a different manner; or

(b) the action must be completed by a different time or date or in a different manner.

19th September 2012

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

## SCHEDULE 1

Regulation 8

### Qualification stage

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

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

## SCHEDULE 2

Regulation 10

### Proposal stage

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

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

## SCHEDULE 3

Regulation 13

### Best and final offer stage

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

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

## SCHEDULE 4

Regulation 21

### Events of cancellation

The events in this Schedule are—

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



- the matters referred to in accordance with regulation 17(2)(a) in the notice given under paragraph (1) of that regulation;
- (j) the matters referred to in accordance with regulation 17(2)(a) in the notice given under paragraph (1) of that regulation are not satisfied by a reserve applicant and the preferred applicant has withdrawn or been disqualified from that tender exercise, or the preferred applicant has failed to satisfy those matters;
  - (k) a successful applicant withdraws from the tender exercise;
  - (l) the competent authority determines that it would not be appropriate to grant a smart meter gas licence and a smart meter electricity licence to any qualifying bidder;
  - (m) the competent authority determines that—
    - (i) the regulated business information has varied from the regulated business information—
      - (aa) which was provided in a previous stage of the tender exercise; or
      - (bb) issued at the beginning of a tender stage, where the variation occurs during that stage of the tender exercise but after the required date and time for the submission to the competent authority of, as the case may be in that stage, the qualification questionnaire, proposal or best and final offer;
    - and
    - (ii) the extent of that variation is such that continuing with the tender exercise would not be fair and equitable to any qualifying bidder or bidder;
  - (n) the competent authority determines that the dialogue phase of the best and final offer stage is not likely to reach a satisfactory conclusion in accordance with the rules for that stage contained in the best and final offer documentation; or
  - (o) the competent authority determines that—
    - (i) the tender exercise has been compromised by the act or omission of (or on behalf of) any tender participant; and
    - (ii) in the circumstances, a competitive determination of the person to whom a gas smart meter communication licence and an electricity smart meter communication licence are to be granted cannot be ensured by continuing with the tender exercise.

## SCHEDULE 5

Regulation 22

### Disqualification events

1. The events in this Schedule are that a tender participant or any person acting on behalf of a tender participant—

- (a) causes or induces any person to enter into an agreement to collude in relation to any aspect of the tender exercise or to inform a tender participant of the detail of any other tender participant's competition document;
- (b) submits any information to the competent authority which is false or misleading, unless the competent authority permits the submission of further information in order to correct the false or misleading information;
- (c) engages in or attempts to engage in any anti-competitive behaviour in respect of a tender exercise, or allows or encourages any such anti-competitive behaviour by any other tender participant or person acting on their behalf;

- (d) does anything which would constitute the commission of an offence under section 1, 2 or 6 of the Bribery Act 2010<sup>(a)</sup>;
- (e) fixes or adjusts the detail of a competition document—
  - (i) by or in accordance with any agreement or arrangement with any other tender participant; or
  - (ii) by improperly using insider information;
- (f) enters into any agreement or arrangement with any other tender participant that either tender participant shall refrain from submitting any competition document;
- (g) communicates to any person other than the competent authority the details of a competition document, except where the disclosure is made in confidence in order to obtain advice or information necessary for the preparation of that document;
- (h) where that tender participant is a bidder group, changes the membership of the bidder group other than in accordance with the approval of the competent authority; or
- (i) contacts any relevant person other than in a manner permitted in accordance with—
  - (i) any instructions particular to the conduct of the stage of the tender exercise during which the contact is made; or
  - (ii) any requirements specified in these Regulations.

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

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

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

4. In paragraph 1(i)—

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

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

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

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(a) 2010 c. 23.

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that apply with respect to it becoming the successful applicant, or where it is disqualified or withdraws.

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

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

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

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

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

Regulation 23 describes the rules for changes to bidder groups.

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

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

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STATUTORY INSTRUMENTS

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