



FOI UNIT  
CAVAN

19 APR 2010

DEPARTMENT OF COMMUNICATIONS,  
ENERGY & NATURAL RESOURCES  
ROINN CUMARSAIDE, FUINNIMH  
AGUS ACMHAINNI NADURTHA

FOI Unit,  
Department of Communications, Marine and Natural Resources,  
Elm House,  
Earlsvale Road,  
Cavan,  
Co. Cavan.

Friday, 16<sup>th</sup> April 2010

**RE:** Department of Communications, Energy & Natural Resources ("**the Department**") Tender for the provision of consultancy services to the Department comprising an Electricity Transmission Assets Analysis, December 2009 ("**the Tender process**")  
Freedom of Information Acts 1997 and 2003

Dear Sir/Madam,

Under section 7 of the Freedom of Information Acts 1997 and 2003 ("**the Acts**"), I hereby request access to the following records which I believe are held by your Department:

- 1 The written tender deemed by the evaluation team in the Tender Process to have been the most economically advantageous, containing the elements specified at section 6 of the Request for Tenders ("**RFT**") document issued by the Department in relation to the Tender Process (dated December, 2009) ("**the Winning Tender**");
- 2 Any records recording or reflecting the evaluation carried out by the evaluation team, which led to the selection of the Winning Tender as the most economically advantageous tender; and
- 3 The contract concluded with the tenderer whose tender was deemed to be the most economically advantageous.

#### **Departmental Contact**

In case it is of practical assistance in dealing with this request, I understand that tenders were to be submitted for the attention of a Mr. Paul Bolger, Electricity (Corporate) Division, Department of Communications, Energy & Natural Resources, 29-31 Adelaide Road, Dublin 2.

#### **Records Under the Control of the Department**

I further understand that, under section 2(5)(a) of the Acts, a reference to records "held" by a public body includes a reference to records that are "under the control of" that body and, accordingly, I wish to indicate that not only do I seek access to records held by the Department in the colloquial sense, but I also seek access to those records that are, properly speaking, under the control of the Department. To the extent, therefore, that records falling within the scope of the request made in this letter are, properly speaking, "under the control" of the Department within the meaning of the Acts, access is sought to these via the Department by means of this request. Please specifically address this point in any response.

### **Express Consideration of Section 8 of the Acts**

Insofar as a decision might be reached that the records sought, or any of them, are exempt, or that the request falls to be refused, or partly refused, on some other ground, please give specific express consideration to the terms of section 8 of the Acts and, in particular, section 8(2)(d) thereof, and address these matters fully in any response.

### **Express Consideration of Section 6(8) of the Acts**

Further, and as an overarching point, I would like to emphasise my understanding that, under section 6(8) of the Acts, nothing in the Acts is to be

“construed as prohibiting or restricting a public body from publishing or giving access to a record (including an exempt record) otherwise than under this Act where such publication or giving of access is not prohibited by law.”

Accordingly, should you be minded to refuse my request for access to records, in whole or in part, I would also be obliged if you could nevertheless give specific consideration to releasing the records to which I seek access, outside of the provisions of the Acts, and if you could please address this point in your response to this request to the extent necessary.

### **Preferred form of Access**

Under section 12 of the Acts, I request that access to the records be given by providing me with a computer disk or other electronic device containing the information sought.

However, in the case of the written tender, as the RFT document specifically states that electronic versions of tender documentation submitted by tenderers were not deemed to be tender proposals for the purposes of the process, I would like to be given access to the Winning Tender in both hard copy and electronic form.

However, I am willing to discuss the form of access with the Department, should it appear desirable to do so.

### **Prescribed Fee**

I **enclose** a cheque in the sum of €15.00 in respect of the fee for making a request under section 7 of the Acts.

### **Time Limits**


I look forward to hearing from you with regard to my request for access within the relevant time limits laid down in the Acts.

Yours faithfully,



Joe Carmody

Encl.



20/04/2010

Mr Joe Carmody  
Edelman  
5th Floor,  
Huguenot House,  
35-38 St Stephen's Green,  
Dublin 2

**FOI Request Reference: FOI/2010/11**

Dear Mr Carmody,

I refer to your FOI request under Section 7 of the Freedom of Information Acts, 1997 and 2003, received in this office on 19/04/2010 requesting records relating to the tender for provision of consultancy services to the Department. The application was received along with the associated fee.


The officer handling your request will be Mr Paul Bolger, Electricity Corporate Division, Department of Communications, Energy and Natural Resources, 29-31 Adelaide Road, Dublin 2. Paul can be contacted on 01 6782936.

You can expect to receive your decision by the 18/05/2010.

If you have not received a decision by that time, you are automatically entitled to appeal to the Department for a review of the matter. This review proceeds on the legal basis that the initial request is considered to be refused once the specified time for responding to it has expired. A request for a review should be addressed to the undersigned at the address shown.

Please note the Department of Communications, Energy and Natural Resources has a policy of posting a summary of non-personal requests and decisions on the Departments website for reference purposes.

Yours sincerely,

  
Carmel Cosgrove

FOI Unit  
Department of Communications, Energy and Natural Resources  
Elm House,  
Earlsvale Rd  
Cavan

Phone: 01 6782902



**An Roinn Cumarsáide,  
Fuinnimh agus Acmhainní Nádurtha,  
Baile Átha Cliath 2.**

**Department of Communications,  
Energy and Natural Resources,  
Dublin 2.**

18 May 2010

Mr Joe Carmody  
Edelman  
5<sup>th</sup> Floor  
Huguenot House  
35-38 St Stephens Green  
Dublin 2

**FOI Request Reference: FOI/2010/11**

Dear Mr Carmody

I refer to the request you have made under the Freedom of Information Acts, 1997 and 2003, regarding records relating to the tender for provision of consultancy services to the Department. This request was received in the Department on 19<sup>th</sup> April 2010.

I made a final decision to part-grant your request on 18 May 2010. If you have any queries regarding this correspondence you can contact me directly, my contact details are listed below.

The purpose of this letter is to explain that decision. This explanation has the following parts:

1. a schedule of all of the records covered by your request
2. an explanation of the reasons for decisions to deny access to records
3. an explanation of the arrangements for access to records which were granted/part granted
4. a statement of how you can appeal this decision should you wish to do so

This letter addresses each of these four parts in turn.

**1. Schedule of records**

A schedule is attached at the end of this letter. It shows the documents that this Department considers relevant to your request. It also gives you a summary and overview of the decision as a whole. The schedule describes each document and indicates whether the document is released in full, released with deletions, or not released.

## **2. Reasons for decisions to deny access**

Certain records are exempt from release under provisions of the FOI Acts, these are known as 'exemption provisions'. I have set out my reasons for invoking certain exemptions in relation to your request and also enclosed a copy of the relevant Sections of the Act for your information. The public interest factors for and against disclosure are listed below.

### **Section 21: Functions and negotiations of public bodies**

This section protects information where the disclosure of such is likely to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of a public body conducted by or on behalf of the public body concerned or the procedures or methods employed for the conduct thereof. I have weighed the various public interest factors for and against disclosure and have decided it would not be in the public interest to disclose certain information

### **Section 27: Commercially sensitive information**

This section is concerned with preventing unwarranted commercial disadvantage to persons carrying out a commercial activity. The written tender from Frontier Economics contains information which is of a commercially sensitive nature. In addition, the name of the unsuccessful tenders and their associated marks is commercially sensitive. I am of the view that release of this type of information could place Frontier Economics & the unsuccessful consultants at a competitive disadvantage vis-à-vis other Consultants and this could reasonably be expected to prejudice their competitive position in the conduct of their business. I have weighed the various public interest factors for and against disclosure and have decided it would not be in the public interest to disclose certain information.

In consideration of whether to grant or refuse access to the records in question, the following public interest factors were taken into account:

#### **Factors for disclosure**

- Rights of the individual to have access to records
- Enhancing the accountability of Government
- Need for the operations of Government to be transparent
- Desirability for the disclosure of documents which relate to issues affecting the wider community

#### **Factors against disclosure**

- Likely to prejudice outcome of analysis
- Companies concerned are not unduly impeded in the effective pursuit of their business

## **3. Access Arrangements**

I consider an electronic version on CD and photocopies as an appropriate form of access in this case. Accordingly, the records described as released in full/released with deletions are now enclosed.

#### 4. Rights of appeal

I wish to advise you that, if for any reason you are not satisfied with the outcome of your request, you are entitled to seek a review by appealing the decision. To appeal, you need to write to the FOI Unit, Department of Communications, Energy and Natural Resources, Elm House, Earlsvale Rd, Cavan, Co Cavan. You must make your appeal within 4 weeks of the date of this letter, but the making of a late appeal may be permitted in certain circumstances. The review will involve a complete reconsideration of the matter by a more senior member of the staff of this Department.

Please note that an application fee for an appeal is currently €75.00 and a reduced fee of €25.00 applies if you are covered by a Medical Card.

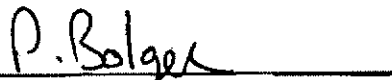
If claiming a reduced application fee, the request must also be accompanied by

- The Medical Card registration number
- The name of the issuing Health Board
- Your consent to the verification of these details with that Health Board.

Payment should be made by way of bank draft, money postal order, or personal cheque made payable to "Department of Communications, Energy and Natural Resources".

On receipt of the fee, you will be advised of when you can expect a decision on your appeal, and the contact details of the person handling the appeal.

Yours sincerely,



Paul Bolger  
Electricity (Corporate) Division  
29 - 31 Adelaide Road  
Dublin 2

Tel: +353 1 678 2936  
Email: [paul.bolger@dcenr.gov.ie](mailto:paul.bolger@dcenr.gov.ie)

Schedule of Records - Summary of Decision Making

FOI Request Reference: FOI/2010/11

Rec. No	Brief description and date of record	File Ref	No. of pages	Decision: Grant/Part Grant/Refuse	Basis of Refusal: Section of Act	Reason for Decision	Record Edited/Identify Deletions
1.	Frontier Economics reply to Request for Tender 29 <sup>th</sup> January 2010	TA 3/1 Tendering Process for Consultants	56	Refuse	s.21(1)(a) s.27(1)(b)	Functions & negotiations. Commercially sensitive	As Marked
3.	Electricity Transmission Assets Analysis - Initial evaluation by reference to the criteria set out in Section 8 of the Request for Tender 3 <sup>rd</sup> February 2010	TA 3/1 Tendering Process for Consultants	1	Part Grant	s.27(1)(b)	Commercially sensitive	As Marked
3.	Evaluation Results for Electricity Transmission Assets Analysis 10 <sup>th</sup> February 2010	TA 3/1 Tendering Process for Consultants	1	Part Grant	s.27(1)(b)	Commercially sensitive	As Marked
4.	Consultancy Agreement between The Minister for Communications, Energy and Natural Resources and Frontier Economics 26 <sup>th</sup> March 2010	TA 6/1 Consultants	90	Part Grant	s.21(1)(a) s.27(1)(b)	Functions & negotiations. Commercially sensitive	As Marked

### Electricity Transmission Assets Analysis

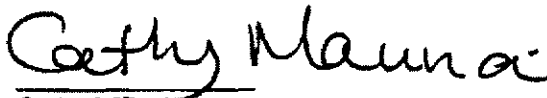
Initial evaluation by reference to the criteria set out in Section 8 of the Request for Tender

Tenderer	Frontier Economics	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
<b>Qualification Criteria</b>						
Completeness of tender documentation in accordance with specifications under section 6.	Yes	Yes	Yes	Yes	Yes	Yes
Stated ability of tenderer to meet all the requirements specified in Section 3 & 5	Yes	Yes	Yes	Yes	Yes	Yes
Statement that none of the circumstances listed in paragraphs 1 & 2 of Article 45 of EU Directive 2004/18/EC apply to tenderer	Yes	No	No	Yes	No	Yes
Eligible for Inclusion in Award Process	Yes	No	No	Yes	No	Yes

Signature of Selection Committee

  
Fergus Cahill

  
Carmel Fields

  
Cathy Mannion

  
Adrian Finneran

  
Bob Hanna

  
Catherine Licken

3<sup>rd</sup> February 2010

Evaluation Results for Electricity Transmission Assets Analysis

Price	Experience on similar projects and the expertise and qualifications of the team in the range of analytical, technical, financial and legal skills necessary to complete that Task	Understanding of the Task and the Terms of Reference. Knowledge of the relevant aspects of the Irish, European and International electricity sector and regulations and the background to this task	Effectiveness and quality of the approach proposed for both phases of the task including the ability of the tenderer to manage the process effectively and to complete it within the required time scale.	Total
40	20	20	20	100
40	15	15	15	85
26	19	20	20	85
1	12	11	11	35

As the evaluation process ended in an equal score between Frontier & Deloitte the Chairman exercised his casting vote and awarded the Contract to Frontier Economics

Comments

Frontier Economics deemed to have the most suitable solution taking all criteria into account

Signed: *Cathy*

Date: 10/2/10

Signed: *James Doherty*

Date: 10/2/10

Signed: *[Signature]*

Date: 10/2/10

Signed: *[Signature]*

Date: 10/2/10

Signed: *[Signature]*

Date: 10 Feb 2010

Signed: *[Signature]*

Date: 10/2/10

**CONSULTANCY AGREEMENT**

**Between:**

**THE MINISTER FOR COMMUNICATIONS, ENERGY AND  
NATURAL RESOURCES**

**One Part**

**- and -**

**FRONTIER ECONOMICS LTD**

**OTHER PART**

---

**THIS AGREEMENT** made the 26<sup>th</sup> day of March 2010

**BETWEEN**

**The Minister for Communications, Energy and Natural Resources**, a corporation sole, which for the avoidance of doubt shall include anyone authorised to act on behalf of the Minister, with offices at 29-31 Adelaide Road in the City of Dublin, hereinafter referred to as "the Minister", (which term shall include his successors and assigns') of the one part, and

Frontier Economics Ltd hereinafter referred to as "the Service Provider", of the other part.

**WHEREAS**

The Minister has sought to enter an agreement with a consultant for assistance in the provision of services in relation to the Task set out in the Request for Tender "Electricity Transmission Assets Analysis" (attached at Appendix IV) and in the Proposal submitted by the Consultant (attached at Appendix V)

**IT IS AGREED** as follows:

**1. Appointment**

- 1.1 With effect from 26<sup>th</sup> March 2010 the Minister hereby appoints the Service Provider to provide the Services as set out in Appendix I of this contract.
- 1.2 The Service Provider undertakes to supply to the Minister the Services and shall supply same with all due care and skill in a competent, efficient, timely and diligent manner.
- 1.3 The Minister has chosen to appoint the Service Provider to provide assistance in the provision of consultancy services in relation to the Task set out in the Request for Tender "Electricity Transmission Assets Analysis".
- 1.4 The Service Provider warrants that he has the authority to enter into and to carry out its obligations and responsibilities under this Agreement and to provide the Services hereunder.

**2. Duration**

- 2.1 Subject to Clause 12 (Termination) the engagement of the Service Provider under this Agreement shall be for the period commencing on 26<sup>th</sup> March 2010 and concluding on 28<sup>th</sup> July 2010.
- 2.2 The Minister may extend the duration of the contract should he deem it necessary to do so.

**3. Fees and payment**

- 3.1 In consideration of the due performance of the Services to be provided under this Agreement and direct expenses, the Minister shall pay to the Service Provider a fixed amount of [REDACTED]. The said sum is expressed exclusive of such Value Added Tax as may be due by the Minister in respect thereof. No fees additional to those provided for in this Clause may

be charged to the Minister in respect of work done in the course or in connection with the Services to be provided under this Agreement unless otherwise agreed in writing in advance between the Service Provider and the Minister in accordance with the Change Control process set out in Clause 26.

3.2



3.3 Provided that no payments are in dispute between the parties to this Agreement, any part of the total amount of fees due under this Agreement outstanding upon the date of its expiry as provided for at Clause 2.1 shall be due for payment upon presentation of an invoice in the appropriate form and manner.

3.4 In the event of the Minister disputing an invoice presented by the Service Provider and such dispute not being resolved between the parties, the disputed invoice shall be referred to arbitration in accordance with Clause 16.2 hereof. The undisputed portion, if any, of the disputed invoice shall be paid on the due date.

3.5 Save where the Minister disputes an invoice under Clause 16 of this Agreement, all invoices certified by the Service Provider and received by the Minister shall be paid within 30 days of their receipt.

3.6 The Service Provider shall not retain for its own benefit any payment from any other party in relation to the performance of this Agreement and any fees, charges or other payments received from third parties shall be accounted for and paid over to the Minister.

3.7 Incorrect invoices will be returned for correction with consequential effects on the due date of payment in accordance with the Prompt Payments Act, 1997 (as amended from time to time).

3.8 The Minister must be in possession of the Service Provider's current Tax Clearance Certificate or equivalent. If a current Tax Clearance Certificate is not produced within 7 days of a request being made by the Minister the period in excess of 7 days until the Certificate is produced will be excluded when determining late payment interest.

3.9 Any additional services outside of the scope of the Services, which are requested by the Minister as necessary for completion of the Services that may incur additional charges and expenses shall be subject to written approval in accordance with the Change Control Process set out in Clause 26 before any such additional services or works are carried out by the Service Provider.

3.10 The provisions of this Agreement supersede the terms and conditions of supply of services by the Service Provider including the terms and conditions upon which it issues invoices, fee notes or statements of account.

4. **Tax and Social Insurance**

- 4.1 The Service Provider shall be responsible for making such deductions in respect of income tax, social insurance and any other deductions required by law that relate to the Services provided.
- 4.2 It is a condition precedent of the Agreement that the Service Provider shall furnish to the Minister current valid Tax Clearance Certificates from the Revenue Commissioners.
- 4.3 The Minister shall as required by law make a deduction from the fees payable to the Service Provider in respect of Professional Services Withholding Tax at the standard rate of income tax applicable and any other deduction as may be required by law.

5. **The Service Provider's obligation**

- 5.1 The Service Provider shall act objectively, fairly and without bias in the performance of the Services and in particular, without prejudice to any other provision hereof, shall act in accordance with Irish law and European Union law and ensure that the Services are provided in accordance with the said laws.
- 5.2 Where the Service Provider is prevented by illness or injury or for any other reason whatsoever from performing those Services, the Service Provider shall notify the Minister as soon as reasonably practicable and shall keep the Minister informed of the reason for such absence and of its expected duration.
- 5.3 The Minister shall have the right to relieve the Service Provider from his obligations in circumstances where he may be ill or have suffered an injury, if it is deemed that such an absence would be of such duration or nature that in the opinion of the Minister it compromises the process through unnecessary delay. In such circumstances the Minister may appoint another Service Provider.
- 5.4 The Service Provider:
- (ii) confirms that at the date of signature of this Agreement it is not aware of any technical, logistical or other reason why he cannot provide the Services.
  - (iii) undertakes that the Services shall be performed in an efficient, diligent, competent and professional manner.
  - (vi) undertakes that he shall provide at his own expense all items reasonably necessary for the supply and performance of the Services.
- 5.5 The Service Provider shall be responsible for the loss, damage or injury directly caused by any negligent act or omission of the Service Provider in the course of or arising out of the performance of the Services.
- 5.6 Without prejudice to Clause 5.1, the Service Provider may consult with the Minister and any other parties as it considers appropriate or necessary so as to perform the Services.

## 6. Indemnification and Professional Indemnity Insurance

- 6.1 The Service Provider shall be liable for and hereby agrees to indemnify and save the Minister, its servants and the Government of Ireland harmless from loss, claims, damages, demands, costs (to include reasonable legal costs) and expenses arising directly by reason of the Service Provider's wilful default, negligence or breach of the obligations under this Agreement, provided that:-
- (i) In no circumstances shall the Service Provider be liable in contract, tort or otherwise howsoever for any indirect or consequential damage or loss of any nature whatsoever.
  - (ii) The liability of the Service Provider for breach of his obligation under this Agreement shall cease six years dating from the expiry of this Agreement.
  - (iii) The Service Provider will not be liable for any loss or damage suffered or incurred by the Minister, its servants or the Government of Ireland which is caused directly by its, their or its negligence or wilful default.
  - (iv) The Service Provider's total liability in respect of any and all claims (whether in contract, negligence or otherwise) under or in connection with this Agreement will not exceed in aggregate the sum of an amount equal to five times the fixed amount (excluding taxes) paid to the Service Provider for the Services.
- 6.2 The Service Provider shall maintain and continue to maintain in full force and effect comprehensive professional indemnity and liability insurance cover. The Service Provider undertakes to advise the Minister forthwith of any material change to its insured status. If requested by the Minister in writing the Service Provider shall produce evidence that the current premiums due have been discharged.

## 7. Confidentiality

The Service Provider undertakes to the Minister:-

- (i) To keep confidential all information (whether commercial, financial, technical or otherwise and whether in documentary form, oral, audio-visual, audio-recorded, electronic, digital or otherwise) received or obtained in connection with this Agreement or arising from the arrangements contemplated by this Agreement during the period leading up to or during this Agreement ("Confidential Information") and without prejudice to the generality of the foregoing to include all information of a commercial, business, economic, technical or policy nature concerning the operation of the electricity sector in Ireland.
- (ii) Not without the Minister's prior consent in writing to disclose any Confidential Information governed by the provisions of the Official Secrets Act 1963 in whole or in part to any other person or party save those necessarily involved in the performance of the Services under this Agreement who have been notified of the confidential obligations set out in this Clause 7 and have agreed in writing to be bound thereby as if a party to this Agreement.
- (iii) To use such Confidential Information solely for the performance of the Services and for no other purposes or use whatsoever.

- (iv) Save in connection with applications or tenders to supply services of a related or similar nature in future, for the duration of this Agreement not to engage in any form of publicity unless expressly approved in advance in writing by the Minister whether or not the Service Provider considers such publicity necessary for the performance of the Services under this Agreement.
  - (v) The Service Provider will execute on his own behalf, any documentation which the Minister reasonably deems necessary to ensure confidentiality (including any documentation necessitated by the provisions of the Official Secrets Act, 1963).
- 7.2 The Service Provider may disclose Confidential Information to the extent required by law provided that it shall give to the Minister prior written notice of and the legal reasons for such disclosure unless prohibited by law from so doing.
- 7.3 The Minister is to keep confidential the Service Provider's Confidential Information. For the purposes of this clause the Service Provider's Confidential Information shall be defined as information about the Service Provider that is by its nature confidential, or is designated as such by the Service Provider (whether in writing or orally), and includes, without limitation, information concerning current services and products, customers, marketing plans and financial information of the Service Provider and his clients.
- 7.4 The undertakings given at Clause 7.1 and 7.3 do not apply to Confidential Information or the Service Provider's Confidential Information (i) which at any time is lawfully or comes lawfully into the public domain; (ii) which was lawfully in either party's possession prior to disclosure; (iii) which at any time after the Agreement commences comes lawfully into either party's possession from a third party and over which the third party is entitled to give and has given permission for the disclosure of the information or (iv) which of necessity must be disclosed to its insurers subject to its insurers' undertakings as to the confidentiality thereof.
- 7.5 The Service Provider undertakes to inform the Minister as soon as the Service Provider becomes aware if at any time during the performance of the Services any conflict of interest or potential conflict of interest arises, consequent upon performance of this Agreement, from any provision by the Service Provider of services to any third party.
- 7.6 Subject to the right of the Service Provider to own all intellectual property rights, all Confidential Information that cannot be classified as belonging to the Service Provider and arising from provision of the Services is owned by the Minister. The Service Provider shall not attempt to obtain any advantage or unjust benefit therefrom.
- 7.7 Without prejudice to the right of the Service Provider to retain such files and documentation as may be reasonably necessary and solely for professional standards and indemnity purposes or as required by law, if requested in writing by the Minister, the Service Provider undertakes to use all reasonable efforts to dispose of any relevant Confidential Information that has been provided or generated for the Minister stored on any media maintained thereby in the manner directed by the Minister.
- 7.8 Where files and documentation are retained for professional standards and indemnity purposes the Service Provider undertakes to keep them in a secure manner in compliance with the undertakings given in Clause 7.1.

- 7.9 To the extent that, in connection with this Agreement, the Service Provider provides the Minister with Confidential Information, the Minister agrees to notify the Service Provider, as soon as reasonably possible, of any request received by the Minister under the Freedom of Information Act 1997 and before making any disclosure of the Service Provider's Confidential Information the Minister shall take account of any representations made within a reasonable time by the Service Provider about the applicability of any exemptions under the Freedom of Information Act 1997.

## **8. Scope of Authority**

- 8.1 Nothing contained in this Agreement shall be construed as establishing a partnership, joint venture or relationship of principal and agent or any other relationship of a similar nature between the parties. Neither party shall act or describe itself as agent of the other nor shall it make or represent that it has authority to make commitments on the other's behalf. The Service Provider shall not be the Minister's Agent. He shall not make or enter into any legally binding obligations on the Minister's behalf and shall not create any legitimate expectation or promissory estoppel in favour of any third party.

## **9. Reporting and Monitoring**

- 9.1 The Minister shall be entitled to monitor the Service Provider's progress in the performance of its obligations under this Agreement and to obtain progress reports on the stage of performance of the Services and the Service Provider's compliance or anticipated compliance with such Key Milestones as are set out in Appendix II. Any reporting requirements that exceed those set out in the Deliverables (Appendix I) will be subject to Change Control as set out in Clause 26.
- 9.2 Without thereby prejudicing the Service Provider's independence, the Minister shall be entitled to seek and obtain information, clarifications, explanations and views and opinions from the Service Provider throughout the duration of this Agreement. To the extent that such information, clarifications, explanations, views and opinions require a material level of additional work by the Service Provider over and above that included within the Services, then such requests will be dealt with under the Change Control procedure as set out in Clause 26.

## **10. Time Limits**

- 10.1 The Service Provider shall use his best endeavours to observe and comply with such Key Milestones as are laid down in Appendix II to this Agreement as may be amended from time to time in accordance with the Change Control procedure as set out in Clause 26.
- 10.2 The Minister acknowledges that the Service Provider shall not be held to be in default of this obligation to observe and comply with such Key Milestones if a delay is not caused by the Service Provider, or is not agreed by the Minister further to a request by the Service Provider or is due to an agreement or instructions from the Minister or Department.

## **11. Property**

- 11.1 Subject to Clause 7.6, all documentation, materials, information, data and all records, whether on paper, in electronic form or on disks of any kind (or such part or parts thereof) shall be the exclusive property of the Minister if generated for the purpose of the

performance of the Services and shall be destroyed by the Service Provider at completion of the project unless otherwise requested in writing by the Minister, on the termination or expiry of this Agreement.

## **12. Termination**

- 12.1 The Minister shall be entitled to terminate this Agreement for breach, without notice and without prejudice to payment for fees for work properly and actually performed prior to the date of the expiry of this Agreement if:
- (i) The Service Provider shall have or be discovered to have any material conflict of interest;
  - (ii) The Service Provider is at any time guilty of any material, serious or persistent misconduct or breach or non observance of any of the terms and conditions contained in this Agreement.
  - (iii) The Service Provider shall receive any payment or benefit or accept the promise or assurance of any payment to benefit financially or otherwise from any party other than the Minister in relation to the performance of the Services or any aspect thereof.
- 12.2 The Minister reserves the right to terminate this Agreement at any time subject to giving the Service Provider one calendar month's notice in writing and to paying it such amounts as may be necessary to cover the work actually and properly undertaken by the Service Provider and any irrecoverable expenses with the agreement of the Minister up to the date of such termination.
- 12.3 The expiry or termination of this Agreement shall not operate so as to affect such of the provisions hereof as might reasonably be contemplated or intended to operate or have effect after such expiry or termination and shall be without prejudice to any obligations which shall have accrued and be owing prior thereto.
- 12.4 The Service Provider shall be entitled to terminate this Agreement by reason of a material breach of the Minister's obligations under Clause 3 which breach has not been remedied upon one month's written notice to the Minister.

## **13. Survival**

- 13.1 Without prejudice to the generality of Clause 12.3, Clauses 4, 6, 7, 8, 11, 15, 19 and 26, both parties' obligations thereunder shall survive the expiry or termination of this Agreement and shall remain binding upon the Service Provider subsequent to the expiry or termination of this Agreement.

## **14. Assignment**

- 14.1 The Service Provider shall not assign or otherwise transfer in whole or in part the benefit or burden of this Agreement or any part hereof.

13 Scope of Agreement

- 15.1 This Agreement shall take effect in substitution for and supersedes all previous agreements and arrangements relating to the subject matter hereof whether written oral or implied between the Service Provider and the Minister and any terms proposed by the Service Provider. It is deemed to incorporate the terms of all documents appended hereto save where their terms conflict with or are inconsistent with the provisions of this Agreement.
- 15.2 The provisions of this Agreement prevail in the event of any conflict between its provisions and those set out in the documents appended hereto.

**16. Disputes and Arbitration**

- 16.1 The parties to this Agreement agree that any dispute which arises concerning the interpretation of this Agreement and/or the Services to be provided hereunder shall be mutually resolved through negotiations in good faith between the appointed representatives of each party.
- 16.2 If any dispute fails to be resolved in such manner then the matter shall be referred to an arbitrator to be agreed upon by the parties or in default of agreement to be nominated by the President for the time being of the Law Society of Ireland in accordance with and subject to the provisions of the Arbitration Acts 1954 and 1980 or any statutory modifications or re-enactment for the time being in force. The award of the said arbitrator shall be final and binding on both parties. It is agreed that nothing in this Agreement or in this clause shall prevent any termination or purported termination by the Minister pursuant to Clause 12 from taking immediate effect. Should the arbitrator ultimately determine that the Minister's purported termination was invalid the Agreement remains terminated and shall be treated as having been terminated in accordance with such notice served by the Minister and the Minister shall have no liability in relation to such termination save for the discharge of any fees properly due and owing to the Service Provider under the terms of this Agreement and incurred to the date of termination.
- 16.3 Subject always to Clause 12 the provision of the Services under this Agreement shall not be delayed or suspended pending the resolution of any dispute.

**17. Validity and Waiver**

- 17.1 The invalidity in whole or in part of any provision of this Agreement shall not affect the validity of any other provision. A waiver of a breach of any provision of this Agreement, or a failure to enforce at any time any provision of this Agreement shall not be construed as a waiver thereof or a waiver of any subsequent breach of any other provision of this Agreement.

**18. Costs**

- 18.1 Each party to this Agreement shall pay its own costs of and incidental to this Agreement.

19. Severance

19.1 In the event that any provision of this Agreement is declared by a judicial or other competent authority to be void, voidable, illegal or otherwise unenforceable the parties shall amend that provision in such reasonable manner as achieves the intention of the parties without the said illegality. Should this not prove possible, such provision may be severed from this Agreement. In that case the remaining provisions shall be of full force and effect but without prejudice to the right of either party to rescind this Agreement if such amendments or severance materially alter the substance of this Agreement.

20. Notices

20.1 Any notice or other communication whether required or permitted to be given by one party herein to another shall be in writing and shall be deemed to have been duly given if signed by or on behalf of a duly authorised officer or a person represented as a duly authorised officer of the party giving the notice and:-

- (i) if delivered, at the time of delivery to the addressee or its duly authorised agent;
- (ii) if sent by pre-paid registered/certified post, four business days after posting if addressed to the party to whom such notice is to be given at the address set forth for such party in this Agreement or such other address as may be subsequently notified to the other party;
- (iii) if transmitted by facsimile number, on receipt of any error free transmission report to such facsimile number of numbers from time to time notified to the other party;
- (iv) by email.

20.2 All notices to the Minister under this Agreement shall be in writing and shall be effective if sent to:

Carmel Fields  
Electricity (Corporate) Division  
Department of Communications, Energy and Natural Resources  
29 - 31 Adelaide Road  
Dublin 2

All notices to the Service Provider under this Agreement shall be in writing and shall be effective if sent to:

Damien O' Flaherty  
Frontier Economics  
Fitzwilliam Hall  
Fitzwilliam Place  
Dublin 2

**21. Miscellaneous**

- 21.1 This Agreement shall not be amended, modified, varied or supplemented except in writing signed by duly authorised representatives of the parties.
- 21.2 The Service Provider confirms that in so far as it is aware it is satisfied that it has no conflicts in relation to the Services and its obligations undertaken under this Agreement. Any registerable interest involving the Service Provider and any sub-contractor and/or agent as the case may be and the Ceann Comhairle (Speaker), members of the Government, members of the Oireachtas, the Minister, or their relatives must be fully disclosed to the Minister immediately upon such information becoming known to the Service Provider, its sub-contractors or agents as the case may be. The terms "registerable interest" and "relative" shall be interpreted as per section 2 of the Ethics in Public Office Act, 1994 a copy of which is available on written request.
- 21.3 Each of the parties to this Agreement confirms that this Agreement is executed by their duly authorised officers.
- 21.4 No services to be provided by the Service Provider to ESB Group, EirGrid, ESB Group of Unions or ESB E.S.O.T. in relation to Chapters IV and V of Directive 2009/72/EC and Article 3 of Regulation (EC) No 714/2009 (of the European Parliament and of the Council) until transposition of Chapters of the Directive into Irish law has occurred.
- 21.5 Prior approval shall be obtained by the Service Provider from the Department before undertaking any new services for ESB Group, EirGrid, ESB Group of Unions or ESB E.S.O.T for the duration of the Assignment, such approval not to be unreasonably upheld.

**22. Acceptance**

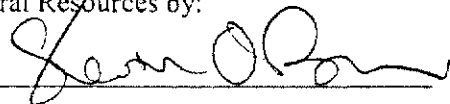
- 22.1 Deliverables will be accepted by the Minister on completion of the process.

**23. Data Protection**

- 23.1 In providing the Services or otherwise in connection with the Services, it is not anticipated that the Service Provider will need to collect, hold and use information (e.g. contact details) about identifiable individuals ("Data Subjects"). However in the event that such information is held, with regard to the Data Protection Acts 1988 and 2003 the Service Provider undertakes
- (a) to process all personal data transferred to it under this Agreement in accordance with the requirements of the Data Protection Acts and in particular the Service Provider acknowledge that personal data will be transferred to it only for the express purpose of processing same within the terms of this Agreement,
  - (b) that all personal data transferred will not be retained or used for the Service Provider's own purposes and will not be retained beyond the life of this Agreement, and
  - (c) to keep personal data secure in accordance with sections 2(2) and 2C of the Data Protection Acts.

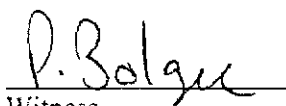
24. The Deliverables, and any other advice the Service Provider provides to the Minister, are for the exclusive use of the Minister and the Department of Communications, Energy and Natural Resources and should be used solely for the purpose described in this Agreement. Except as expressly provided in this Agreement, no entity other than the Department may rely on the Deliverables and/or information derived from them and the Service Provider accepts no responsibility to any other person to whom the Deliverables are shown or into whose hands they may come and to the extent that the Deliverables are made available to third parties by the Minister, the Minister shall not remove a disclaimer to this effect from such Deliverables or from any part thereof.
25. No person who is not a party to this Agreement shall have any rights under this Agreement.
26. If the Minister or the Service Provider wish to make any addition, modification or change to the Services or performance required under this Agreement ("**Variation**"), the Service Provider and the Minister will comply with the Change Control Procedures as set out in Appendix III. Unless otherwise agreed by the parties, until any Variation is formally agreed, the Service Provider will continue to perform and be paid for the Services as if the Variation had not been requested.
- 27. Law and Jurisdiction**
- 27.1 This Agreement shall be governed by and construed in accordance with the Law of Ireland.
- 27.2 This Agreement shall be deemed to have been made in Ireland.
- 27.3 Without prejudice to Clause 16, the Courts of Ireland shall have exclusive jurisdiction in relation to any issue arising out of or connected with this Agreement.

**SIGNED** for and on behalf  
of the Minister for Communications, Energy  
and Natural Resources by:


  
\_\_\_\_\_

being an Officer so authorised  
by the Minister for Communications, Energy  
and Natural Resources  
under Section 15(4)  
of the Ministers and Secretaries Act, 1924

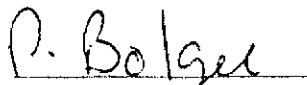
in the presence of:-

  
\_\_\_\_\_  
Witness

**SIGNED** for and on behalf  
of Frontier Economics

  
\_\_\_\_\_

in the presence of:-

  
\_\_\_\_\_  
Witness

## APPENDIX I

### DELIVERABLES

The Service Provider will be required to provide the following Services:

- (i) Comply with the Task as set out in the Request for Tender "Electricity Transmission Assets Analysis".
- (ii) Comply with the Reporting Requirements as set out in the Request for Tender "Electricity Transmission Assets Analysis".

**APPENDIX II**

**KEY MILESTONES**

The following items comprise the Key Milestones for the purposes of this Agreement:

[REDACTED]

8. APPENDIX III

CHANGE CONTROL PROCEDURES

**Consultancy Agreement**  
**Change Order Number \_\_\_\_\_**  
[date]

Minister of Communications, Energy and Natural Resources  
[Client address]

For the attention of [Client contact name]

Dear Sirs

This Change Order, including any appendices, schedules, and/or attachments, documents changes to the Agreement between XX and the Minister for Communications, Energy and Natural Resources (the "Client") dated XX 2010, including any prior Change Order(s) or amendments thereto. This Change Order constitutes the entire understanding and agreement between Client and XX XX with respect to such changes, supersedes all prior oral and written communications with respect to such changes (including, but not limited to written change requests), and may be amended, modified or changed only in writing when signed by both parties. The section(s) of the Tender Response set forth below is/are hereby amended, effective as of the date first written above, by adding at the conclusion of the respective section(s) the following text:

**2. THE SERVICE PROVIDER'S SERVICES AND RESPONSIBILITIES**

[describe any changes to this section here or, if there are none, delete this form field along with the section label immediately above]

**3. DELIVERABLES**

[describe any changes to this section here or, if there are none, delete this form field along with the section label immediately above]

**4. ACCEPTANCE**

[describe any changes to this section here or, if there are none, delete this form field along with the section label immediately above]

**5. CLIENT RESPONSIBILITIES**

[describe any changes to this section here or, if there are none, delete this form field along with the section label immediately above]

**6. FEES AND EXPENSES**

[describe the impact that any changes above will have on fees and expenses or, if there is none, delete this form field along with the section label immediately above]

**7. CONSEQUENTIAL CHANGES TO CONSULTANCY AGREEMENT**

[describe any non-operational legal issues to be highlighted here]

Except as expressly modified herein, all other terms and conditions of the Tender Response and the Agreement remain unchanged. Please indicate your agreement to these arrangements by signing and returning to XX the enclosed copy of this Change Order.

Yours faithfully,

\_\_\_\_\_  
XX

**Acknowledged and Accepted:**  
**Minister of Communications, Energy and Natural Resources**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**APPENDIX IV**

Request for Tender

"Electricity Transmission Assets Analysis"



**DEPARTMENT OF COMMUNICATIONS, ENERGY & NATURAL RESOURCES**

**ELECTRICITY TRANSMISSION ASSETS ANALYSIS**

**REQUEST FOR TENDER**

Open Procedure

**DECEMBER 2009**



## DEPARTMENT OF COMMUNICATIONS, ENERGY & NATURAL RESOURCES

### SECTION 1: INVITATION

The Department of Communications, Energy & Natural Resources (hereinafter referred to as 'the Department') invites tenders from suitably qualified parties to carry out an analysis ('the Task') regarding the structure of ownership of Ireland's state-owned electricity transmission assets.

### SECTION 2: BACKGROUND

Ireland's electricity market is undergoing significant change. The impetus for change results from the desire of the Government to structure the market in a manner that optimises its contribution to Ireland's economic competitiveness, from EU regulation, and from an increasing focus on environmental obligations and objectives, including the development of renewable energy sources.

The Energy Policy Framework 2007-2020 (published on 12 March 2007) and the Programme for Government (13 June 2007) endorse the case for a process of structural change in the electricity sector. The actions agreed by the Government aim to create the conditions that will deliver more competition, more consumer choice and support greater innovation in the electricity market and aim to ensure the strategic development of the state-owned distribution and transmission networks. In relation to the structure of ownership of the electricity transmission network, the Energy Policy Framework set out the following as a key action:

*"Establish EirGrid as the National Transmission Grid Company by end 2008, transferring the ownership of the transmission assets. This will create efficiencies, reduce duplication and achieve full independence thus enhancing competition and transparency and reducing costs."*

A change in the structure of ownership of the transmission network is a complex process involving a range of legislative, commercial, technical, legal and financial dimensions. In line with successive Partnership Agreements, it has been recognised that there should be a full process of engagement with the management and unions of both ESB and EirGrid and the ESB's Employee Share Ownership Trust (ESOT) on analysis of the issue. Furthermore, Government policy is clear in its intention that this issue be approached in a way that ensures the strategic future of both ESB and EirGrid as strong viable semi-state entities, as well as protecting the position of the State and the members of the Employee Share Ownership Plan (ESOP) as shareholders.

These underlying objectives were confirmed in the statement made by the Minister for Communications, Energy and Natural Resources on the future of Ireland's electricity sector on 13 March 2008 (see Appendix B). This, inter alia, proposed an independent analysis of the transmission assets issue in the context of the all-island Single Electricity Market, and in the context of EU developments since 2007.

Under Directive 2009/72/EC of the EU Third Energy Package, which became law this year, Member States will be required, by 3 March 2011, to legislate for a new unbundling regime for electricity transmission networks under one of three options. A provision is also provided for Member States who wish to make a case to the European Commission that the status quo guarantees more effective independence of the transmission system operator than the third option (ITO).

The three options under the Directive are:

- The Full Ownership Unbundling option, entails a full separation between the ownership of electricity transmission networks and supply/generation activities. Under this regime, owners of electricity grids cannot be affiliated with or be part of a group which is also active in supply or generation and the owner of the network will be required to operate and control the network.
- The ISO (Independent System Operator) option allows vertically integrated companies to retain the ownership of their network assets, but the network is managed and operated by an ISO. The ISO has to be an undertaking or entity which is completely separate from the vertically integrated company and must perform all the functions of a network operator.
- The ITO (Independent Transmission Operator) option constitutes the lowest threshold for network unbundling under the Directive. The ITO preserves integrated supply and transmission companies but obliges such companies to comply with additional rules to ensure that both the ownership and operation of the transmission system is the responsibility of a fully independent subsidiary.

The Directive also contains a provision which allows for the possibility that, where a Member State considers that there are current arrangements in place which guarantee a more effective independence of the transmission system operator than the ITO regime, the Member State may make this case to the European Commission.

### SECTION 3: THE TASK

There are two phases to the task.

#### 1. The Examination Phase

The successful tenderer ('the Consultant') will be required to examine all the options available to ensure Ireland's compliance with Directive 2009/72/EC of the EU Third Energy Package. In this examination the Consultant will compare each of the other three scenarios set out in Directive 2009/72/EC against the Government's preferred option of Full Ownership Unbundling. The Consultant will also take into account regional and European grid developments and proposals and the all-island Single Electricity Market context.

The Examination Phase analysis should examine the impact of the Full Unbundling Option and each alternative option on;

- the energy sector generally,
- the structure and operation of the all-island electricity market,
- energy users,
- planned grid development,
- legal and regulatory complexity and
- the likelihood of transmission system operator certification under Directive 2009/72/EC and Regulation 2009/714/EC.

Focussing on the implications that arise for the electricity transmission network under each option, the Examination Phase should take account of, among other factors:

- the ability to attract investment in the transmission network,
- ongoing transmission network construction and expansion,
- ability to deliver international electricity interconnection,
- transmission network maintenance costs and operational practices and
- potential operational and other efficiency gains including from reductions in overheads, duplication of activities and transaction costs.

The analysis should also take account of the potential impact, including costs and benefits, of each option on:

- investors in new power generation (including investment in renewable generation),
- the financial structure, value and capabilities of both ESB and EirGrid,
- competitive electricity pricing objectives,
- standards of service,
- security of supply,
- sustainability,
- network access,
- any likely change in transmission charges arising from the financial structuring of the option,
- competition issues and
- transparency in market and consumer choice.

The analysis shall take account of submissions by the key stakeholders. Submissions may also be received from other parties. It is anticipated that some submissions may suggest courses of action that diverge from Government policy. Account should be taken of such submissions in the conduct of the analysis.

The analysis shall include consideration of the requirement to protect the value of the ESB ESOP.

The Consultant, after examination, will identify the option or options, in addition to Full Ownership Unbundling, which in the Consultant's assessment would also be appropriate in the Irish and all-island electricity market contexts.

## 2. Implementation Phase

In this Phase, the Consultant will be required to make recommendations and produce a roadmap for the timely implementation of both the Government's preferred option (Full Ownership Unbundling) and the other option or options identified as appropriate in the Examination Phase.

Account shall be taken of all relevant issues and regulatory impacts, including:

- Corporate issues, including the effects on ESB and EirGrid of implementing the option.
- Legal issues, including assessments of the legislative requirements of the option; necessary contract provisions and undertakings in connection with the structure; competition, regulatory, and EU aspects including the implications of Directive 2009/72/EC; corporate governance issues, including shareholder and minority shareholder issues and entitlements; and HR/TUPE (Transfer of Undertakings - Protection of Employees) aspects of the option.
- Financial issues, including corporate finance issues, taxation issues, options for structures to effect the option, provision of a financial model describing the option, shareholder and minority shareholder issues and entitlements, transactional costs arising to identified bodies, financial and cost implications for other parties including electricity suppliers and users.
- Technical issues in relation to the nature of transmission systems should form part of the analysis only insofar as they give an understanding of corporate, legal and financial aspects. Detailed identification of transmission assets will not be required as part of this analysis.

Based on the analysis, the Consultant should provide a detailed implementation plan setting out the necessary steps for the implementation of each option examined under this phase of the Task in a manner which ensures compliance with the Directive. This plan should also identify the necessary steps to optimise the positions of both the ESB and EirGrid, and to protect the value of the ESB ESOP.

Reporting Requirements for the Task are set out in Section 5.

#### **SECTION 4: PROJECT MANAGEMENT**

The Minister appointed Mr Fergus Cahill as Independent Chairman in June 2009 with responsibility for the oversight and facilitation of the analysis, in accordance with the Minister's announcement on the issue in March 2008 – see Appendix B.

All communication from the Consultant in relation to the Task shall be done through the Independent Chairman or a person specifically nominated by the Chairman to undertake this role.

#### **SECTION 5: REPORTING REQUIREMENTS**

The Consultant will be required to produce and submit, through the Independent Chairman, to the Minister:

- A Report which fully completes the analysis of both the Examination and Implementation phases of the Task, within four calendar months of the date of commencement of the contract.

The Consultant will be expected to report regularly to the Independent Chairman on progress with the assignment.

The Consultant will be expected to give presentations on the Report as required by the Independent Chairman.

#### **SECTION 6: SUBMISSION OF TENDERS**

Tenderers are required to submit written tenders for this analysis. Tender documentation (exclusive of CVs) should not exceed 20 pages and should include all of the following:

1. a summary of the tenderer's understanding of the issues involved in providing the advice in both the examination phase and the implementation phase of the analysis;
2. the names, qualifications and experience and proposed specific responsibilities of the persons who will be involved in the process, including an up-to-date CV for each person. Expertise/experience relevant to the advice should be clearly indicated;
3. the proposed time input of each individual to the process and a clear indication of their availability during the contracted timeframe;

4. an outline of the approach and methodologies that will be employed in carrying out both the examination phase and the implementation phase of the analysis, including a clear identification of the issues that may arise and the approach proposed for overcoming such issues;
5. a work programme and schedule with deadlines for deliverables throughout the process, including an outline of the project management arrangements proposed for the process and details of key performance indicators and the quality control procedures which will be applied;
6. the nomination of a person to liaise with the Chairman (and his nominees);
7. where a group or consortium submits a tender, details of the lead contractor who will assume overall responsibility for the full and effective completion of the process and the identification of the specific responsibilities of each member of the group or consortium;
8. the names, roles, qualifications and relevant experience of any subcontractors which the tenderer proposes to employ; where a consortium submits a tender the consortium will be responsible for services provided by subcontractors, if any;
9. an all-inclusive fixed tender price (including all fees and expenses) for the cost of completing the process. The price should be exclusive of VAT and be denominated in Euro. The price should hold good for 3 months from the final date for receipt of tenders (see below);
10. an outline of the method and phasing of payments;
11. confirmation of acceptance of the terms and conditions set out in this Request for Tender document and confirmation of acceptance of the draft Proposed Contract.

This contract will be executed between the Department and the successful tenderer.

The Department requires that all information provided pursuant to this invitation to tender be treated in strict confidence by tenderers. Information supplied by tenderers will be treated as contractually binding. The Department, however, reserves the right to seek clarification or verification of any such information.

The Department will not be liable in respect of any costs incurred by interested parties in the preparation of tenders, including an electronic copy, or any associated work effort.

Eight (8) copies of the complete tender and an electronic copy of the tender on a compact disk should be sent by registered post or recorded delivery service or delivered by hand so as to arrive at the following address not later than **noon (12.00 pm local time) on Friday, January 29<sup>th</sup>, 2010:**

**Mr Paul Bolger,  
Electricity (Corporate) Division,  
Department of Communications, Energy & Natural Resources,  
29-31 Adelaide Road,  
Dublin 2,  
Ireland.**

The tender envelopes should be clearly marked "Tender for Mr Paul Bolger", with the name and address of the tenderer clearly indicated on the front of the envelope, which should be sealed. Tenders that are delivered late will not be considered. Late delivery of tenders occasioned through the use of agents will not be entertained.

NOTE: Electronic versions of tender documentation will not be deemed to be a tender proposal for the purposes of this process.

All tender documentation should be in English or Irish.

#### **SECTION 7: CONTRACT**

A contract will be concluded with the tenderer whose tender is deemed to be the most economically advantageous, subject to agreement on conditions of contract. This Request for Tender will form part of the contract documents. This contract will not be concluded earlier than 14 days after unsuccessful tenderers have been notified of the result of the tendering procedure.

Please note the following:

- a) Any terms and conditions in the proposed contract does not imply acceptance by the Department.
- b) All works carried out shall be governed by the Laws of Ireland and subject to the exclusive jurisdiction of the Courts of Ireland.
- c) The Department may cancel the tender process at any time prior to the contract being entered into.

The draft Proposed Contract is attached at Appendix C.

## SECTION 8: SELECTION PROCESS AND AWARD CRITERIA

The tenders will be evaluated by a team comprised of the Independent Chairman, officials from the Department of Communications, Energy and Natural Resources and the Department of Finance and officials from the Commission for Energy Regulation ('the Selection Committee').

Tenders will initially be evaluated by reference to the following qualification criteria:

- a) Completeness of tender documentation in accordance with the specifications under Section 6 above;
- b) Stated ability of the tenderer to meet all the requirements specified in Section 3 (Task) and Section 5 (Reporting Requirements);
- c) Statement that none of the circumstances listed in paragraphs 1 and 2 of Article 45 of EU Directive 2004/18/EC apply to the tenderer (copy of Article 45 attached at Appendix A).

To be eligible for inclusion in the award process, a tender must meet the above qualification criteria.

The contract will be awarded on the basis of the Most Economically Advantageous Tender (MEAT) applying the following criteria, with the individual weighting of each criterion being indicated in parentheses:

1. Price (40 points);
2. Experience on similar projects and the expertise and qualifications of the team in the range of analytical, technical, financial and legal skills necessary to complete that Task (20 points);
3. Understanding of the Task and the Terms of Reference. Knowledge of the relevant aspects of the Irish, European and International electricity sector and regulations and the background to this task (20 points);
4. Effectiveness and quality of the approach proposed for both phases of the task including the ability of the tenderer to manage the process effectively and to complete it within the required time-scale (20 points);

The Selection Committee may shortlist tenderers for interview on the basis of the written tenders before taking a final decision on tender selection.

The Selection Committee reserves the right not to accept the lowest priced or any tender.

## **SECTION 9: FURTHER INFORMATION AND QUERY HANDLING**

Every effort has been made to ensure that this documentation contains all the necessary information for completion of tenders. In the interests of equity, however, requests for additional information, clarification on the content of this document and all other queries of substance (other than in relation to purely factual or procedural matters) must be made in writing or by e-mail.

Any additional information elicited will be made available to all potential tenderers who have obtained a copy of this document via the e-tenders website or directly from the Department.

Any queries should be submitted via the eTenders Web Site at [http://www.etenders.gov.ie/Search/Search\\_Switch.aspx?ID=108299](http://www.etenders.gov.ie/Search/Search_Switch.aspx?ID=108299), not later than **noon (12 pm local time) on Monday, January 25<sup>th</sup> 2010.**

## **SECTION 11: FREEDOM OF INFORMATION**

Ireland's Freedom of Information regime is provided for by way of the Freedom of Information Acts 1997 and 2003. The regime seeks to contribute to the maintenance of a high level of openness and transparency within the public service. In line with its obligations and duties under the relevant Acts, the Department strives at all times to meet this objective fully.

It should be noted, therefore, that any information supplied by tenderers in response to this notice may be subject to disclosure in accordance with the provisions of these Acts. In cases where tenderers consider that specific information supplied by them should not be disclosed, they should identify the relevant information and specify the reasons under the Acts why it should not be disclosed. The Department will consult with tenderers about information identified in this way, before making a decision on any relevant request received under the Freedom of Information Acts.

Copies of the Freedom of Information Act 1997 (No. 13 of 1997) and the Freedom of Information Act 2003 (No. 9 of 2003) are available online at [www.oireachtas.ie](http://www.oireachtas.ie).

## **SECTION 12: GENERAL CONDITIONS OF TENDER**

The following conditions will apply:

- i. Tenders must include the information stipulated at Section 6 above. Failure to provide the information specified may lead to the rejection of the tender without evaluation.

- ii. The Department is not bound to accept the lowest or any tender submitted and will not be liable for any costs incurred by tenderers in responding to this request for tender by way of the preparation of tenders, including electronic copies, or any associated work effort.
- iii. Tenderers will treat the details of all documents supplied in connection with this request for tender and evaluation as private and confidential.
- iv. The Department undertakes to use its best endeavours to hold confidential any information provided by tenderers in response to this invitation to tender, subject to the Department's obligations under law, including the Freedom of Information Act 1997 to 2003. Please note that, in response to a request under the Freedom of Information Acts, any information supplied by tenderers in response to this notice may be subject to disclosure in accordance with the provisions of these Acts. In cases where tenderers consider that specific information supplied by them should not be disclosed, they should identify the relevant information and specify the reasons under the Acts why it should not be disclosed. The Department will consult with tenderers about information identified in this way, before making a decision on any relevant request received under the Freedom of Information Acts.
- v. Information supplied by a tenderer will be treated as contractually binding. The Department reserves the right, however, to seek clarification or verification of any such information.
- vi. The tender price stated in the tender document shall be that amount which is necessary to carry out all of the work required to satisfy the requirements of this request for tender. This sum shall include costs of all labour, materials, travel and other expenses, overheads, insurance, permits, licenses and liaison with relevant authorities.
- vii. The tender price will include the cost of providing copies of any documents produced in the course of the evaluation. Thirty (30) hard copies of the final report will be required. A copy of all reports in an agreed electronic format will also be required.
- viii. In responding to this Request for Tender, tenderers should state that their tax affairs are in order and that obtaining a Tax Clearance Certificate from the Revenue Commissioners will not pose a problem for them.
- ix. A successful non-resident tenderer or contractor (or sub-contractor) will be required to promptly produce a Statement of Suitability available from the Irish Revenue Commissioners. Application for tax clearance may be made to the Irish Revenue Commissioners at the Office of the Collector General, Tax Clearance Section, Sarsfield House, Limerick, Republic of Ireland (Telephone +353-61-310310).

- x. The successful tenderer or contractor will be required to produce evidence of adequate professional indemnity insurance before the contract is awarded.
- xi. Any conflicts of interest involving a successful tenderer or contractor on appointment (or sub-contractors in the event of a consortium bid) must be fully disclosed to the Department. The Department reserves the right to take whatever action it considers appropriate in case of failure to disclose a conflict of interest or in case of mis-declaration of conflict of interest.
- xii. Any registerable interest involving the successful tenderer or contractor and the Minister for Communications, Energy & Natural Resources, members of the Government, members of the Oireachtas or employees of the Department, or their relatives, must be fully disclosed along with the submission of tender, or should be communicated to the Department immediately upon such information becoming known to the successful tenderer or contractor, in the event of this information only coming to their notice after the submission of a bid and prior to the award of the contract. The terms 'registerable interest' and 'relative' shall be interpreted as per section 2 of the Ethics in Public Office Act, 1995.

## APPENDIX A

### ARTICLE 45 OF EU DIRECTIVE 2004/18/EC

#### Personal situation of the candidate or tenderer

1. Any candidate or tenderer who has been the subject of a conviction by definitive judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

- (a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA<sup>1</sup>;
- (b) corruption, as defined in Article 3 of the Council Act of 26 May 1997<sup>2</sup> and Article 3(1) of Council Joint Action 98/742/JHA<sup>3</sup> respectively;
- (c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities<sup>4</sup>;
- (d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering<sup>5</sup>.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned.

Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract who:

- (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

<sup>1</sup> OJ L 351, 29.12.1998, p. 1.

<sup>2</sup> OJ C 195, 25.6.1997, p. 1.

<sup>3</sup> OJ L 358, 31.12.1998, p. 2.

<sup>4</sup> OJ C 316, 27.11.1995, p. 48.

<sup>5</sup> OJ L 166, 28.6.1991, p. 77. Directive as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (OJ L 344, 28.12.2001, p. 76).

- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;
- (c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;
- (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;
- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

- (a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;
- (b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

## APPENDIX B

### **Statement by Minister Eamon Ryan on the future of Ireland's electricity sector**

Energy Minister Eamon Ryan today (March 13<sup>th</sup> 2008) announced a number of measures delivering on the Government's objectives of a sustainable, secure and competitive electricity sector in Ireland.

The Minister announced:

- Publication tomorrow of legislation to enable EirGrid to ensure the urgent delivery of the East-West interconnector by 2012
- Regulations establishing the ESB Subsidiary to undertake the Distribution System Operator Role of ESB Networks
- An ambitious, innovative corporate strategy being progressed by the ESB
- A Transmission Development Strategy to 2025 being finalised by EirGrid

In this context, independent analysis is to be carried out on the issue of transmission unbundling with full engagement and input from the direct key stakeholders. A senior independent Chairperson will be appointed by the Minister to oversee this analysis.

#### **Minister's Statement:**

1. The Energy Policy White Paper published in March 2007 and the Programme for Government of June 2007 set out a range of policy objectives to achieve environmental and energy sustainability in the context of maintaining security of supply and competitiveness.

In the intervening period, it has become increasingly clear both at EU and national level, that the climate change agenda and energy security are becoming increasingly urgent. This is especially true of the electricity sector, which in November of last year entered a new era with the establishment of the all-island Single Electricity Market.

2. I regard the achievement of targets we have set for emissions reduction, renewables and energy efficiency improvement as absolute priorities for this sector. ESB and EirGrid have key roles to play in developing plans for their delivery, working closely with CER and my Department and securing their approval where appropriate.
3. The recently published All-Island Grid Study shows the possibility of over 40% of electricity to be provided from renewable generation by 2020. This poses significant technical challenges in terms of the operation of the National Transmission System, which I am confident, can be addressed and resolved by EirGrid.
4. It also requires a whole new approach to the design and operation of the transmission system, one requiring significant development and investment. I look forward to the early publication of EirGrid's Transmission Development Strategy 2025 to support renewable energy generation making this level of contribution to Ireland's electricity needs. It is clear that there are enormous challenges building

- ESB and EirGrid will prioritise the development and delivery of the wider sectoral challenges which I have outlined. The delivery of the power generation asset strategy, the establishment of an independent network subsidiary, the delivery of the East-West interconnector, the Transmission Development Strategy, and a new collective focus on sustainability are clear and urgent priorities.
  - At the same time this will provide an opportunity to carry out an independent analysis (including costs, benefits, regulatory impact assessment, etc.) of the transmission issue in the context of EU developments and the very recent all island single electricity market.
  - Input to this study will be sought from the direct key stakeholders: ESB and EirGrid managements, ESB and EirGrid unions, ESB ESOP, CER and the Department of Finance. The Terms of Reference for this analysis will be drafted in such a way that guarantees that all views will be taken into account in a fully transparent way.
  - I will shortly appoint a senior independent figure to chair this examination. The Chairperson will appoint independent consultants to carry out the technical and economic analysis.
  - Acknowledging the Tripartite Agreement of 2000, I will be asking the Group of Unions to engage in the process outlined earlier and to address the outcome with ESB management using their partnership model. This model has been a successful vehicle for change and transformation of ESB and the evolution of competition in generation and supply markets are testament to its success.
9. I believe this process offers a way forward for all parties. It is designed to maintain the integrity of key stakeholders and deliver a result that will be acceptable to all.

Eamon Ryan TD  
Minister for Communications, Energy and Natural Resources  
March 13<sup>th</sup> 2008

**APPENDIX V**

Proposal Submitted by Consultant

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