



TREASURY TASKFORCE

Private Finance

TECHNICAL NOTE No.4

How to appoint and work
with a preferred bidder

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HOW TO APPOINT AND WORK WITH A PREFERRED BIDDER

1 INTRODUCTION

1.1 STATUS OF TREASURY TASKFORCE TECHNICAL NOTES

1.1.1 This note is the fourth in a series of Technical Notes to be issued by the Treasury Taskforce providing practical guidance on key technical issues which arise from the implementation of the Private Finance Initiative (PFI). Each note focuses on a specific area of the procurement process where experience has shown that project managers and other interested parties would value assistance.

1.1.2 The note is designed to assist public sector procurers to choose the right moment to enter into exclusive negotiations with a preferred bidder following competition and to carry out the negotiations in a fair and cost effective manner. It is advisory rather than mandatory, providing guidance on good practice. Accounting Officers may wish to take the guidance into account in accordance with their value for money responsibilities.

1.1.3 The note should be read in conjunction with Treasury Taskforce Technical Note No. 2 *“How to Follow EC Procurement Procedure and Advertise in the OJEC”*. In accordance with the advice contained in that document, this note assumes that where the EC procurement rules apply, the procurement is being carried out under the negotiated procedure. Consequently, the term ‘Invitation to Negotiate’ or ITN is used to mean the documentation which is sent out to bidders following prequalification which sets out the procurer’s requirements and invites the first substantive proposals from bidders. For those projects which involve a further stage before the appointment of a preferred bidder, invitations for further proposals are dealt with under the ‘Best and Final Offer’ (BAFO) documentation.

1.1.4 The text of this note is available on the Internet at <http://www.treasury-projects-taskforce.gov.uk>.

1.2 STRUCTURE OF THE NOTE

1.2.1 Section 2 of this note explains what procurers should look for when moving towards the appointment of a preferred bidder and identifies some potential problem areas. Sections 3 and 4 give an overview of the appointment process and identify some criteria which can be used to choose between competing bids. Section 5 outlines some options which may be pursued exceptionally if negotiations with a preferred bidder have proved to be unsuccessful.

2. CONSIDERATIONS LEADING TO THE APPOINTMENT OF A PREFERRED BIDDER

2.1 THE RIGHT PARTNER

2.1.1 When a preferred bidder is appointed, there should be very clear expectations on both sides, based on a solid business case. A true partnership relationship based on trust should be established as early as possible during the final negotiations in order to produce a successful outcome. While the value for money basis and risk allocation on which a preferred bidder’s

appointment takes place must be preserved, a common sense and open approach rather than an adversarial over-detailed approach should secure the most successful outcome.

2.1.2 A preferred bidder should be able to demonstrate before appointment that it has the resources and management skills to undertake the pre-contract negotiations in an efficient and professional manner and that it has the ability to deliver, post-contract signature, a complete solution to meet the output specification. Equally, a preferred bidder should have access to information such as public sector management structures and approval processes.

2.2 TIMING

2.2.1 After the appointment of a preferred bidder, it may be difficult to maintain competitive tension. Since competition is the best driver of value for money, great care needs to be taken that the appointment is not made prematurely. However, prolonging competition beyond a point that is optimal increases costs for both bidders and procurers alike and increases the risk of the withdrawal of bids. Key contractual terms should normally be agreed before the appointment of a preferred bidder. For this to be effective, the bidder's financiers will need to have reviewed and accepted the contract terms. Financiers should also be required to supply confirmation that they have committed to the project (to the extent agreed in advance at the shortlisting stage), and have tested the robustness of the financing proposals for the purpose of the required finance (see paragraph 4.3.4).

2.2.2 Preferred bidder stage is the final stage before financial close and contract signature. Having already assessed the deliverability, affordability and value for money of the preferred bid, the time during this stage should be used to finalise detailed drafting of the project terms, and the schedules to the contract that specify the operation of the service and define the nature of the asset as proposed in the bid. The time should be used for putting the financial documentation into place rather than for substantive negotiations over commercial terms or price.

2.2.3 Generally, the ideal time to appoint a preferred bidder is when there is little risk that the finalisation of contract terms details, due diligence and funding arrangements (and, when required, TUPE negotiations and other negotiations with employees and/or detailed planning clearance or other statutory consents) will lead to any material change to the proposed deal.

2.2.4 Anything further, such as an adjustment of the risk transfer originally agreed, a reassessment of the price at which the bids were placed, or the reopening of key contract terms, would normally be indicative of a preferred bidder being selected prematurely and may involve a breach of EC procurement rules.

2.2.5 During the procurement process, procurers should be committed to fairness in their treatment of bidders, delivering agreed plans and timetables, and devote well-organised, well-advised and capable procurement staff to the project. With the right level of resources, a realistic timetable and adequate preparation before each stage of the competition it should be possible to avoid:

- ⚡ unilateral extensions to agreed timetables;
- ⚡ excessive clarification;
- ⚡ unplanned resubmission of bids or re-pricing of offers; and
- ⚡ arbitrary changes to the selection process.

2.2.6 Procurers should avoid setting unrealistic timetables as this creates a risk that bidders may drop out of the competition or submit non-compliant bids. However, procurers should also reserve the right, subject to any legal constraints, in the light of changing circumstances

to modify the timetable, to seek re-submission of bids and to change the selection process in any way which seems likely to improve value for money, although this should be unnecessary where the timetable is realistic and the project team is adequately resourced.

2.3 DEVELOPING PROPOSALS FOR THE EVALUATION OF BIDS

2.3.1 Before a procurer can move to the stage of appointing a preferred bidder, it will need to have established the sequence of events between the Invitation to Negotiate (ITN) and the appointment. There are a number of issues which must be considered and agreed early in the competitive process, ie before the issue of the ITN, particularly those issues that will require clarification and negotiation with bidders during the ITN response period.

2.3.2 Confidence about deliverability should be considered. Procurers should decide whether any bid should be rejected, irrespective of how it is rated for price, where there are clear grounds for lacking confidence that, for example, the specified quality of service will be achieved, that the service will be available by the required date, that the funding proposals are sufficiently robust, or that key assumptions (such as demand/traffic forecasts) on which the bid is based are realistic.

2.3.3 Once the deliverability issue has been resolved and a minimum quality threshold has been established and notified to bidders, it will be useful to consider how conflicts between cost and quality will be resolved. For example, to what extent the procurer should pay a premium for what is perceived to be a higher quality service (eg triple glazing where this does not contribute towards a lower NPV). This is an issue which requires a cost benefit analysis, taking advice from financial advisers as necessary.

2.3.4 When more than one contract is to be awarded from a single competition, there needs to be a basis for deciding whether more than one contract might be awarded to a single supplier. In order to reach such decisions, the procurer needs to ensure that there is a clear invitation in the ITN for bidders to indicate any discount they are willing to offer if awarded more than one contract, and to provide the evidence required to enable the procurer to be satisfied that adequate arrangements would be in place to manage the greater risks assumed by a supplier in such circumstances. In some cases, procurers may identify unacceptable risks in letting more than one contract to one bidder, as was the case for example in the letting of the first two major PFI prison contracts.

2.3.5 At the beginning of the PFI procurement process, it is important to consider any market share or strategic market development issues (ie whether or not it is important to look at potential effects on similar future projects). The criteria to be followed in these circumstances must have been explained at a very early stage to bidders to ensure that they have had the opportunity to comment before final decisions are taken (at least prior to the ITN and possibly at OJEC stage). Procurers must take legal advice before developing and applying such criteria.

2.3.6 A detailed methodology for making selection decisions must be finalised by the procurer before responses to ITNs are received. This should only be revised if a further request for Best and Final Offers (BAFOs) is called for, in which case, any revised scoring system must be finalised before these are submitted. Bidders should be clear on how their bids will be evaluated.

2.3.7 Similarly, ITNs should indicate how variant bids will be dealt with. Variant bids can be considered if a compliant bid is submitted. It is important to ensure that bidders understand that there is an acceptable way of proposing alternative solutions but that non-compliant bids will result in their exclusion from competition. The criteria for evaluating variant bids must

have also been determined internally before bids are submitted, although there may have to be some fine-tuning in the light of what is actually received. This is an issue on which procurers need to work closely with advisers, including departmental legal advisers. These matters need to be explained to bidders in ITNs and may be clarified in discussion during the ITN response period.

3. *AWARD CRITERIA: OVERVIEW*

3.1 PREFERRED BIDDER AWARD CRITERIA

3.1.1 To give bidders the best chance of putting forward proposals which will meet the procurer's requirements, procurers should make the award criteria for the appointment of the preferred bidder and award of the contract clear to bidders. This is also a requirement of procurement law. However, detailed scoring and weighting matrices need not be provided. It is recognised that any central set of criteria must be sufficiently flexible to take into account the circumstances of different sectors with different projects. Nevertheless, experience to date suggests that there are some common criteria that it might be sensible to include. These are explored in Section 4 below.

3.1.2 Before the appointment of a preferred bidder, procurers and their advisers must be satisfied that bidders have:

- ≠ presented proposals that meet the output specification;
- ≠ provided whole life value for money;
- ≠ accepted the key contractual terms and the required transfer of risk;
- ≠ confirmed access to finance that does not require underwriting by the public sector or revisions to the contractual terms;
- ≠ quoted a unitary charge and specified other costs, if there are any, that are affordable to the public sector;
- ≠ if a consortium, demonstrated fully that it is a cohesive entity rather than a disparate collection of constructors and service providers.

3.1.3 Before coming to a decision on a preferred bidder, in addition to being satisfied on the above points, procurers should also be completely satisfied that:

- ≠ the proposals to meet the output specification, including the strength of the underlying assumptions in the outline business case are sufficiently flexible;
- ≠ it is able to pay for the deal (taking into account any balance sheet implications);
- ≠ proposed contract management arrangements are appropriate;
- ≠ outline planning permission has been obtained as required; and
- ≠ it has identified a strategy for dealing with any attempts by the preferred bidder to renegotiate key aspects of the proposed deal. This strategy may include the establishment of a reserve bidder, being ready to invite "refreshed" bids (see Section 5 below), or in exceptional circumstances, to re-tender.

4. *AWARD CRITERIA: SPECIFIC EXAMPLES*

4.1 PROPOSALS THAT MEET THE OUTPUT SPECIFICATION

4.1.1 It is a prerequisite that this criterion be met in full. The overall requirement having been specified, private sector bidders in competition are likely to come up with a variety of

proposed solutions to meet it. The judgement to make before the appointment of a preferred bidder is whether that bidder offers a deliverable solution to achieve the specified levels of service (ie without being “gold-plated” at the one extreme, or falling below acceptable standards at the other) and will represent value for money. Although innovation should be encouraged, the risks associated with it should be assessed fully. The extent to which the bidder’s proposals will meet the output specification must be assessed over the whole life of the contract.

4.1.2 If it looks likely that any bidder has the scope to refine its bid to match more closely the procurer’s requirements, and it is considered appropriate to do so (legal advice having been obtained) then the opportunity should be given to shortlisted bidders to improve their earlier bids within a certain timescale. It clearly benefits the public sector to take advantage of competition and to negotiate and agree as much as possible before the appointment of a single preferred bidder, although care needs to be taken not to infringe the intellectual property rights of any of the bidders.

4.2 WHOLE LIFE VALUE FOR MONEY

4.2.1 As PFI is about the delivery of a stream of services over the longer term, judgements should be made on whole life costs rather than on individual cost components incurred at particular junctures. The evaluation of bids needs to focus on the overall cost of services over the life of the contract rather than on the phasing of items of expenditure or individual cost components within it. For example, in competing for the same service requirement, two rival bidders may have different approaches, with one choosing to have high up-front capital investment with lower future upgrade/maintenance requirements, and the other relatively low initial capital investment but with more frequent renewals and upgrades. The procurer should concern itself with the overall NPV of bidders’ unitary charges rather than the mix or balance of individual components within it. If the asset reverts to the public sector at the end of the contract, the procurer should also assess the residual value of that asset to get a whole life value of each bidder’s proposals.

4.2.2 Procurers should not unpick bids by comparing and contrasting constituent elements against each other. However, it may be useful to identify separate cost elements in order to enable procurers to seek clarification where, for example, a strong bid on price may have underestimated the resources required for a particular service element. If overall deliverability and price over the contract period are both judged to be capable of achieving the output specification and are affordable, then the bid offering best value for money in terms of whole life cycle costs and quality of service should be accepted, provided that acceptable financing terms have been secured (see 4.4 below).

4.2.3 The achievement of value for money will normally be driven by the private sector bidding in competition. A Public Sector Comparator (PSC) is a systematic approach to informing the Accounting Officer’s judgement on whole life value for money compared with alternative approaches to achieving the public sector’s objectives. There should, therefore, normally be a PSC. But it is important to bear in mind that this is not to be regarded as a pass/fail test, it is a quantitative way of informing judgement. If there is only one feasible bid on the table, it may not represent a particularly good deal. In this situation the procurer must assess the bid very carefully. In the absence of competitive tension, comparison with a publicly funded option (PSC) will be critical. Procurers should be as open as possible with bidders in terms of disclosure of the PSC.

4.2.4 Alternative benchmarks have also been considered as appropriate by the National Audit Office. For example, where there has been only one final bid or, exceptionally, where after a preferred bidder has been selected it is necessary to change the specification, in the

absence of competitive tension, benchmarking of the bidder's price for the service will be important as well as the usual comparison with a PSC. The benchmarking may be with a similar recent privately financed project or with information on costs and rates of return which is available in the market (see the NAO Report on the Dartford and Gravesham Hospital).

4.2.5 Further guidance on PSCs can be found in Treasury Taskforce Policy Statement No.2 "Public Sector Comparators and Value for Money" and in a forthcoming Technical Note (No.5) "How to Construct a Public Sector Comparator."

4.3 ACCEPTANCE OF KEY CONTRACTUAL TERMS AND THE REQUIRED TRANSFER OF RISK

4.3.1 While certain elements of the contract will always remain to be negotiated in the period between appointment of the preferred bidder and financial close, it is important that a potential preferred bidder accepts, and the price reflects, the key contractual terms that form the basis of the agreement between the parties. In practice this means that it is content with the extent of the risks being transferred.

4.3.2 Experience to date suggests that the areas in the contractual terms with the potential to delay deals the most have included:

- ≠ the allocation of general and specific legislative risk and the boundary between them;
- ≠ the compensation arrangements for termination and the trigger events for default;
- ≠ the payment mechanism - particularly the balance between availability, demand and performance and the triggers for defaults;
- ≠ indexation - relating both to the base costs eligible for indexing and the appropriate indices;
- "step-in" rights; and
- ≠ changes in client requirements.

4.3.3 The standardisation of contract terms should help resolve these issues more easily. Nevertheless, the procurer needs to be satisfied that agreement on the contract terms has been reached, and that they are consistent with the price proposed, before appointing a preferred bidder. Otherwise, it risks having them reopened at a later stage when there are no other bidders remaining, and mounting pressures to meet the project timetable.

4.3.4 The procurer can be exposed to a number of risks:

- ≠ inexperienced bidders may choose apparently attractive financing packages which ultimately prove not to be deliverable;
- ≠ bidders may not anticipate the requirements of debt/equity providers, or be over optimistic about the amount of risk they can pass on to sub contractors; and
- ≠ because funders' technical due diligence procedures often only begin after competition has ceased following the appointment of a preferred bidder, they may be conducted with less of the disciplines of the competitive process and the procuring authority may have little control over how long they take (see paragraphs 4.4.4 to 4.4.10 below on due diligence).

4.3.5 With the increased standardisation of contract terms and more detailed specifications of the ITN, funders should accept the commercial allocation of risk and reward agreed between the procurer and the bidders before selection of a preferred bidder. In doing this, changes to the commercial deal which alter the agreed balance of risk may not be sought when competitive pressure has been relaxed (see Section 5).

4.3.6 To a certain extent, these risks arise in all PFI deals. The use of suitable expert advisers can help to reduce them, but many of the difficulties are attributable to a failure to tie down contractual documentation in a realistic manner at sufficiently early a stage in the bidding process. Too often in the past ITNs have been issued with no, or incomplete, contract documentation. Output specifications have been, at one extreme, unnecessarily detailed or, at the other, too vague, and proposed payment mechanisms have reflected an uncommercial risk allocation. Procurers must be clear about their real requirements from the outset and should introduce mechanisms to measure how a preferred bidder will deliver the services required.

4.3.7 Procurers may come under pressure from their own time constraints and from the cost concerns of bidders to leave significant elements of the contract to be negotiated after the appointment of the preferred bidder. Experience has shown this to be very counter-productive. Negotiating complex and commercially sensitive terms and conditions with a single bidder has proved a long, costly and sometimes inconclusive process. It is important that the procurer and shortlisted bidders agree the contractual terms/principles that form the agreement between the parties to inform the evaluation of their proposals and contribute to the selection of a preferred bidder. In practice, this means that the preferred bidder is content with the extent of the risks being transferred, has had the opportunity to discuss those risks, price them, and reach an accord with the proposed lenders as to how the risks are to be allocated within the consortium structure.

4.3.8 In order to minimise these potential difficulties, the Treasury Taskforce recommends that all the key commercial terms in the contract documentation and output specification, including the terms of any parent company guarantees that may be deemed necessary, should be negotiated fully before the appointment of a preferred bidder. In this way the activities post-preferred bidder appointment are more likely to be limited to the detail of the financing arrangements and service specifications/descriptions of the asset to be provided, whilst the basic commercial agreement remains intact.

4.3.9 The procurer should provide the fullest possible documentation in the ITN, including full drafts of the contract, performance standards, payment mechanisms, draft term sheets, with clauses on compensation on termination, default trigger events and step-in rights. There should also be a clear and realistic statement of the required degree of risk transfer and the degree of agreement to be achieved on all key aspects of the project. Unrealistic expectations of risk transfer or changes to any key aspects of the project after the issue of tender documents are likely to involve abortive costs for bidders and should be avoided.

4.4 CONFIRMATION OF ACCESS TO FINANCE

4.4.1 A bid cannot be credible without satisfactory assurances about the adequacy of funding. This is particularly important for larger projects. Prior to the appointment of a preferred bidder, the procurer should approach the proposed funding institutions behind the proposed bidder to seek assurances that they are willing (in principle) to finance the proposed venture and that they have had sight of, and are in principle content with, the commercial terms. Procurers should be aware, however, that it does not necessarily follow that a preferred bidder will have a single captive source of finance. If an alternative option is maintained, (eg bank vs. bond), in order to retain an element of competition beyond preferred bidder stage, it should be clear to the procurer how the benefits of that further competition will be shared.

4.4.2 As much information as possible should be obtained on:

- ≠ the quality of the funding institutions, including their experience of PFI and similar projects. This might include credit ratings and views from advisers on ability to deliver;

- €# the financing plan, the proposed method of funding (eg bonds) and an outline of the financing facilities to deliver that plan;
- €# any security guarantees or other support the funders will require from the consortium;
- €# the bidders' and their funders' due diligence requirements, distinguishing between legal and technical due diligence (see 4.4.6 below);

4.4.3 The Taskforce recommends that, as part of the documentation accompanying responses to an ITN, procurers should require bidders to submit preliminary term sheets for the facilities required as part of the financing plan. The deliverability of the financing plan should, however, be an explicit feature in the criteria for evaluating bidders' proposals, and a matter on which procurers should seek the expert advice of their own financial advisers in order to test proposals received from bidders.

4.4.4 Before the appointment of a preferred bidder, it is also recommended that procurers obtain confirmation from the debt providers appointed to arrange or underwrite the debt facilities to the project to the effect that:

- €# the debt providers have reviewed the results of financial model runs reflecting the results of the commercial proposals agreed between the procurer and the bidder as a basis on which the bidder can be selected as preferred bidder, and are satisfied, subject to final credit approval, that those results are capable of supporting the debt facilities envisaged by the project's financing plan; and
- €# where realistic, all key aspects of the debt providers' due diligence process capable of affecting their willingness to enter into the financing have been completed to their satisfaction. It will be necessary to identify, on a case-by-case basis, which aspects of the due diligence process fall into this category. In a road project, for example, due diligence on traffic forecasts might well be considered as a key aspect, while due diligence on insurance matters might be regarded as more routine.

4.4.5 To sign off due diligence on certain issues, debt providers may need to engage specialist consultants and bidders themselves may have to incur greater design development costs than it is realistic to expect at this stage. In deciding how far they wish the due diligence process to have been completed before a preferred bidder is appointed, procurers will also need to pay attention to the level of cost to which bidders are likely to be put as a result, and in establishing their requirements procurers should consult their financial advisers to determine what is reasonable in the circumstances. During negotiations prior to the selection of a preferred bidder, the full extent of due diligence requirements should be ascertained. Clients may need independent professional and technical advice to reach a view on this issue.

4.4.6 There is a distinction between legal and technical due diligence. The former concerns itself with the formal aspects of contract signature, such as ascertaining the position on vires. The latter is closely intertwined with the potential contractor's ability to successfully complete the project. It would, for example, include being satisfied about ground conditions in a DBFO roads project.

4.4.7 There is much the public sector can do to help with both, particularly with legal due diligence. At an early stage in the negotiations bidders should be asked what their and their funders' legal and technical due diligence requirements are likely to be.

4.4.8 Even with technical due diligence, procurers should agree with shortlisted bidders the extent to which:

- €# the procurer can provide the technical due diligence information sought to all parties on a standard basis, eg traffic forecasts or condition surveys; or

- €# one or more of the bidders could undertake technical due diligence (eg site and condition surveys) and then pool the information, with the costs being shared between all the shortlisted bidders (and the procurer as necessary) on a basis to be agreed in advance.

4.4.9 Where the information serves a common purpose to all bidders, this should prove an attractive proposition in keeping down bidders' costs. Where a particular bidder requires information peculiar to its unique solution, it may not be happy to adopt a pooled approach. If so, then the bidder will have to decide whether the cost of the due diligence is justified by the potential competitive edge that its innovative solution will give to its bid.

4.4.10 How far legal due diligence can properly be expected to have progressed before the appointment of a preferred bidder will be influenced by the quality of the information on the commercial terms included in the ITN. At the very least, debt providers should have reviewed a detailed contract summary reflecting the allocation of risks between the procurer and the bidders, and should be satisfied, subject to any detailed matters arising during any subsequent full documentary due diligence, that the allocation of risks is acceptable as a basis for the provision of the debt facilities. In the future, as standard template contracts are introduced, it should increasingly be possible to ask debt providers to sign off the templates themselves. Where a type of project has become fully established as a commodity product, changes should be made to the template to meet the circumstances of the particular case. This will enable the negotiating process to be brought to a close with bidders and their debt providers before competition ceases.

4.4.11 Prior to the appointment of a preferred bidder, debt providers should also be asked to confirm that, subject to documentation and subject to any outstanding aspects of their due diligence programme, they have received approval "in principle" from their credit committees or other internal sanctioning authorities to enter into financing on the basis of the financing plan. A timetable to financial close should also be agreed, with confirmation from the debt providers of the extent of their due diligence programme still outstanding.

4.5 A UNITARY CHARGE THAT IS AFFORDABLE TO THE PUBLIC SECTOR

4.5.1 A procurer cannot accept a proposed deal that is either poor value but affordable, or good value but unaffordable. Before appointing a preferred bidder, the procurer will need to be satisfied that the best value for money option is on the table, within the amount of money available to spend. The proposed accounting treatment of the deal needs to be considered as part of the affordability assessment (see the Treasury Taskforce's Revised Technical Note No. 1 "How to Account for PFI Transactions").

4.5.2 PFI deals have to be affordable not just within a budgetary cycle, but over the duration of the contract, which can be for 25 - 30 years. This will have particular importance for certain public sector bodies where the deal may be very material to their annual spending. The following affordability criteria should be satisfied for a deal to proceed:

- €# The procurer should be satisfied that, after meeting the payments for PFI deals, there is still sufficient funding to meet other priority spending, including good value investment that does not lend itself to PFI. The accounting treatment of a transaction will be relevant here, especially if the transaction is on balance sheet; and
- €# The private sector partner, and the banks who fund the project, should be satisfied that the procurer is able to confirm formally that it can meet the full PFI payments, including termination obligations, over the duration of the contract, provided services are delivered to agreed levels of quality and on time.

4.5.3 The Treasury will monitor this in general terms rather than by specific projects. Treasury Taskforce Policy Statements No. 1 (PFI and Public Expenditure Allocations) and No. 3 (PFI and Public Expenditure Allocations for NDPBs) give further guidance on affordability.

4.6 CONFIRMATION THAT THE CONSORTIUM IS A COHESIVE ENTITY

4.6.1 Although there are a number of single service providers, most PFI contracts are bid for by consortia which bring together a range of capabilities required to deliver the service requirement. Typically, a consortium will comprise a service provider, a facilities management company, a constructor/builder and a financial institution. These may be, and often are, supplemented by other service providers/operators and equity fund investors. As far as the procurer is concerned however, many of the advantages of PFI lie in it only needing to deal and contract with a single point of contact representing its private sector partner. This issue should be addressed early in the competitive process, and procurers should be convinced that a consortium is a fully cohesive entity before the appointment of a preferred bidder is made.

4.6.2 The procurer cannot insist on the execution of full legal documentation at an early stage as proof of the cohesiveness of the consortium's constituent membership, although it is within the procurer's rights to seek a bid agreement between the consortium members as early as at OJEC stage. This need be no more than acceptance by the parties to enter a joint bid. New consortia cannot be disadvantaged by an insistence on their legal formation before bidding.

4.6.3 It is important in the business context from the outset that the consortium acts as one contracting entity. Indications of this will be, for example:

- €# whether there is a single point of contact for discussion or whether the public sector has to deal separately with each member of the consortium;
- €# whether representatives from the consortium speak for the consortium as a whole or for interests within it; and
- €# whether the documentation embraces the consortium as a whole.

4.6.4 It may be useful to ask the consortium to demonstrate its cohesiveness by providing tangible evidence within its bid submission, for example minutes of team meetings or statements of the extent to which the parties are working together to maximise value for money through a cohesive approach. Past track records of the consortium, or members within it, acting together on other projects might be good supporting evidence, although care must be taken not to discriminate against a newly formed consortium, and to ensure that such information is taken into account at the correct stage of the process. These considerations can be developed during the negotiations leading up to the appointment of the preferred bidder.

4.6.5 Above all, a consortium should be able to demonstrate the management ability to deliver the output specification within the project timetable. Where a consortium seeks the procurer's approval for a change in a consortium member or debt provider after the selection of a preferred bidder, the new party should first be required to sign up to the terms and principles previously agreed by the consortium and its constituent members. This preserves continuity and protects the time and effort invested to that stage in tying down key contractual terms and agreed risk transfer.

5. REMEDIAL OPTIONS

5.1 RESERVE BIDDERS

5.1.1 Prolonging the competitive process by obliging other shortlisted bidders to keep full bid teams in place, when the reality is that the procurer has internally decided on a preferred bidder, is unreasonable to the unsuccessful bidders. It exacerbates the costs of bidding, ties up resources that might otherwise have been aimed at winning business elsewhere, and it does not foster the good faith implicit in delivering successful public private partnerships. It also risks contravening procurement law.

5.1.2 A well conducted competition, with a realistic timetable set at the outset which is achieved, should minimise the need for extended negotiations with multiple tenderers. However, public sector experience, especially of some of the early PFI deals, has shown that some key contractual negotiation issues have arisen after appointment of preferred bidder, introducing potential difficulties on the way to contract signature. Elsewhere, this guidance suggests that most of these issues should be resolved before selection of preferred bidder. Nevertheless, some procurers might feel that their negotiating position during this critical phase could be weakened without an alternative arrangement to fall back on in exceptional circumstances.

5.1.3 Having used other methods of protection against “deal drift”, such as a clear negotiating line marking out the limit of any concessions before the deal ceases to be good value for money relative to alternatives, as an exceptional fall-back option the practice of appointing a reserve bidder can meet both public and private sectors’ needs. Under such a system, at the time that a preferred bidder is appointed, the next favoured bidder in terms of meeting scored criteria, can be invited to be a reserve bidder. Reserve bidder status would mean that should negotiations with the original preferred bidder fail to reach financial close, the procuring entity could offer the reserve bidder the opportunity for further negotiations leading to a signed PFI contract, but would not allow any attempts to reopen previously agreed issues in order to improve its position.

5.1.4 At the time of being selected, a preferred bidder should be told of the existence of a reserve bidder. The procurer should strongly consider setting key negotiating deadlines for reaching agreement, after which date it would reserve the right to invite reserve bidders to participate. Reserve bidders should be kept in touch with key developments in negotiations in order to minimise delays if they are subsequently brought into play. Legal advice should be taken when considering the use of a reserve bidder to ensure that the procedure for reinstatement is understood and that this approach is viable for the project in question.

5.1.5 Within the scope of the agreed contract terms and price, the impact on value for money of any changes which are proposed after the preferred bidder has been appointed should be assessed. Further guidance on the assessment of value for money can be found in Treasury Taskforce Policy Statement No. 2 “ Public Sector Comparators and Value for Money “ and in the forthcoming Technical Note No. 5 “ How to Construct a Public Sector Comparator”.

5.1.6 Following appointment, a preferred bidder may develop advantages (eg building up a relationship with a local planning authority) which would make introducing a reserve bidder later on a difficult proposition. Procurers should also bear in mind that reserve bidders will soon have other projects to work on and may be reluctant to incur further significant costs to develop their existing bids, without some sort of contribution towards these costs. Procurers should assess whether, in very exceptional circumstances, the costs of any contribution are outweighed by the potential increase in value for money by having the reserve bidders refine their proposals.

5.2 REVISITING THE SHORTLIST

5.2.1 An alternative to the appointment of a reserve bidder, depending on the strength of the shortlist, is to invite ‘refreshed’ bids. This would ensure that all shortlisted bidders are on an equal footing. In practice a reserve bidder may have done little, if anything, to modify the bid when initially missing out on being named preferred bidder, so there may be nothing to be lost by this approach.

5.2.2 Consideration needs to be given to the EC procurement rules before deciding, exceptionally, to invite refreshed bids. For example, it will not always be possible to return to an earlier stage of a competition in this way if significant time has elapsed, or if fundamental aspects of the project require changes. Therefore, although seeking refreshed bids is intended to offer equal treatment to all previous bidders, procurers should be aware of any circumstances which make such a return inadvisable in a particular case. Legal advice should be taken before adopting this approach.

5.2.3 The effectiveness of either strategy (ie reserve bidder or revisiting the shortlist) is likely to diminish with the passage of time if deals are perceived as suffering from endless “negotiating drift”. This will usually result in the reserve bidders, or other shortlisted candidates, losing interest in the project and, thus, no longer providing a credible negotiating alternative.