

MOD Private Finance Unit
Guidance Note
Selection of a Preferred Bidder for
PFI Projects

Version 2

August 2008

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Selection of a Preferred Bidder for PFI Projects

Constraints

1. The EC Public Procurement Regulations apply to MOD contracts unless the nature of the work qualifies for an exemption. Reference must be made to the detailed guidance on the mandatory procedures to be followed.

Authoritative Guidance Summary

2. This document provides guidance on the selection of Preferred Bidder in a PFI project.

Background

3. The stage after selecting the preferred bidder covers the period running up to financial close and contract signature. This stage, which can be relatively lengthy (4 - 12 months), is used to finalise the detailed drafting of the contract schedules that specify the operation of the service and define the nature of the asset proposed in the preferred bid. Also, if the bidder is proposing to obtain third party finance it is at this stage that the detailed work is done to close the bankability of the deal - a process known as "due diligence". It should be realised however that this stage is not the time for substantive negotiations over the requirement, commercial terms, price or any other material issues. It is therefore important that the project team should not down-select to the preferred bidder if it can be anticipated that :
 - an adjustment to the current position on risk transfer is required;
 - a price reassessment is likely;
 - there is a need to change any of the key contract terms.
4. If it is envisaged that significant changes in any of these respects is likely to occur, or that a change is needed to the proposal on the table to make the deal acceptable to the Authority, then there is a clear indication that premature selection of the preferred bidder is being proposed. This may involve a breach of EC procurement rules as these lay down the criteria for contract award. Should the selection of the preferred bidder occur before the proposal is sufficiently mature and clear then there is clearly a danger that further detailed consideration of these issues may change the basis upon which the bid was originally selected and/or give the preferred bidder an opportunity to make changes not afforded to other bidders. The EC procurement rules impose the following as the criteria for contract award:

- the lowest price, or;
 - the offer which is the most economically advantageous.
5. For the majority of MOD projects the latter criterion applies, in which case the MOD may use criteria, which is important to the particular project, such as: the period for completion or delivery, quality, aesthetic and functional characteristics, technical merit, after sales service, technical assistance, price and the 8 “pre-requisites” referred to in Paragraph 8 below for contract award. It is important that the contract notice or contract documentation clearly sets out the evaluation criteria and their relative importance to the same level of detail as will be utilised by the evaluation team. If the MOD fails to state the criteria or such criteria is not sufficiently clear it will only be able to award the contract on the basis of lowest price.

Process

6. Even if the acquisition team are under pressure of time, for example from the need to meet the ISD or because of bid cost concerns, the lessons have been repeatedly learnt that leaving material elements of the deal unresolved at this point is counter-productive. It will take more resources in the long run, and could well result in a less satisfactory deal. It has been seen time and again that attempting to negotiate even small improvements to the Authority’s position after the preferred bidder has been appointed (as given, say, in the Best and Final Offer response) is fraught with difficulty.
7. At the same time, the acquisition team should not prolong the competitive process and oblige bidders to keep bid teams in place when in reality the choice of a preferred bidder can be properly and sensibly made. It is seen as good practice to de-select bidders who are highly unlikely to win the competition as soon as this fact becomes clear. However, the need to retain a viable and sustainable competition must be a primary consideration.

Selection of Preferred Bidder

8. Before down-selecting to the preferred bidder the acquisition team must be satisfied that all of the remaining bidders have given sufficiently clear, verified and mature proposals to allow a firm view to be taken against each of the eight categories in the table below. This could be achieved using separate issue papers, matrices (e.g. to define risk transfer and compensation on termination arrangements) and heads of agreement type documents.

Table 1: Pre-requisite for illustrative project selecting Preferred Bidder

#	Pre-requisites	Bidder 1	Bidder 2	Bidder 3
1	proposals that meet the output specification	?	N	Y
2	provide vfm	Y	N	Y
3	accepted key T&Cs	N	Y	N
4	accepted risk transfer	?	Y	Y
5	no scope to seek price revisions	N	N	Y
6	confirmed access to finance	Y	Y	Y
7	quoted unitary charges that are affordable	Y	N	Y
8	demonstrated that they are a cohesive team	Y	N	?

[Note that the table has been filled by hypothetical answers to illustrate the points made in the paper. In reality there is a greater degree of interdependence among the criteria such that, for example, a “no” answer on pre-requisite 1 would imply “no’s” on numbers 2, 5, 6 and 7.]

9. The eight criteria are expanded upon in the Treasury Taskforce’s Technical Note number 4, “How to appoint and work with a Preferred Bidder”.
10. It should be noted that the answers against some of the criteria will not necessarily be objective and may require judgements to be made on the evidence supplied by bidders. For example, unconditional access to finance will not be confirmed until financial close, but a view must be taken, based on experts’ advice, as to the likelihood of the funds’ being made available.
11. At the end of the bidding phase, or after Best and Final Offers, the project team should reject any bid, irrespective of how it is rated for price, if there are clear grounds for thinking that, for example:
 - the specified quality of service will not be achieved,
 - that the service will not be available by the required date,
 - that the funding proposals are not sufficiently robust, or
 - that key assumptions on which the bid is based are unrealistic.
12. It should be noted that the compliance of each bid, along with its accuracy, is assumed to have been adequately covered earlier in the evaluation process. Bids that clearly do not comply or are clearly incorrect in some way should be addressed at the start of the process and these issues should be resolved before a bidder comes forward to be considered as a potential preferred bidder. While quality of the bid itself is evidence of a bidder’s resource and commitment, the selection process

should not be designed to choose as preferred bidder the consortium with the best bid compiling team.

Implementation

13. When, as in the illustrative example shown in the table above, the bids do not achieve a mark of "Yes" against each of the eight categories then it is clear that it is premature to select the preferred bidder. The recommended way forward is for a package of work to be put in place with each of the remaining bidders (at least two) so that a position can be reached when at least one of the bidders' proposals is sufficiently mature, clear and acceptable to enable a "Yes" to be placed in each box in the above table. This work usually revolves around a further series of focused negotiation meetings. In some circumstances this may mean the Authority considering carefully its fallback position, which should be clearly defined in the internal negotiating brief, on some issues and possibly relaxing sufficiently to a position such as to make a failing aspect of a proposal acceptable.
14. As is said above, it is important that this round of further work is carried out whilst there is still competitive pressure because the chances on improving on a material issue after selecting the preferred bidder are slim.
15. The ideal case is when **two or more proposals** are such that each achieves the "All Yes" marking. In this eventuality the prescribed evaluation criteria (in line with the EU public procurement rules if these are being followed) should be used to select the preferred bidder. It is usual for one or more of the best losing proposals to be retained (either formally or informally) as backups should the detailed negotiation and due diligence with the preferred bidder falter. Consequently any constructive debriefs should be left until after contract award.
16. If only **one proposal** achieves the "All Yes" position, then it must be selected as the preferred bidder, irrespective of other considerations.
17. If **no proposal** achieves that "All Yes" position, even after further negotiations have been exhausted and the Authority has considered carefully to see whether its fallback position with regard to any sticking points could be further relaxed, then it must be concluded that a PFI deal is not workable. Depending on the reasons for the failure, it may be that it is not possible to proceed with the procurement at all.
18. Notwithstanding the above, it is possible to continue work with only one bidder despite the failure of all the proposals from achieving the "All Yes" marking. This is when a preferred bidder (and a reserve bidder if feasible) is formally nominated so that the Authority can concentrate on only one bidder and continue negotiating and exploring the transaction to see if an acceptable deal could be struck. However this should be seen

as very much a sub-optimal position, is not considered good practice where a competition has been run, and is only credible for short periods. The chances of completing the deal are clearly reduced as the majority of competitive pressure needed to resolve issues in a reasonable timescale have been lost. In practice the consequences of this option are very close to those resulting from the premature selection of the preferred bidder.

KEY POINTS

- Negotiations with a preferred bidder should not involve any points of substance, or any issues going to price.
- The preferred bidder should not be selected until that proposal achieves an “All Yes” marking against the eight criteria.
- A clearly defined work package should be instigated to enable an “All Yes” marking to be achieved by at least one, and ideally at least two, bidders. This should include a consideration of Authority’s fallback positions.
- Only proposals that achieve an “All Yes” marking should be considered for down-selection to preferred bidder, irrespective of other features such as technical merit or low price.

Further Information

- Treasury Taskforce Technical Note No. 4, “How to Appoint and Work with a Preferred Bidder”.