



MINISTRY OF DEFENCE

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# **MOD Private Finance Unit Guidance Note Estates matters in PFI projects**

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## **MOD PFU Contacts**

This document can be found on the MOD PFU intranet-site at :

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## CONTENTS LIST

Document Change Record	3
Contents List	4
Constraints	5
Authoritative Guidance Summary	6
Authoritative Guidance	7
Further Help & Support	28

## **Estates matters in PFI projects**

### **Constraints**

1. This guidance note applies to all members of the acquisition community involved in PFI projects. It supplements existing policy and guidance on estates matters with regard to PFI projects produced by Defence Estates, HM Treasury and the MOD Private Finance Unit (PFU). The guidance itself is not mandatory; this is partly an acknowledgement of the principle and need for flexibility of approach. However acquisition teams are required to provide a full presentation, explanation and justification on their proposed procurement approach, incorporating the planning, design and estates matters in their Outline Business Case (OBC) and Market Engagement Review Note (MERN). Where there is significant difference from this guidance, explanation and justification is required. It is for acquisition teams to review and confirm the acceptability of its proposed approach with the MOD PFU and Defence Estates at the earliest opportunity.

2. This guidance should be read in conjunction with the following policy and guidance:

- a. All PFI projects involving construction in the built environment must comply with the requirements of JSP 434 (Defence Construction in the Built Environment) which provides comprehensive 'best practice' guidance on all aspects of the delivery of Defence construction in the built environment. Its objective is to improve effectiveness within the context of practicality, achievability and value for money on an ongoing basis. In JSP 434, best practice is identified and derived from a combination of Ministerial commitments, mandated regulations and policies, industry best practices, research and applications to tools and improved performance, and business and commercial processes. In doing so it is acknowledged that construction is a significant, highly regulated, particularly diverse activity and, as such, will be subject to continual onward change.
- b. The EC Public Procurement Regulations apply to MOD PFI contracts unless the nature of the work qualifies for an exemption. Reference must be made to the detailed policy and guidance on the mandatory procedures to be followed – available on the Acquisition Operating Framework.
- c. Competitive Dialogue in 2008: OGC/HMT joint guidance

on using the procedure.

- d. HM Treasury mandates the use of standardised terms and conditions for PFI contracts. Therefore all PFI projects/programmes shall comply with HM Treasury's Standardisation of PFI contracts (SoPC) version 4 and the MOD Standard Project Agreement version 1 (including subsequent Addendums) unless specific and explicit authority to derogate from it has been obtained from HM Treasury<sup>1</sup> and MOD PFU<sup>2</sup>.
- e. MOD PFU Guidance Notes: Preparing the Invitation to Negotiate for PFI projects and Negotiation of PFI projects.
- f. Further guidance on other site and estates issues to be addressed in PFI contracts can be found in Parts 2, 3, 5, 9 and 10 of MOD PFU Guidance Note: MOD Project Agreement version 1.

### **Authoritative Guidance Summary**

3. This guidance provides advice on how the planning (consent) process and design development and completion of PFI projects might be managed under the Competitive Dialogue procedure and provides specific guidance at different stages of that procedure. It has been developed from guidance issued by Local Partnerships and is used with their kind permission. It should:

- a. ensure greater awareness and consistency across the acquisition community of the need to establish a coherent and 'straight-line' procurement approach by Initial Gate and certainly before proceeding to market;
- b. avoid premature and unduly high bid requirements by of bidders and consequently high bid costs which can threaten both competition and value for money;
- c. avoid uncertain, inappropriate and prolonged procurement approaches that can undermine procurement as well as threatening competition and value for money.

4. This guidance also sets out the principles which apply when land and building assets are included in PFI deals, It has been developed from guidance issued by the National Health Service Private Finance

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<sup>1</sup> For SoPC4 derogations which must be approved via the MOD PFU.

<sup>2</sup> For MoD PAV1 derogations.

Unit and is used with their kind permission. It addresses the following issues:

- a. the overriding principles governing the inclusion of land and buildings in PFI deals;
- b. the criteria for judging whether or not to include land in a PFI deal;
- c. the sale of surplus MOD land to the private sector for subsequent sale in exchange for a reduction in annual unitary payments;
- d. land or buildings leased to the private sector;
- e. the use of assets donated by third parties to effect a reduction in annual unitary payments.

## **Authoritative Guidance**

### **PLANNING PROCESS & DESIGN DEVELOPMENT**

#### **Introduction**

5. The challenge for acquisition teams under the Competitive Dialogue procedure is to balance the requirements of the procurement regulations with the need to achieve contract signature while operating in a world where change can occur between the closure of the dialogue phase and contract signature.

6. It is clear that it is not appropriate to leave material issues unresolved beyond the closure of dialogue because neither the acquisition team nor the bidders have addressed the issue, or considered it necessary to do so, without good cause.

7. It is important to recognise that the dialogue phase is the phase in the procurement procedure which offers the greatest flexibility. The dialogue phase should therefore continue until the acquisition team is satisfied that it has identified and defined its requirements with sufficient precision to enable robust final tenders (which fully meet these requirements) to be submitted.

8. To achieve a satisfactory result under Competitive Dialogue requires significant preparation, planning and effort by the acquisition team, including communication with the supplier market. Acquisition teams must undertake significant “front-end” work: engaging and informing the market; developing robust project governance; planning their procurement; developing their specification; being clear of their requirements; ensuring affordability and value for money; preparing their data; checking

their property interests and requirements; commissioning relevant surveys capable of being relied upon by bidders; facilitating the commissioning of joint bidder surveys; and issuing well-developed contracts at the start of the dialogue. Not only is this likely to lead to more efficient and quicker procurement, it will help achieve compliance with the requirements of the competitive dialogue process.

9. All substantial aspects of bids need to be agreed before conclusion of the Competitive Dialogue. Only limited discussion and clarification, and which does not amount to negotiation, is permitted once the dialogue stage has closed. All parties need to be fully aware of the limited room for manoeuvre following the closure of the dialogue and the implications of this before closing dialogue and issuing the Call for Final Tender.

10. The acquisition team must be confident that the remaining bidders have sufficient information/clarity to be able to submit fully developed and “final” bids at this stage of the procurement. If there is a subsequent need to go beyond “confirmation, clarification or fine-tuning” then this may require a cancellation of the procurement process and a re-procurement.

11. Under Competitive Dialogue, the acquisition team therefore needs to anticipate as far as possible the issues and factors that may impact or constrain the procurement to ensure that it can proceed in an efficient and effective manner. It is important to make robust early plans, as bidders and the acquisition team will need to make substantial arrangements for resources, people and advisers for the procurement process.

12. Where the acquisition team has not done the necessary planning work needed to ensure that the selected approach is the right one, it will not be able to change tack later when the defects in its preparation become apparent – if it cannot operate the procurement process within the parameters set for the competition (outlined in the Contract notice and other competition documents) then it may have to cancel the procurement and start again.

13. Though after final bids have been submitted it is only permissible to clarify, specify and fine tune both bids and the scheme, this does not necessarily mean that the Contract has to be complete in every detail at this stage. The requirement to include all elements in the Final Tender should be interpreted in the light of the greater need and sometimes necessity in complex projects to leave some matters of detail open. It is to be expected that some parts of the Contract will still need to be clarified or confirmed post award of Preferred Bidder status.

14. Changes can occur during the period after receipt of final tenders at Preferred Bidder stage for a number of reasons which



may be within or outside the control of the acquisition team. At Preferred Bidder award discussion the final detailed design may not be completed to the extent necessary for detailed planning permission to be applied for (including meeting consultation requirements).

15. Acquisition teams should not seek though to defer necessary but difficult decisions. It is clear that it is not appropriate to leave issues unresolved beyond the closure of dialogue just because neither the acquisition team nor the bidders have addressed the issue, or considered it necessary to do so, without good cause and justification.

16. Where the main elements of an issue have been addressed in the final tender but such aspects remain to be completed to the level required for contractual close, it is valid for the detail and approvals in question to be developed and sought only once a preferred bidder has been appointed.

17. In these circumstances, where there are known or likely reasons for change to occur during the post dialogue phase, it is important that the tender rules and Contract lay down clear and non-discriminatory mechanics governing the finalisation of such issues. The acquisition team should develop transparent mechanisms to allow such changes to be handled in a pre-agreed manner. If all bidders accept the specified approach as a condition of submission of their final bids, then the acquisition team might mitigate some of the potential risk of a legal challenge on the grounds of lack of transparency.

18. However, any later specification or fine-tuning of final tenders would still have to be within the boundaries set out in the relevant bidder's final tender. The acquisition team should take all reasonable measures to ensure that the likely form of final solutions which bidders have indicated during the dialogue phase they will provide are as far as reasonably possible not likely to be subject to substantial change to the basic features of the tender.

19. It is not possible to state a set of common contract issues that can appropriately be resolved after the closure of the dialogue and the submission of final tenders covering all complex procurements and their individual circumstances. In judging whether issues are suitable to resolve after close of dialogue, acquisition teams should consider whether it is practically possible or cost effective to resolve the issue, either wholly, partly or at all, before closure of the dialogue. Although each case needs to be dealt with in the context of the specific procurement, issues or details that might best be dealt with after the submission of final tender include detailed planning permission and design completion.

## **Planning Process**

20. The planning process in England works within a strong national statutory legal, policy, guidance and procedural framework that sets both the parameters within which Local Planning Authorities (LPAs) must comply and have regard to and also the discretion available to LPAs in respect of their consideration of planning applications and making of planning decisions.

21. Good practice would include the MOD and bidders having discussions with the LPA on planning matters. These should take place from the earliest practical scheme development stage, Expression of Interest, and with bidders from the earliest appropriate stage following OJEU (which may be at Invitation to Submit Outline Solutions (ISOS) or Invitation to Submit Detailed Solutions (ISDS)), continuing up to Call for Final Tender. Such discussions by acquisition teams (either supported by or led by Defence Estates) are extended versions of Pre-Application Discussions that are offered by all LPAs to all applicants for planning permission and as such are good practice and legally acceptable. Such direct contact can help ensure effective communications and common understanding between the LPA, the MOD and bidders of LPA guidance and requirements. It is also considered appropriate and good practice for LPAs to corporately work with and advise acquisition teams on planning matters including assessing and providing views on bids from an early stage.

22. However LPA planning officers should not be involved in actual decision-making on bids and from Call for Final Tenders should formally separate themselves from bid assessment including selection of the Preferred Bidder. At this stage, the acquisition team and bidders should be confident that the final bids, which are based on the final solutions, will be acceptable to the LPA including in respect of expected Section 106<sup>3</sup> and/or Section 278<sup>4</sup> requirements.

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<sup>3</sup> Planning obligations (or 'Section 106 agreements') in England under section 106 of the Town and Country Planning Act 1990 as substituted by the Planning and Compensation Act 1991, are private agreements negotiated, usually in the context of planning applications, between local planning authorities and persons with an interest in a piece of land, and intended to make acceptable development which would otherwise be unacceptable in planning terms. Obligations can also be secured through unilateral undertakings by developers. Section 106 provides that anyone with an interest in land may enter into a planning obligation enforceable by the Local Planning Authority identified in the instrument creating the obligation. Such an obligation may be created by agreement or by the person with the interest making an undertaking. The use of the term "planning obligation" reflects the fact that obligations may be created other than by agreement between the parties (that is, by the developer making an undertaking). Such obligations may restrict development or use of the land; require operations or activities to be carried out in, on, under or over the land; require the land to be used in any specified way; or require payments to be made to the authority either in a single sum or periodically. The obligations created run with the land so they may be enforced against both the original covenantor and against anyone acquiring an interest in the land from him/her unless the agreement makes specific to the contrary. The obligations can be positive (requiring the covenantor or his/her successors in title to do a specified thing in, on, under or over the land) or negative (restricting the covenantor or his/her successors from developing or using the land in a specified way).

23. Providing that such a proactive and reasonable approach is taken by the acquisition team, it is considered that any reasonable LPA imposed changes and variations to the tender would not be considered to be likely to distort competition or have discriminatory effect. This position is subject to the provision that the acquisition team and preferred bidder could not have better managed things to avoid this situation and that the changes could not have reasonably been anticipated or predicted.

24. Any change of requirement or circumstance that was reasonably predictable, or directly under the acquisition team's control, arising from an LPA decision is unlikely to be a satisfactory reason though, from a legal perspective, to change a bid during the post dialogue phase. In these instances, significant or material change that lead to changes in the basic features of the final tender or substantial changes (technical or price) would potentially call into question the need for a fresh procurement process and legal advice should be obtained from Central Legal Services (CLS) where this situation arises.

25. Any later specification or fine-tuning of final tenders required by the MOD would also have to be within the boundaries set out in the relevant bidder's final tender. It is inappropriate for a acquisition team to undertake any changes to bids received after the closure of dialogue, if these changes could have been anticipated and dealt with during the dialogue stage. Issues should be resolved as early as possible in the process and should only be left to Preferred Bidder stage where resolution at an earlier stage cannot be achieved.

26. Bidders also cannot re-open discussions with the acquisition team at this stage and non-compliant bids will not be acceptable. It is important for the acquisition team to ensure that all parties are aware of these restrictions and the practical implications that arise from them.

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<sup>4</sup> A Section 278 Agreement (under Section 278 Highways Act 1980) allow developers to enter into a legal agreement with a County Council to make alterations or improvements to the public highway. Examples of work covered by this type of agreement would include new access into a development site i.e. a roundabout, signalised junction, right turn lane or a simple priority junction. A Section 278 Agreement may also be required for works such as a new signalised pedestrian crossing or improvements to existing junctions close to the development site. Where highway schemes require developers to offer up land within their control for adoption as public highway the agreement would be combined with an agreement under Section 38 of the Highways Act 1980. The agreement process allows the County Council to review the detailed design of developer promoted schemes to ensure that the design and construction of highway schemes and new infrastructure complies with appropriate standards. The developer is responsible for meeting all costs associated with the design and implementation of Section 278 schemes. In addition the developer must pay a fee to cover the County Council's administration and inspection costs. Where a developer constructs infrastructure that requires additional maintenance the agreement process enables a commuted sum to be secured to fund the future maintenance. The Section 278 Agreement often requires the developer to deposit a bond with the County Council to cover the total cost of the highways works. The bond is released incrementally with 50% released on completion of the works and the remainder released after the completion of a satisfactory 12 month maintenance period. If a developer fails to perform or observe any of the conditions of the agreement we can call in the bond to complete the works.

27. The acquisition team and bidders should therefore ensure at Call for Final Tenders, as far as is reasonably possible, that the likely form of final solutions which bidders have indicated during the dialogue phase they will provide are likely to meet planning requirements, including expected Section 106 and/or Section 278 requirements, whilst also being financially robust and affordable.

## **Design Completion**

28. Requesting the design to the level of detail required for contractual close is not considered necessary at the ISDS or final tender stage: indeed this should be discouraged to assist bidders in managing their bid costs and thereby to help promote competition and maintain competitive tension. However, any subsequent design details must be within the scope of the original design that was submitted at final tender stage (in both technical and pricing terms).

29. This issue may be approached, for example, through specifying a specific or composite Royal Institute of British Architects (RIBA) Stage design level for the purpose of selecting a Preferred Bidder with subsequent progress to a more detailed RIBA Stage design level for Final Planning Permission and contract close. This process of progressive design development, provided it has no or minimal impact on overall cost, should be regarded as clarification of the design which is still permissible under the competitive dialogue procedure.

30. RIBA provides an Outline Plan of Work that recommends Work Stage Sequences by Procurement Method. The Outline Plan of Work organises the process of managing and designing building projects and administering building contracts into a number of key work stages. For PFI/PPP project procurement, RIBA sets out two work stage sequences, one of which is the OGC model tender process. This reflects the Competitive Dialogue process and is generally appropriate for PFI procurement.

31. RIBA recognises though that Work Stage sequences and content may well vary and overlap to suit the detail of the procurement approach used and the nature of the individual project under consideration.

32. The RIBA Outline Plan of Work and Work Stage Sequences are therefore presented as guidance, as opposed to requirements, on the progressive development and agreement of a design approach for PFI schemes of various types and procurement approaches to be procured through the Competitive Dialogue. The Scheme Design Brief, the base design document, will develop and alter as the project develops along the different RIBA Work Stage Sequences. Such an approach allows for the planned and managed progressive development of design detail through the scheme development and procurement process with finalisation at Preferred Bidder stage within the scope of the original

design submitted at Final Tender (in both technical and pricing terms).

33. Specifying a RIBA Stage design level for the purpose of selecting a Preferred Bidder with subsequent progress to a more detailed RIBA Stage design level(s) for Contract Close would appear to comply with the Competitive Dialogue process and requirements.

### **Local Development Framework**

34. Project proposals should be developed by MOD with explicit regard and reference to the LPA's Local Development Framework (LDF) and its Development Plan Documents including Core Strategy, Proposals Map, Planning Policies and Supplementary Planning Documents.

35. Where project proposals do not comply with the LDF, the acquisition team should explain and justify its submission and provide evidence as to how Planning Permission is likely to be supported by the LPA. Such justification is essential in circumstances where proposed sites are not allocated for the proposed residential or related development purposes. Such a position would also mean that the LPA could not approve Planning Statements / Development Briefs.

36. There will be a presumption by MOD that project proposals should comply with the LDF or have demonstrated that deviation from the LDF is acceptable to the LPA by OBC stage. For further advice, acquisition teams should contact Defence Estates.

### **Single & Different Solutions Procurement Approaches**

37. The acquisition team needs to decide at the beginning of scheme development if it is adopting either:

- a. **Single Solution approach** – a common development or works requirement to be developed by the MOD, based upon a MOD site(s) scheme design brief(s), possibly also with Outline Planning Permission being obtained by the MOD, to be the subject of compliant bids and development / refinement with bidders through the procurement process. This approach may be appropriate and be proposed for a PFI new-build scheme where the nature of the scheme reflects a standard development and where the scheme is of limited scale. This approach may also be appropriate for refurbishment works schemes where there is little scope for innovative solutions. Or:
- b. **Different Solutions approach** – a base proposal to be developed by the MOD, based upon a MOD site(s) scheme design brief(s) and, possibly also as appropriate, a base estate or area masterplan that

provide a basis for varying individual design and commercial solutions to be developed by bidders. (An estate or area masterplan provided for this purpose can be developed to different levels of completeness or detail depending upon MOD's perspective on their requirements and its use). This approach is more appropriate and is proposed for more complex and major PFI estate schemes that include new-build and where there is a case for allowing greater creative scope and flexibility (though within MOD set parameters) with regard to the final layout or 'footprint', design and commercial solution. A different solutions approach would also be appropriate for a PFI new-build scheme, larger-scale scheme or a scheme with multiple sites.

### **Phased Development Proposals**

38. In the event of the proposed phased development of a major site or of a number of sites, and consequent phased design development and obtaining of full planning permission, any such proposal should be explicitly set out in the Expression of Interest, and if provisionally approved at this stage, also in the Outline Business Case.

39. Any such proposals that appear to depart from the MOD PFU guidance and SoPC4 would require in principle consideration and approval by both MOD PFU and HMT, before the Expression of Interest could be fully considered by MOD PFU and formally considered and approved by the MOD PFU. The proposals would be subject to similar review and approval with regard to full detail and practical implementation at OBC stage.

40. Phased site development proposals may also be necessary in some circumstances to ensure the fundability and bankability of a project of significant scale and capital funding requirements.

41. Details of any phased site development proposals in respect of the solutions approach and of related design, planning, funding, commercial risk, required derogations and delivery issues should be developed and submitted in full to MOD PFU for advance consideration and determination at the earliest opportunity before submission of a formal OBC.

### **Expressions of Interest Stage**

42. An Expression of Interests will be stronger where there is a Design Brief and Planning Statement (or a single such document) for the site(s) in question. Their development and use will support the Expressions of Interest proposal and costing of the scheme and result in a more robust project at OBC stage.

43. The Design Brief at Expressions of Interest stage may be a

Strategic Brief or an initial Feasibility Study informed by scheme and site specific technical studies and analysis, probably more weighted to desk than field data, relevant generic information and professional advice. This approach will allow the provision of appropriately evidenced and referenced design proposals and costs.

44. The Planning Statement may be adopted and form part of the LPA's Development Plan Documents. Preferably, the Planning Statement should be a draft document with a view to its development and subsequent adoption.

#### Expressions of Interest Base Requirements

Elements	Status	MOD PFU Policy
Design Brief	RIBA Stage n/a	Advised
Planning Statement	LPA Adopted / Draft	Advised – Draft
LDF	Compliant (includes an approved deviation)	Advised

#### **Outline Business Case Stage**

45. The OBC should be supported by both a Design Brief and Planning Statement (or a single document) for the site(s) in question.

46. The Design Brief at Outline Business Case stage would comprise Outline Proposals and be informed by relevant scheme and site specific technical studies and analysis, to the appropriate level of detail, with balance between desk and field data, relevant generic information and professional advice. This approach will allow the provision of appropriately evidenced and referenced design proposals and costs.

47. The Planning Statement may be adopted, thereby forming part of the LPA's Development Plan Documents. However it may be more appropriate to have a draft Planning Statement at OBC stage, which is supported by the LPA, but which is subject to consultation with bidders and adoption by ISDS stage.

48. For a Single Solution approach Outline Planning Permission (OPP) is not required at Outline Business Case stage and is not a scheme development or procurement requirement. Full or Detailed Planning Permission can be obtained at Preferred Bidder stage without interim Outline Planning Permission. However an acquisition team may decide that the nature of its PFI scheme, where the scheme reflects a standard development or lends itself to design development led by the MOD and acceptance by bidders of a commonly-agreed solution. The related obtaining of Outline Planning Permission by OBC stage by the MOD may also be considered to make the project subsequently more attractive to the market. In

such circumstances it is suggested that the acquisition team:

- a. if it considers seeking OPP at OBC stage, ensures and demonstrates thorough market consultation in order to firm up its design proposals and secure potential bidder 'buy-in' before obtaining OPP and OBC submission / approval; or
- b. if it is seeking OPP by ISDS stage, consults with bidders at ISOS stage in order to firm up its design proposals and secure bidder 'buy-in' before obtaining OPP.

49. Option a) may provide more cost certainty at OBC stage though restrict bidder input and design flexibility whilst Option b) will allow for greater bidder input and design flexibility though should be accompanied by appropriate contingency provision at OBC stage.

50. For a Different Solutions approach, where appropriate a professionally prepared and robustly costed draft base Masterplan that complies with the Design Brief and Planning Brief should be produced by the acquisition team. The purpose of such a Masterplan, in addition to helping to underpin the affordability of a project, is to provide a basis for design and commercial solutions to be developed by bidders, within local authority set parameters. (An estate or area masterplan for this purpose can be developed to different levels of completeness or detail depending upon a local authority's perspective on their requirements and its use).

51. The Masterplan should be supported by all relevant stakeholders, and therefore have been subject to stakeholder and local resident consultation, and also be supported by the LPA and comply with the Development Framework. However the Masterplan should not have any formal LDF status.

52. For a Different Solutions approach, complex or major schemes should not have OPP at OBC stage as this would limit market flexibility and creativity in developing solutions (as well as being expensive in terms of both cost and time and with a likelihood of being abortive). Where an MOD project has obtained OPP or considers obtaining OPP during the procurement process before Preferred Bidder stage, an acquisition team must demonstrate to MOD PFUs satisfaction that such Planning Permission would provide a sound basis for procurement.

53. For a Different Solutions approach, acquisition teams are strongly recommended not to seek OPP for complex or major schemes. It is advisable for acquisition teams to review and confirm the acceptability of seeking OPP with the MOD PFU and Defence Estates at the earliest opportunity before submission of a formal OBC.



54. Any proposed material change in the planning and design procurement approach following OBC endorsement will require MOD PFU approval.

#### OBC Base Requirements

Elements	Status	MOD PFU Policy
Design Brief	RIBA Stage C	Advised
Planning Statement	LPA Adopted / Draft	Advised
Estate / Area Masterplan	n/a [for Single Solution approach]  LDF Compliant, not adopted [for Different Solution approach]	n/a  Advised, as appropriate,
Outline Planning Permission	LPA Approval [for Single Solution approach]  n/a [for Different Solution approach]	Discretionary  Presumption against OPP
LDF	Compliant (includes approved deviations)	Required

#### **Invitation to Submit Outline Solutions Stage**

55. There should be an MOD Design Brief and Planning Statement (or single such document) for the site(s) in question.

56. The Design Brief at ISOS should comprise Outline Proposals and be informed by relevant scheme and site specific technical studies and analysis, to the appropriate level of detail, with balance between desk and field data, relevant generic information and professional advice. It should also be informed and developed from a market perspective through bidder consultation at ISOS stage and have bidder 'buy-in' for ISDS. This approach would allow the MOD to firm up its design proposals and secure bidder 'buy-in'.

57. The Planning Statement may be subject to consultation with bidders and subsequently adopted and form part of the LPA's Development Plan Documents by commencement of the ISDS stage (if not formally adopted earlier)..

58. For Single Solution approaches, the acquisition team may seek OPP by ISDS stage, consulting with bidders at ISOS stage in order to firm up its design proposals and secure bidder 'buy-in' before obtaining OPP (or continue to develop the Design and Planning Briefs through ISOS with bidders and planning officers with a view to seeking Detailed Planning Permission at Preferred Bidder stage)

59. For Different Solution approaches, a base estate or area

Masterplan should comply with the Planning Statement, Design Brief and the LDF, be supported by the LPA but have no formal LDF status. A base estate or area Masterplan should be subject to review and consultation with bidders at ISOS to assist both the MOD and bidders to understand acquisition teams design and planning scope and requirements. Masterplan review and responses by bidders could therefore also form an element of MOD assessment of bidders at ISOS stage.

### ISOS Base Requirements

Elements	Status	MOD PFU Policy
Design Brief	RIBA Stage C	Advised
Planning Statement	LPA Adopted / Draft [for Single Solution approach]	Advised
Estate / Area Masterplan	n/a [for Single Solution approach]  LDF Compliant, not adopted and for reference only [for Different Solution approach]	n/a  Advised, as appropriate,
Outline Planning Permission	LPA Approval [for Single Solution approach]  n/a [for Different Solution approach]	Discretionary  Presumption against OPP
LDF	Compliant (includes approved deviations)	Required

### **Invitation to Submit Detailed Solutions Stage**

60. There should be a Design Brief and Planning Statement (or single such document) for the site(s) in question.

61. For Single Solution approaches, the Design Brief at ISDS will comprise Detailed Proposals and be informed by relevant scheme and site specific technical studies and analysis, to the appropriate level of detail, supported by comprehensive desk and field (including survey) data, and professional advice. This approach will allow the MOD to firm up its design proposals and secure bidder 'buy-in'.

62. For Different Solution approaches, the Design Brief at ISDS should comprise Outline Proposals and be informed by scheme and site specific technical studies and analysis, supported by comprehensive desk and field data, and professional advice. This

approach will allow the MOD firm up its design proposals and secure bidder 'buy-in'.

63. For Different Solution approaches, The Planning Brief should be adopted and form part of the LPA's Development Plan Documents.

64. For Different Solution approaches, The base estate or area Masterplan helps illustrate the parameters of local authority bid requirements and provides a reference point for the MOD and bidders from ISDS onwards. It is not a basis for compliant bids though bidders may decide to reflect elements of the Masterplan in their bids at their discretion.

65. The Planning Statement should be adopted and form part of the LPA's Development Plan Documents.

66. For Single Solution approaches where OPP exists, bidders will be asked to tender against the MOD's single solution, the common development scheme, subject to provision of detail to the appropriate RIBA stage.

#### ISDS Base Requirements

Elements	Status	MOD PFU Policy
Design Brief	RIBA Stage C+	Advised
Planning Statement	LPA Adopted	Advised
Estate / Area Masterplan	n/a [for Single Solution approach]  LDF Compliant, not adopted and for reference only [for Different Solution approach]	n/a  Advised, as appropriate,
Outline Planning Permission	LPA Approval [for Single Solution approach]  n/a [for Different Solution approach]	Discretionary  Presumption against OPP
LDF	Compliant (includes approved deviations)	Required

#### **Call for Final Tender Stage**

67. At Call for Final Tender the acquisition team will require and bidders should ensure submission of the final and complete tender documentation to the required RIBA design stage.

68. For Single Solution approaches where OPP exists, bidders must ensure that tenders meet OPP requirements and are capable of being refined and finalised to meet reserved matter requirements and likely Section 106 and/or Section 278 requirements at DPP stage, whilst being financially robust and affordable.

69. Where there is no OPP, the acquisition team and bidders should ensure that tenders are likely to be acceptable from a planning perspective including likely Section 106 and/or Section 278 requirements at DPP stage whilst being financially robust and affordable.

#### Call for Final Tender Base Requirements

Elements	Status	MOD PFU Policy
Design Brief	RIBA Stage D	Advised
Planning Statement	LPA Adopted	Advised
Estate / Area Masterplan	n/a [for Single Solution approach]  LDF Compliant, not adopted and for reference only [for Different Solution approach]	n/a  Advised, as appropriate,
Outline Planning Permission	LPA Approval [for Single Solution approach]  n/a [for Different Solution approach]	Discretionary  Presumption against OPP
LDF	Compliant (includes approved deviations)	Required

#### **Preferred Bidder Stage**

70. By Preferred Bidder stage the MOD should be in possession of tender documentation that is materially complete, financially robust and affordable and agreed between the acquisition team and the Preferred Bidder.

The Preferred Bidder should complete the detailed design to the required RIBA stage for application for Detailed Planning Permission. The Preferred Bidder must be made responsible for obtaining planning permission<sup>5</sup> and implementing development consents. MOD will remain responsible for MOD operational issues such as staff travel surveys, provided reasonable costs incurred are met by the Preferred Bidder. The Preferred Bidder should be responsible for all its own and any third party costs for making the planning application (including any planning consultants or surveys required) and must make provision for all costs associated with Section 106 and/or Section 278 requirements in the financial model (financing them if necessary). Acquisition teams should ensure these arrangements are set out in the Invitation to Participate in Dialogue so that bidders (and especially the Preferred Bidder) are left in doubt of the

<sup>5</sup> Advice will be required from Defence Estates and the projects legal advisors over the advantages/disadvantages of putting the planning application in MOD or the bidder's name.

responsibilities of each party during this stage.

71. Design detail must be within the scope of the original design that was submitted at Final Tender stage, in both technical and pricing terms, including with regard to likely Section 106 and/or Section 278 requirements, subject to any new LPA requirements.

#### Preferred Bidder Base Requirements

Elements	Status	MOD PFU Policy
Design Brief	RIBA Stage E	Advised
Planning Statement	LPA Adopted	Advised
Estate / Area Masterplan	n/a [for Single Solution approach]  LDF Compliant, not adopted and for reference only [for Different Solution approach]	n/a  Advised, as appropriate,
Outline Planning Permission	LPA Approval [for Single Solution approach]  n/a [for Different Solution approach]	Discretionary  Presumption against OPP
Planning Application in accordance with Planning Brief	Adequate for Detailed Planning Permission	Required
LDF	Compliant (includes approved deviations)	Required

#### **Contract and Financial Close Stage**

72. For PFI schemes which have a significant estates element requiring significant planning consent which is fundamental to the success of the project, Detailed Planning Permission should be obtained from the LPA prior to Contract and Financial Close between the MOD and the Preferred Bidder. For PFI schemes which have an insignificant estates element requiring little or no planning consent and that which is required is not fundamental to the success of the project, then Detailed Planning Permission may be obtained from the LPA after Contract and Financial Close between the MOD and the Preferred Bidder, with obtaining planning consent becoming a condition precedent to the Contract.

73. It is considered that Contract and Financial Close should be scheduled to take place three months after Detailed Planning Permission has been granted by the LPA (to allow for MOD Judicial Review risk, subject to no material planning condition arising).

#### Close Base Requirements

Elements	Status	MOD PFU Policy
Design Brief	RIBA Stage F1	Advised
Planning Statement	LPA Adopted	Advised
Detailed Planning Permission	LPA Approval	See notes above
LDF	Compliant	Required

## **LAND AND BUILDINGS IN PFI PROJECTS**

### **Overriding Principles**

74. Unless there are strong supporting commercial reasons, surplus land not integral to the development should be excluded from PFI procurements.

75. Where surplus land is included in PFI procurements (to be sold in exchange for a reduction in service payments) acquisition teams should ensure that:

- a. they own the land prior to sale;
- b. the land is sold to the consortium for at least open market value - the "VFM test";
- c. they take all reasonable steps to maximise the value of the land prior to disposal; for example, by obtaining enhanced planning permission;
- d. consideration is given to whether arrangements to share in the future benefits, which the consortium or other parties may derive from the land, will improve the value for money of the PFI deal;
- e. parent company guarantees are obtained to enable the MOD to recover the full cost of the land in the event of the private sector partner being unable to complete the building project and deliver services;
- f. the timing of the sale is appropriate;
- g. the accounting treatment of land is considered fully when determining the affordability of the project.

76. Before deciding to include surplus land in PFI transactions, acquisition teams should consider from the outset the potential disbenefits. PFI transactions are highly complex and experience to date has shown that inclusion of surplus land in deals adds further

complications. As a consequence there may be delays in the PFI process which can prove costly. Other possible disbenefits may include:

- a. potential tax liabilities; and
- b. potential timing problems if transactions are not back to back.

77. Where a new building is to be built on a site that the MOD already owns, acquisition teams should ensure that:

- a. they retain their freehold interest in the land rather than sell this to the project company;
- b. the arrangements for land on expiry of the primary period are sufficiently flexible;
- c. the accounting treatment of land is considered fully when determining the affordability of the project.

78. Occasionally, MOD may wish to sell land which is integral to the scheme to the private sector. Any decision to sell the site on which a new building is to be built should first take into account the requirement that MOD should not enter into any contractual arrangement where assets essential for its functions are put at risk.

79. If it is deemed appropriate to sell rather than lease, the primary considerations should then be of a commercial, value for money nature. If the buildings have an alternative use and the private sector is constructing the property with this in mind, then there may be an argument for selling the freehold. This is more likely to be a valid reason for some small community-type schemes. If the situation arises where there is a real commercial justification for MOD to sell the freehold to the project company, they should only do so in exchange for at least open market value, subject to overage as discussed further below.

80. Asset changes to MOD's balance sheet as a result of entering into a PFI contract must be set out clearly as part of the project's business case. These changes will have to be agreed with the acquisition team's relevant financial controller prior to inclusion in the balance sheet, capital charge estimates and hence pricing.

### **Criteria for judging whether to include Land in a PFI scheme**

81. Unless there are strong supporting commercial reasons, surplus land not integral to the development should be excluded from PFI procurements. The criteria listed below should be

considered in determining the suitability of surplus land for inclusion in a PFI procurement.

82. The following criteria should be used to evaluate suitability:

- a. before commencing a PFI test, MOD should explicitly review what parcel(s) of land/buildings might be associated with a particular scheme and ascertain into which of the following categories it/they would fall:
  - (i) land/buildings that would remain in operational use within the proposed development;
  - (ii) land/buildings that would become surplus to requirements as a consequence of the proposed development (and by implication would not become surplus if the proposed development did not proceed);
  - (iii) land/buildings with the potential to release development gain (i.e. enhanced value or more valuable planning consent) on either itself/themselves or other land/buildings if they were to be disposed of by the MOD;
- b. in the case of (i) then such land/buildings are clearly integral to the overall deal and the economic assessment of the overall PFI scheme would also suffice for the economic assessment of any such land transactions. In the case of (ii) and (iii) two tests of value for money would be required:
  - (i) the economic assessment of the overall PFI scheme, and
  - (ii) the economic assessment of the land disposal;
- c. surplus land should only be considered for inclusion within a PFI test if the MOD considers that the alternative of conventional sale and reinvestment of the proceeds in another project that has not secured private finance would not command a higher priority. Acquisition teams should agree explicitly what proportion of the proceeds arising from the disposal of surplus land will be included in the PFI Scheme in order that any implications for affordability can be assessed early. Acquisition teams should also consider whether improved value for money and affordability can be



achieved by reinvestment of the proceeds in equipment or in publicly funding the refurbished elements of the scheme;

- (i) consideration should be given to whether the inclusion of any surplus land would facilitate achievement of other national/local priorities and objectives;
- (ii) reference should be made to MOD's estate strategy in making decisions on whether to associate surplus land with a PFI scheme. The absence of an MOD estate strategy would tend to favour a decision not to associate land with a PFI project;
- (iii) in assessing both the relative returns and relative priority between inclusion in a PFI project and conventional disposal, acquisition teams should also take into account:
  - the levels of risk and ease of disposal;
  - the potential timing of disposal;
  - the opportunities for securing planning permission;
  - the holding costs of the land (eg continuing capital charges, security, essential health and safety expenditure etc) prior to its disposal; and
  - the impact of any delay and/or uncertainty in realising disposal values arising from inclusion within the PFI project that would be associated with each option;
- (iv) in the cases of both the retained estate and MOD vested land, legal advice should be obtained to ensure that proper title to the land exists and that there are no impediments or reversionary clauses (e.g. the Crichel Down rules) that would prevent the proposed disposal route or impose restrictions on the future use of the land. The Crichel Down rules, for example, require that the original owner of land acquired under compulsory purchase should be given the first option if

the land is to be sold. Particular care should be taken where the actual conveyancing of the land to the MOD, although intended, is not complete.

### **Disposal of surplus land - Ownership of the land prior to sale to the project company for subsequent resale: retained estate**

83. All land which is included in a PFI project must be in the ownership of the MOD before it is sold to the private sector for subsequent resale.

84. Detailed criteria for establishing suitability for inclusion in the PFI deal are outlined in this guidance. Suitability should be established at OBC stage (or for schemes with a capital value over £25 million at Strategic Outline Case stage) as reference will need to be made in the Official Journal of the European Community (OJEC) notice which follows OBC approval.

85. Acquisition teams (in conjunction with Defence Estates) should confirm that land currently held by MOD is suitable for inclusion in a specific PFI project. Acquisition teams will need to reconfirm this as part of the full business case (FBC). Including the land within the PFI project must be consistent with the MOD strategy for disposals and use of the estate.

### **Value obtained on disposal**

86. Surplus assets must be sold or disposed of for at least open market value (OMV). It is not sufficient that the MOD achieves a value which simply makes the scheme affordable. The private sector partner must be prepared to pay at least the OMV for the asset at the point of sale.

87. Identification of OMV requires relevant professional advice. It is recommended that a suitable land valuation is sought from Defence Estates. Acquisition teams may, of course, seek an additional valuation from a suitably qualified and independent valuer and discuss any differences with Defence Estates. However, for PFI valuations, Defence Estates is recommended in the first instance. Acquisition teams may wish to obtain professional advice regarding the marketing of land in order to help maximise disposal proceeds.

88. Where the land included in a PFI project represents only part of the total available estate, steps should be taken to ensure that the item of land sold does not adversely affect the value of the remainder. This could be achieved through Defence Estates valuations or market testing the entire site as a single disposal and comparing the likely figure obtained with the actual cost of sale plus

an equivalent market test for the remainder of the land.

89. The acquisition team should also consider whether the value to be derived from land disposals will be improved by the MOD obtaining enhanced planning permission for the land prior to disposal. The advantage of this approach is that the MOD will receive the full benefit of any uplift in value from the enhanced planning permission.

90. Acquisition teams should consider whether overage arrangements are necessary. Overage occurs when the proceeds realised at the actual time of sale of the land by the PFI consortium are in excess of the minimum underwritten value in the project agreement and the excess is shared between the MOD and the Project Company. Hence, the total agreed price for the land would be the minimum of OMV at the time of signing the project agreement plus overage. For example, this may be appropriate where enhanced planning permission is likely to increase the market value of the property. The affordability of the scheme for the purposes of FBC approval should be based on the minimum underwritten value.

91. Overage arrangements will ensure that the MOD receives best value for money from the inclusion of surplus land in PFI schemes in respect of valuation risk and the forward sale of land. The anticipated benefits for any overage arrangements should be compared with any increase to the contract price which the consortium requires in return for agreeing to such arrangements. The acquisition team should also consider whether other arrangements to share in the future benefits which the consortium or other parties may derive from the land will improve the value for money of the PFI deal. For example, the MOD could negotiate for share of future revenue streams in the event that the consortium realised opportunities for developing the land or acting as a building contractor on any development by a third party.

92. As with all claw-back arrangements, the acquisition team will need to assess whether such arrangements will improve the value for money of the PFI deal, taking into account any price adjustment which the consortium may seek for agreeing to these arrangements.

93. The formula for the overage arrangements should take into account the risk and effort that the private sector has taken in enhancing the value of the land. Where the risk taken by the Project Company is insignificant, a higher share of overage should accrue to the MOD. Conversely, where the Project Company underwrites proceeds in excess of market value, a smaller share of overage may be appropriate. Irrespective of risk transfer, underage should not be agreed as this would cause difficulties in obtaining

value for money.

### **Protection for surplus land value on early termination**

94. If any surplus land is put into a scheme the resulting benefits, including overage, must be protected in the event of early termination. Protection may include requiring a parent company guarantee to be provided by the Project Company. The acquisition team should consult the MOD PFU for further details.

### **Timing of sale of surplus land**

95. Disposal of the land to the project company should occur prior to the operating phase of the contract only when there is real commercial justification for the sale and there are appropriate safeguards to the MOD by way of appropriate parent company guarantees.

### **Accounting Implications**

96. Accounting for PFI and land transactions is complex, therefore acquisition teams should seek appropriate professional advice from their financial controller. Further guidance can be found in JSP 472.

### **Further Help and Support**

97. Please contact the MOD PFU and Defence Estates for all further help and support.