



MOD Private Finance Unit Guidance Note Demonstration and Certification of PFI Services

Version 2

August 2008

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This document can be found on the MOD PFU website at :

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/FinanceandProcurement/PFU/PrivateFinanceUnit.htm>

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1. DOCUMENT CHANGE RECORD

This is a controlled document. Additional copies can be obtained through the issuing authority. Amendment shall be by whole document replacement. Proposals for change are to be forwarded to the issuing authority.

Issue No	Details Of Amendments Made	Amended By	Date
1.0a	Original DPA PFG Publication (Titled: Certification Of Services Where An Element Of Subjectivity Is Required)	O Ellis	March 1999
2	Minor update (Guidance requires major update)	R Haria	August 2008

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Demonstration of Services Where an Element of Subjectivity is Required

CONSTRAINTS

1. None

AUTHORITATIVE GUIDANCE

CERTIFICATION WHERE AN ELEMENT OF SUBJECTIVITY IS REQUIRED BY MOD

2. As detailed in the Treasury Taskforce Guidelines, in any PFI Contract the contracting Authority must ensure that there is a clear limit to the extent of Authority participation in the Supplier's implementation procedures. Involvement to a greater extent than is appropriate for monitoring purposes may lead to the Authority taking back risk which it is paying the Supplier to accept and a management role which it is paying the Supplier to deliver.
3. There will of course need to be a process of certification by MOD that the services offered meet its Statement of Requirements. The TTF Guidelines should be read in full before drawing up the relevant certification procedures as these clearly lay out the parameters for MOD involvement. For the Contractor to have the assurance that MOD will test the services in a fair and objective way the Statement of Requirements will need to be expressed objectively. For some DES procurement projects this will be achievable. However, it may be felt necessary to prescribe certain of the requirements subjectively and this may be acceptable to the Contractor provided that such subjective requirements can be subsequently turned into objective criteria. This process is explained in more detail below.
4. In general terms the framework for the provision of services under a PFI Contract will be such that:-
 - MOD's Statement of Requirements will be set out in a schedule to the Contract. The Contractor must comply with this.
 - The Contractor will also be obliged to construct any assets required to support the provision of the services in accordance with the specifications offered to the Authority in its tender. The risk of whether compliance with these specifications will in fact enable the Contractor to meet the SOR is borne by the Contractor and not the MOD. The Contractor is entitled to amend its specifications provided that he can demonstrate that the quality of the service is not affected.

- a) Where the assets to be used in the provision of the services can be objectively tested against the output specification in their entirety (e.g. a barracks) the process for testing will be relatively straightforward. The parties should follow the prescribed testing process and if they fail to agree on whether the services meet the requirements the issue can be referred to the dispute resolution procedure which can assess the services against the output specification. In view of the unique nature of the majority of MOD's requirements such testing should be undertaken by MOD rather than by a third party.
- b) A layer of complexity may arise if a number of the Authority's requirements are expressed in subjective terms. In order for the Contractor to allow such subjectivity into the SOR it is possible that MOD will have to accept responsibility for certain aspects of the services which it expressly approves during the design development. As an illustrative example, we can see how this was settled in the MSHATF project. Of course, subjective requirements could be required in any type of PFI contract - not only training contracts.

The MSHATF Example

- In the MSHATF Contract, the concept of "Design Freeze" was incorporated in to the Liaison Schedule. The effect of this concept is that where there are elements of the design that MOD has stated within the contract are to be subjectively tested (e.g. the scope of the simulated area of the cockpit; the baseline aircraft to be simulated) the design is presented to MOD for a statement as to whether the design meets MOD's subjective requirements. Where it is held that such requirements are met, the design is frozen and future elements of the training service are measured in respect to that freeze, which effectively becomes the objective benchmark test.
 - These design freezes are exempted from the overall disclaimer made by MOD that it has no responsibility for the testing process. MOD is bound by any representations and/or decisions communicated to the Contractor in respect of the design freeze and is not entitled to refuse certification of a training element which has been approved by the Authority under the Design Freeze process. Neither, unsurprisingly, is MOD entitled to claim any Service Credits, as a result of MOD requiring an alternative option or solution to their decision at the time of the Design Freeze. Also, once MOD has approved a Design Freeze, MOD may only change the freeze by agreeing a contract price adjustment with the Contractor.
- c) We can see from this example that the Contractor will seek to take advantage of the desire by the Authority to include subjective assessment. For these reasons, such subjectivity is not considered best practice and should be avoided. Where it is felt it is unavoidable the

MOD PFU can provide advice on an appropriate solution/proposal to Industry.

Key Points

- MOD participation in contractor implementation procedures should be clearly defined and limited.
- MOD's Statement of Requirements should be written in objective output terms. Subjective requirements may be negotiable but it is likely that the preferred bidder will seek for these to be benchmarked and subsequently objectively tested.
- The attraction of including subjective requirements should be weighed up against the fact that the contractor will no doubt require a level of risk to be transferred back to MOD.

FURTHER INFORMATION

Operational Taskforce Note 2: Procurement to Service Delivery Guidance
(http://www.hm-treasury.gov.uk/media/2/3/pfi_projecttransition_210307.pdf)