

Public Private Partnerships in the National Health Service: The Private Finance Initiative

Good Practice

Section 2: The PFI Procurement Process

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1. Introduction

1.1 This section of the guidance sets out the procurement process which should be followed for schemes under the Private Finance Initiative (PFI) in the NHS. It sets out the procedures from first approaching the marketplace prior to formally advertising a scheme through to selecting bidders and on to financial close and monitoring contract implementation.

1.2 The practical guidance in this section covers:

- the main steps involved, from placing an advertisement to the evaluation of bids;
- structuring the procurement process;
- defining the requirements of the NHS.

1.3 Procuring bodies in the NHS should seek the appropriate professional advice before undertaking any procurement as well as reading this guidance.

2. An overview of the PFI procurement process

2.1 The different stages involved in taking a scheme from publication of the OJEC notice to financial close are set out in Figure 2.1. The stages outlined in this guidance are consistent with those in *A Step-By-Step Guide to the PFI Procurement Process*, published by HM Treasury.

2.2 An illustrative schedule of the tasks and timetable for a PFI procurement is shown in Appendix 1 of this section of the guidance.

2.3 This section of the guidance assumes that the need for a scheme has been fully demonstrated and that all necessary approvals for a PFI procurement to proceed have been received from the NHS Executive and HM Treasury. Schemes which are above an NHS Trust's own delegated limits require Outline Business Case (OBC) approval from the Regional Office of the NHS Executive before formal procurement can begin. NHS Trust delegated limits for PFI schemes are set out in Appendix 1 of *The Selection and Preparation of Schemes*.

2.4 Major schemes (with a capital value of £25m or over) must have been prioritised by Ministers following the submission of a Strategic Outline Case to the Capital Prioritisation Advisory Group. *The Selection and Preparation of Schemes* details the tasks which the NHS Trust and commissioning HAs or PCGs, in addition to obtaining OBC approval, must complete before commencing the formal procurement process by advertising the scheme in the Official Journal of the European Communities (OJEC).

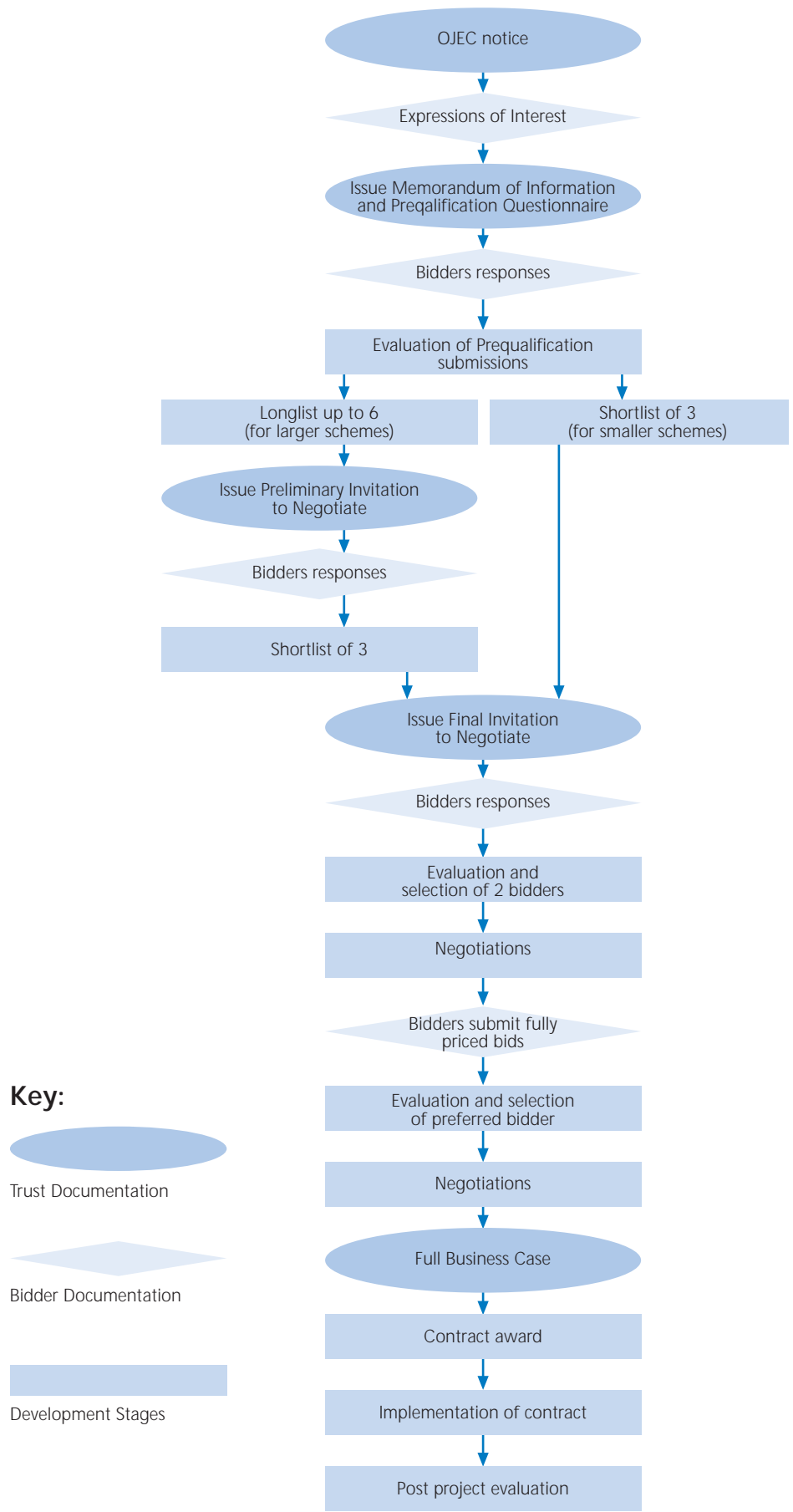
Further information

A Step-By-Step Guide to the PFI Procurement Process, HM Treasury, revised edition, 1998

The Selection and Preparation of Schemes, PFI in the NHS, NHS Executive, 1998

HM Treasury guidance is also available on the Treasury's web site <http://www.hm-treasury.gov.uk>, under the section headed "Guidance".

Figure 2.1: The NHS PFI procurement process



3. Advertising the project

Introduction

3.1 This chapter sets out the steps which an NHS Trust should take in the earlier stages of the procurement process leading up to the publication of an advertisement in the Official Journal of the European Communities (OJEC).

3.2 Key issues for consideration at this stage include:

- taking informal soundings from the market place;
- the procurement route and procedure to be used;
- issuing a Prior Information Notice;
- placing a contract notice in OJEC.

Commencing the procurement

3.3 Once a scheme has received Outline Business Case (OBC) approval, the NHS Trust can then commence formal procurement procedures under the European Union (EU) public procurement rules. Further information on these is set out in Appendix 2 of this section of the guidance. NHS Trusts should take their own legal advice during the procurement process and must leave a clear audit trail at all relevant stages.

Works or Services

3.4 An NHS Trust must decide whether to advertise its scheme under the Public Works Contracts Regulation 1991 as a “works” contract, or under the Public Services Contracts Regulations 1993 as a “services” contract. NHS Trusts should seek legal advice on this point.

3.5 This guidance assumes that the NHS Trust has chosen to advertise the scheme as a “services” contract, as the NHS Executive believes this to be the most likely scenario, bearing in mind Treasury’s statement in its revised Technical Note No. 1, that “the objective of PFI procurement is to provide high quality public services that represent value for money for the taxpayer”.

3.6 Where an NHS Trust decides to advertise its scheme as a “works” contract, it should contact the NHS Executive Private Finance Unit before proceeding.

Prior Information Notice

3.7 The first formal step in the public procurement process is for the NHS Trust to consider issuing a Prior Information Notice (PIN). The format of any PIN issued should follow that required by the procurement Regulations.

3.8 For schemes advertised under the Public Services Contracts Regulations 1993, it is not mandatory to place a PIN which is specific to the scheme (Services PINs are required in respect of service categories on an annual basis and should have been placed at or around the start of the financial year). However, a PIN which is specific to a particular scheme may still be placed on a voluntary basis, using the standard format and providing detailed information in the “other information section” in order to gauge the level of market interest and give advance notification of the scheme. Such a PIN may be particularly useful as a means of opening a dialogue with the market (since bidders throughout the EU would thereby have an opportunity of recording their interest).

Market sounding – informally approaching the market

3.9 Although there are formal requirements to be observed in terms of placing advertisements, it is good practice to take soundings within the marketplace to determine the likely level of interest for the scheme from potential bidders prior to issuing a contract notice. This should be done as a matter of course for major schemes (with a capital value of £25m or over) during the preparation of the OBC. Smaller schemes should consult and involve the Regional Office in their market sounding exercise.

3.10 Approaching the market should enable the NHS Trust to gain insight into the likely level of interest in the market but without giving any one potential bidder a head start in the procurement process. The NHS Trust should take legal advice before approaching the market to ensure that its actions do not prejudice the future procurement process.

3.11 NHS Trusts could also consider approaching contractors and/or service providers with whom they are used to doing business to discuss their ideas about the scheme and to invite suggestions as to how it might be taken forward. Other companies and consortia active in the health PFI market may also be approached. The NHS Trust’s advisers may also be able to facilitate informal approaches to the market. Preliminary information about the site, the facilities being considered, the planning situation, the locality and the NHS Trust itself may usefully be provided. NHS Trusts should ensure that in providing information, they do not give any potential bidders an unfair competitive advantage.

3.12 Potential bidders may be able to suggest previously unforeseen ways of exploiting the development opportunity, such as alternative land uses and the generation of additional capital or revenue streams.

3.13 In certain cases, particularly where the scheme involves surplus land and/or the possibility of retail lets, the NHS Trust might also give consideration to retaining professional property advisers to gauge market interest.

3.14 If responses from the market indicate that the proposed scheme is unfeasible or that there is not likely to be much competition during the bidding process, NHS Trusts should discuss with the NHS Executive how to proceed further.

Advertising the project

3.15 A contract notice must be placed in OJEC for schemes which have a value above the thresholds set out in the procurement regulations and which are detailed in Appendix 2 of this section of the guidance. The form of contract notice will depend on which Regulations apply and which contract award procedure is used. It is expected that in general PFI schemes will be advertised using the negotiated procedure, although NHS Trusts should always take legal advice first.

3.16 Once drafted, contract notices should be sent to the OJEC in Luxembourg. There is no charge for the inclusion of a notice in the Official Journal and notices should be published within 12 days of their being received.

3.17 If the NHS Trust uses other advertisements, for example, in the specialist press or the national media, these adverts must not appear before the OJEC version has been despatched and must not contain any additional information to that contained in the OJEC notice. Any such adverts should refer to the date of the despatch of the advertisement to OJEC. It is also good practice for all schemes to be additionally advertised in *Government Opportunities*.

3.18 It is important that careful attention is paid to the detailed drafting of the contract notice. If the scope of the project alters, it may be necessary to advertise the altered scheme and to start the whole process again. If the original contract notice is drafted with sufficient flexibility, it may be possible to cater for subsequent change, although a balance must of course be struck with the need to provide potential tenderers with an adequate description of the requirement.

3.19 The contract notice should emphasise that the project is a PFI scheme and that this will mean that the private sector will be expected to bear a significant proportion of risk. It should also give details of the scheme as envisaged and invite expressions of interest from the private sector. The contract notice should state that variant bids are acceptable. Variant bids are discussed in chapter 5 of this section of the guidance.

3.20 When the NHS Trust uses the negotiated procedure, a minimum of 37 days must be allowed from the date of despatch of the contract notice to the last date that is allowed for requests to be received. In the event that this 37 day period ends on a Saturday, Sunday or public holiday, it should be extended to expire on the nearest working day.

3.21 The Treasury Taskforce guidance *How to follow EC Procurement Procedure and Advertise in the OJEC* contains a standard form of wording for specific sections of the OJEC contract notice.

Further information

PFI Technical Note No 2: *How to follow EC Procurement Procedure and Advertise in the OJEC*, Treasury Taskforce, May 1998

Public Works Contracts Regulations, SI 1991/2680

Public Services Contracts Regulations, SI 1993/3228

Contracts and commissions for the NHS estate, NHS Estates, Concode, November 1995

Guide to contract procedures, NHS Estates, Concode, February 1996

Government Opportunities, Business Information Publications, tel 0141 332 8247, fax 0141 331 2652.

CUP Guidance No. 51, *Introduction to the EC Procurement Rules*, HM Treasury, 1995.

CUP and HM Treasury guidance is also available on the Treasury's web site <http://www.hm-treasury.gov.uk>, under the section headed "Guidance".

4. Prequalification

Introduction

4.1 This chapter sets out the process by which an NHS Trust should reply to expressions of interest received in response to the contract notice placed in OJEC. This is done by issuing a Prequalification Questionnaire to potential bidders together with a Memorandum of Information which sets out details of the NHS Trust and commissioning HA or PCG, and of the proposed scheme. The aim of this stage is to prequalify and then longlist and/or shortlist a number of bidders who will progress to the later stages of the bid process. The decision on whether to longlist or shortlist bidders at this stage depends upon the choice of procurement route taken at the Invitation To Negotiate (ITN) stage. This is discussed further in chapter 5 of this section of the guidance.

4.2 Key issues for consideration at this stage include:

- preparation of the Memorandum of Information;
- preparation of the Prequalification Questionnaire;
- prequalification of potential bidders.

The Memorandum of Information and the Prequalification Questionnaire

4.3 The number of responses to the contract notice placed in OJEC which are received will normally be greater than is demanded by the procurement process. However, not all those that respond should or will want ultimately to bid for the project. Potential bidders will base their decision about whether they want to be involved further largely on the next piece of information that they will obtain from the NHS Trust: the Memorandum of Information.

4.4 The NHS Trust should be ready to issue the Memorandum of Information and a Prequalification Questionnaire to everyone who responds to the contract notice and these documents should be prepared in advance of issuing the contract notice in OJEC.

4.5 The Memorandum of Information and the accompanying Prequalification Questionnaire should aim to:

- enable potential bidders to decide whether they want to continue to be involved in the bidding process by providing appropriate information about the NHS Trust and commissioning HAs or PCGs, and the project and its prospects;

- invite expressions of interest in bidding for the project from the private sector;
- obtain information that will establish whether potential bidders are technically and financially capable of delivering the project. PFI contracts are complex and expensive to push through. NHS Trusts must ensure that only consortia with the appropriate resource and skill-base are selected;
- enable the NHS Trust to gain an understanding of the economic, financial and technical status and previous experience of the potential bidders.

4.6 NHS Trusts should specify in the Memorandum of Information what type of members it requires to be present when consortia respond at this stage in the procurement process. For schemes with a capital value over £10m at this stage in the development of PFI in the NHS, it is recommended that in order to prequalify successfully consortia should include the following as a minimum:

- lead design and construct contractor and building maintenance services provider (however it is not necessary to have appointed architects at this stage);
- hotel services/facilities management provider;
- identified funding equity sponsors for the proposed project company, but not necessarily explicitly identified third party equity providers;
- financial advisers (or the equivalent) to the consortium capable of setting out the proposed financing approach for the scheme, but not necessarily explicitly identified financiers.

4.7 Sponsors should be identified for the proposed project company at this stage. The private sector bidder must demonstrate it has the resources to see the bid through to completion.

4.8 There is no preference on the part of the NHS Executive as to what type of company leads bidding consortia. Typically to date, consortia on major schemes have been led by building contractors or by companies specifically formed to bid for PFI projects and jointly led by contractors, service providers and/or financial institutions. The PFI marketplace continues to evolve and future bidding consortia and the type of companies leading consortia will not necessarily be the same as today's.

4.9 For smaller schemes (with a capital value under £10m), consortia may sometimes be professionally led by architects, project management companies or developers. There may also be the intention to tender aspects of the PFI deal, eg construction or service provider, at a later stage in the procurement to maintain competitive pressure on prices for longer during the procurement process. Depending upon the circumstances of the individual schemes the prequalification criteria should not be set so as to rule out such consortia. However, extreme caution must be exercised in such circumstances and bidders should be asked to demonstrate that they will be able to recruit the necessary additional companies within the framework (particularly on risk transfer) of the deal that is envisaged prior to the selection of preferred bidder. Where NHS Trusts receive bids which have differing

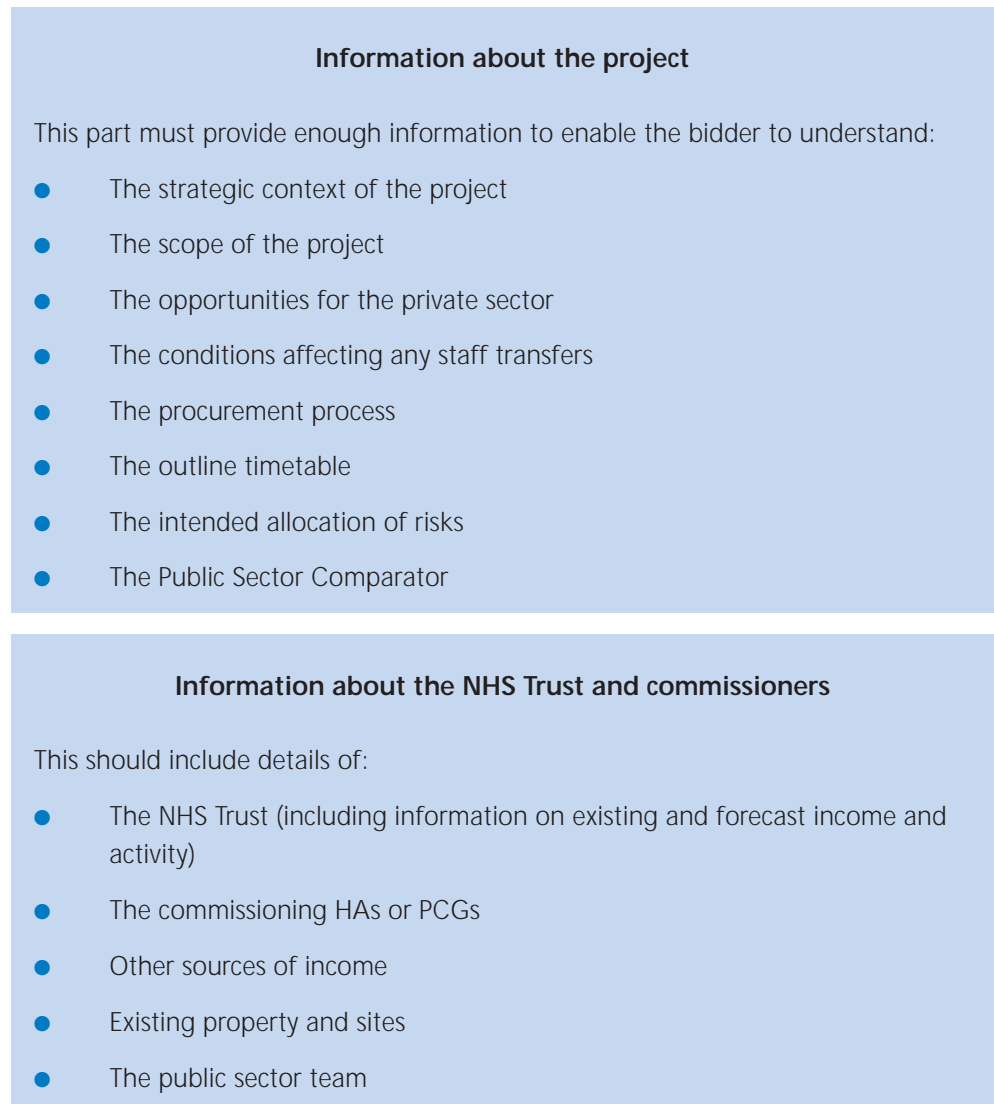
levels of consortium membership then care should be taken to treat all consortia on an equal basis during evaluation.

4.10 The Outline Business Case and Strategic Outline Case (where applicable) should be made available on request to potential bidders at this stage.

Content of the Memorandum of Information

4.11 The Memorandum of Information should include the information described in Figure 4.1 below.

Figure 4.1: The Memorandum of Information



4.12 An example Memorandum of Information is shown at Appendix 3 of this section of the guidance. Generally, it is advisable to present the Memorandum of Information attractively and in a user-friendly style. It is an important element in an NHS Trust's efforts to attract the best quality bidders.

Content of the Prequalification Questionnaire (PQQ)

4.13 The Prequalification Questionnaire serves two main purposes:

- it asks whether there are any grounds pursuant to which a bidder may be rejected under Regulation 14 of the Public Services Contracts Regulations;
- it establishes whether bidders have sufficient economic and financial standing, ability and technical capacity to be awarded the contract, enabling an initial sift of persons and organisations expressing interest in response to the OJEC notice to take place.

4.14 A model prequalification questionnaire is at Appendix 4. All NHS Trusts should base their PQQs closely on this model.

Prequalification

4.15 The grounds for eliminating a bidder from further participation in the procurement process are set out in Regulation 14 of the procurement Regulations. They include circumstances where a bidder has been convicted of a criminal offence relating to the conduct of his business or profession, or has committed an act of grave misconduct in the course of his business or profession, where a company has been wound up, has failed to pay relevant social security contributions etc. Bidders should be asked to confirm in their response to the prequalification questionnaire that none of the grounds set out in Regulation 14 apply to any member of the relevant consortium. Bidders should also be required to inform the NHS Trust during the bid process if any of these grounds apply subsequently.

4.16 The other central purpose of the prequalification questionnaire is to assist the NHS Trust to determine which of those bidders who are not disqualified under Regulation 14 grounds should be selected to compete in the next round of the procurement competition, the ITN stage.

4.17 In selecting bidders to go forward to the ITN stage, NHS Trusts may only take into account factors relating to the economic and financial standing, ability and technical capacity of bidders. Factors relating to the award of the contract itself (for example, a bidder's approach to design issues etc.) may only be considered at the ITN stage. Similarly, at the ITN stage only factors relating to the award of the contract itself may be taken into account in selecting bidders to progress further in the competition. Factors relating to the economic and financial standing, ability and technical capacity of bidders may only be considered at stages after prequalification where there has been a significant change in a bidder's status or where it is necessary to seek confirmation in respect of details already provided.

4.18 The information which may be taken into consideration to determine that bidders meet the NHS Trust's minimum standards of economic and financial standing and ability and technical capacity, is set out in Regulations 15 and 16 of the Public Services Contracts Regulations 1993. Regulation 17 permits NHS Trusts to require information supplementing the information supplied in accordance with Regulations 14, 15 and 16 or to clarify that information, provided that the information so required relates to the matters specified in Regulations 14, 15 and 16. Subject to any

requirements of commercial confidentiality specified by bidders, their responses relating to employment matters should be made available to relevant Trades Unions. The Trades Unions should be asked if they wish to make any representations to the NHS Trust regarding the information submitted by bidders (details are set out in Chapter 13 of *Selection and Preparation of Schemes*).

4.19 The time allowed for the bidders to respond to the PQQ will vary with the information asked for by the NHS Trust, but a period of four weeks from the date the OJEC notice closes will normally be long enough for bidders to collate their responses.

4.20 If a submission is borderline or unclear, the NHS Trust can ask for more information for clarification. Such requests must be very specific and kept to a minimum.

4.21 NHS Trusts can, in accordance with normal business practice, ask bidders to provide details of referees in respect of relevant projects which they have undertaken. It may be convenient to ask for such details at PQQ stage, although they may be sought at ITN stage. What NHS Trusts must ensure is that, whatever stage of the procurement process referees are contacted, the information sought and the use of that information must be consistent with what is allowed under the Public Services Contracts Regulations for that stage.

4.22 The NHS Trust should consider seeking advice from other NHS Trusts, from the NHS Executive Private Finance Unit and Regional Offices, and from its own paid advisers, on the capability of potential bidders. Again, NHS Trusts will need to ensure that the information sought and its subsequent use is consistent with that allowed under the Regulations.

5. The Invitation To Negotiate

Introduction

5.1 There are two alternative routes that can be used in the procurement process during the Invitation To Negotiate (ITN) stage:

- up to six bidders may be longlisted as a result of the prequalification process to whom a Preliminary Invitation To Negotiate is issued. From responses to the Preliminary ITN three bidders will then be shortlisted to whom the Final ITN is issued; or
- three bidders are directly shortlisted as a result of the prequalification process to whom the Final ITN is issued. A Preliminary ITN stage is not used.

5.2 The three shortlisted bidders to whom the Final ITN is issued should be asked to submit initial responses. After evaluation and initial negotiation of these responses, two bidders should be invited to negotiate further following which they should be asked to submit final bids. After evaluation of the final bids, the NHS Trust should appoint a preferred bidder.

5.3 This chapter discusses what information should be presented in the Preliminary and Final ITNs and what should be sought from bidders. The first part of the chapter details information which is common to both the Preliminary and Final ITNs, and then looks separately at information specific to each ITN.

5.4 Key issues which should be addressed in the ITN include:

- information about the NHS Trust and commissioning HAs or PCGs, and their requirements;
- full details about the scheme itself including output specifications, a copy of the standard form contract together with summary of its contents, the allocation of risks, payment mechanism and performance monitoring regime;
- what level of information is to be sought from bidders in the Preliminary ITN;
- what level of information is to be sought from bidders in the Final ITN;
- the evaluation process and criteria for assessing bids;
- the length of time up to financial close for which it is expected a fixed bid price will be held;
- how to encourage innovation in bids.

The ITN should be prepared before the formal procurement commences. For major schemes (with a capital value of £25m or over) the content of the ITN will need approval from the NHS Executive headquarters before the scheme can be advertised in OJEC.

5.5 Given that the content of the ITN will dictate the shape of the final deal, NHS Trusts are strongly recommended to involve professional advisers where required when the ITN is being drafted, rather than only at a later stage in the procurement process.

Procurement route

5.6 Large PFI schemes in health can be significantly more complex to develop than in other sectors. The choice of a procurement route that includes the use of a Preliminary ITN stage is designed to minimise the bidders' costs early in the process and reduce both bidders' and NHS Trusts' costs overall. It allows an NHS Trust to receive more information from potential bidders before shortlisting and issuing the Final ITN without bidders having to work up detailed priced bids. It allows the NHS Trust to select the most appropriate bidders to develop more detailed proposals, which should reduce the potential for bidders to invest resources in developing bids which do not meet the NHS Trust's requirements. With this in mind, NHS Trusts should strike a balance so as to avoid over-specifying their requirements at Preliminary ITN stage. The use of a Preliminary ITN stage should also give greater scope for and encourage potential bidders to demonstrate at an early stage what innovation they will be intending to bring to the scheme.

5.7 The choice of procurement route will partly depend on the size and nature of the proposals:

- on schemes with a capital value of £25m or over NHS Trusts should longlist up to six bidders and issue a Preliminary ITN before shortlisting three bidders and issuing the Final ITN;
- on schemes between £10m and £25m NHS Trusts should follow either procurement route. Factors which should be considered before deciding on which route to take should include the degree of complexity of the scheme and the number of potential bidders that it is expected that there will be in the market. An NHS Trust with a project over £10m capital value which does not intend to use a Preliminary ITN must obtain the agreement of the NHS Executive Regional Office to this course of action;
- on schemes under £10m NHS Trusts are not expected to use a Preliminary ITN stage in most circumstances.

5.8 The procurement route which is selected must be clearly set out in the Memorandum of Information. NHS Trusts should consider the use of pre-submission procedures to allow bidders to respond on key issues prior to the submission of bids.

Degree of commitment expected of bidders

5.9 Figure 5.1 below sets out the information which should be sought from bidders at the different stages of the procurement process where a Preliminary ITN stage is being used. Figure 5.2 below sets out the information which should be sought from bidders if the NHS Trust is shortlisting three bidders at prequalification and then issuing a Final ITN directly.

Figure 5.1: Commitment expected at each stage of procurement from bidders on major projects

Procurement stage	Number of bidders at end of stage	State of contract discussions at end of stage	Designer	Design and construct sub-contractor	Services sub-contractor	Bidding consortium	Financial advisers/Financiers
Prequalification	Up to six	n/a	None.	Demonstrate capacity and capability.	Demonstrate capacity and capability.	Complete Prequalification Questionnaire	Details of financial advisers.
Preliminary ITN	Three	Confirmation of acceptance of key positions in contract summary. Statement of acceptance of standard contract in principle.	Design approach.	Construction approach.	Services approach.	Confirmation that standard contract terms set out in ITN will be acceptable to consortium members and sub-contractors and financiers.	Proposed method(s) of finance.
Final ITN	Two	Outline agreement on all key contractual issues affecting price and risk allocation, including payment mechanism and performance regime.	1:500 plans, sketch plans, selected blow-ups, functional relationships, outline area schedule.	Statement of acceptance of standard contract, payment mechanism, performance regime and allocation of risks within consortium.	Statement of acceptance of standard contract, payment mechanism, performance regime and allocation of risks within consortium.	Full financial model setting out costs, financing, ratios, etc. Agreement on allocation of risks within consortium.	Statement of support from funders/equity with draft term sheet and acceptance of standard contract terms, payment mechanism and performance regime, financial model and allocation of risks within consortium.
Selection of preferred bidder	One (and reserve bidder)	Agreement on all contractual issues affecting price and risk allocation.	1:500 plans, cross sections, site plan, area schedule, performance specifications.	Confirmation of acceptance of draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Confirmation of acceptance of draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Full financial model. Agreement on all points of principle on specifications.	Further statement of support from funders/equity.
Preparation of Full Business Case	One	Fully developed contract drafts.	1:200 plans. Also, 1:50 plans for key areas and Room Data Sheets as required for banks' due diligence.	Final sign-off on draft contract, mechanism, performance regime and allocation of risks within consortium.	Final sign-off on draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Due diligence commences prior to submission of Full Business Case.	
Financial close	One	Signed contracts.	Further design details as required.	All contracts and major sub-contracts in place.		Due diligence complete.	

Figure 5.2: Commitment expected at each stage of procurement for schemes not using a Preliminary ITN stage

Procurement stage	Number of bidders at end of stage	State of contract discussions at end of stage	Designer	Design and construct sub-contractor	Services sub-contractor	Bidding consortium	Financial advisers/Financiers
Prequalification	Three	Confirmation of acceptance of key positions in contract summary. Statement of acceptance of standard contract in principle.	None.	Demonstrate capacity and capability.	Demonstrate capacity and capability.	Complete Prequalification Questionnaire.	Details of financial advisers.
Final ITN	Two	Outline agreement on all key contractual issues affecting price and risk allocation, including payment mechanism and performance regime.	1:500 plans, sketch plans, selected blow-ups, functional relationships, outline area schedule.	Statement of acceptance of standard contract, payment mechanism, performance regime and allocation of risks within consortium.	Statement of acceptance of standard contract, payment mechanism, performance regime and allocation of risks within consortium.	Full financial model setting out costs, financing, ratios, etc. Agreement on allocation of risks within consortium.	Statement of support from funders/equity with draft term sheet and acceptance of standard contract terms, payment mechanism and performance regime, financial model and allocation of risks within consortium.
Selection of preferred provider	One (and reserve bidder)	Agreement on all contractual issues affecting price and risk allocation.	1:500 plans, cross sections, site plan, area schedule, performance specifications.	Confirmation of acceptance of draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Confirmation of acceptance of draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Full financial model. Agreement on all points of principle on specifications. Consortium agreement of internal risk allocation.	Further statement of support from funders/equity.
Preparation of Full Business Case	One	Fully developed contract drafts.	1:200 plans. Also, 1:50 plans for key areas and Room Data Sheets as required for banks' due diligence.	Final sign-off on draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Final sign-off on draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Due diligence commences prior to submission of Full Business Case.	
Financial close	One	Signed contracts.	Further design details as required.	All contracts and major sub-contracts in place.		Due diligence complete.	

The Invitation To Negotiate

5.10 This section describes the content of the ITN that is common to both the Preliminary and the Final ITN.

5.11 The ITN is the document that provides the framework for the prequalified bidders to put together their detailed proposals. A well drafted and comprehensive ITN is vital to the smooth running of a project. It will help the bidders produce accurate proposals and will avoid misunderstandings that can lead to later problems. The NHS Trust should have substantially completed its proposed form of ITN including the draft contract, payment mechanism and performance regime prior to advertising for the scheme in OJEC. In particular, areas such as the development of output specifications are very time consuming to produce and the NHS Trust should have completed work on these before commencing the formal procurement process.

5.12 The Preliminary ITN is essentially the Final ITN in draft form, although with some differences such as the inclusion of a summary of the contract terms and a section inviting responses covering specific areas of information (see below). When the Final ITN is issued there may be some changes to reflect comments received in response to the Preliminary ITN. NHS Trusts should ensure that any changes made are within the scope of the procurement regulations and original OJEC notice.

5.13 If not requested at the previous stage by potential bidders, copies of the Outline Business Case and Strategic Outline Case (where applicable) including the Public Sector Comparator should be provided to potential bidders unless there are demonstrable circumstances which would make publication detrimental to competition during the procurement process.

Contents of the Invitation To Negotiate

5.14 The ITN should be constructed in such a way that it will:

- enable bidders to provide submissions;
- enable the NHS Trust to make a meaningful comparison both between competing private sector bids and between the preferred bid and the publicly funded option;
- promote discussions with bidders that should lead to an efficient, focused and cost effective procedure and eventual solution.

5.15 Although the document will need to be tailored to fit the requirements of the project, it is possible to set out a number of key items that should be included in the ITN, and a checklist is set out in Appendix 5 of this section of the guidance.

Executive summary

5.16 The ITN will consist of a number of documents, so it is essential to produce an executive summary with a contents sheet for quick reference.

Bidding process

5.17 The document should specify the bidding process and timetable that is to be followed, including the identification of flexibilities within the process.

Background information

5.18 The bidders must be given comprehensive information on the structure, performance and culture of the NHS Trust and the scheme to the extent not already provided. The information should include:

- the functional content for the scheme;
- the NHS Trust's management structure, including NHS Trust board membership and details of the composition of the project board;
- financial information on the NHS Trust (such as the NHS Trust's three most recent accounts);
- activity and performance data;
- information on the existence of contracts with incumbent service providers;
- the NHS Trust's strategic and business objectives;
- the current configuration of the NHS Trust's services;
- the NHS Trust's forecast requirements based on the preferred option;
- information on employees to be transferred under the contract;
- transfer issues (for example union recognition and entitlement to a broadly comparable pension).

5.19 Bidders should also be given relevant information on commissioning HAs or PCGs involved in the project:

- the commissioner's management structure;
- financial information on the commissioner (such as the commissioner's three most recent accounts);
- the commissioner's strategic and business objectives (including Health Improvement Programmes);
- current and future commissioning intentions;
- confirmation of commissioner's support for the scheme.

5.20 Background information on the scheme should include:

- confirmation of relevant approvals received for scheme to date (such as Strategic Outline Case and Outline Business Case approval);
- details of the Public Sector Comparator (if there is one).

5.21 Background information should also address overall developments in health policy (such as *The New NHS*) and the implications for the scheme.

5.22 The NHS Trust should also set up a data/briefing room, where all the relevant information can be made available to bidders. This should include all relevant NHS guidance and instructions. The data/briefing room also provides an opportunity to display information using a variety of formats and media.

Output specifications

5.23 Detailed output specifications should set out the NHS Trust's requirements to enable bidders to be able to prepare workable bids accordingly. It is largely up to the private sector to decide how it wants to deliver the NHS Trust's requirements. Output specifications are discussed further in *The Selection and Preparation of Schemes*.

Affordability

5.24 The affordability ceiling below which bids must be priced should be clearly set out, together with the assumptions which underlie this. The ITN should state that the most economically advantageous bid that is developed below the stated ceiling will be selected as preferred provider.

Risk allocation and value for money

5.25 The ITN should set out clearly which risks the NHS Trust intends to pass on to the private sector, and which are to be retained or shared. A suggested risk allocation matrix is set out in *Technical Issues*, and the allocation of risks should reflect the standard form contract which is also included in the ITN. The ITN should also detail which systems the NHS Trust intends to use to secure value for money throughout the contract. The NHS Trust's intentions as regards indexation, benchmarking or market testing and efficiency mechanisms should be set out.

NHS standard form contract

5.26 Most existing schemes use locally negotiated contracts. The NHS Executive has developed a standard form of PFI contract. This form is obligatory for use on all major NHS PFI schemes with effect from those approved in the second wave in April 1998. A scaled down version of the contract will be made available in due course for smaller schemes. In the meantime, the commercial terms reflected in the standard form contract and outlined in the *Commercial Issues* section of this guidance should be adopted in contracts for smaller schemes. Any proposed variations should be approved in advance by the NHS Executive.

5.27 The standard form contract covers all key commercial terms. These must not be varied or amended without the specific prior approval of the NHS Executive Private Finance Unit. The standard form contract cannot, however, cover all local circumstances. NHS Trusts must therefore amend or add to the standard form contract should local circumstances demand this.

5.28 The standard form contract comes with guidance notes indicating where local changes or input are required. All changes must be discussed and agreed by the NHS Trust's legal advisers and, if changes are contemplated outside the designated areas, these must be with the prior approval of the NHS Executive Private Finance Unit or Regional Office.

5.29 The standard form contract is available on the Department of Health website at www.doh.gov.uk/pfi.htm

Details of the contract terms

5.30 A copy of the standard form contract together with a summary of its contents should be issued with the Preliminary ITN and a further copy should be issued with the Final ITN. These will be vital in making bidders aware of the NHS Trust's stance on a number of key issues and will facilitate accurate bids. The use of the standard form contract on larger schemes (and the version to be made available for smaller schemes) means a standardised contract summary can be used. NHS Trusts should contact the NHS Executive Private Finance Unit for copies of the standard contract summary. Additions will need to be made for project-specific aspects of each scheme but no change should be made to the standard drafting. If any of the standard drafting needs to be changed for project-specific reasons, (in accordance with the NHS Executive's requirements on use of the standard form contract) approval should first be obtained from the NHS Executive.

Payment mechanism

5.31 The NHS Trust should set out in detail the form of payment mechanism and performance regime on which bids are expected to be based. This will enable bidders to work within this framework and prepare their bids accordingly. Payment mechanisms are detailed further in *Technical Issues*. Again, NHS Trusts should follow precedent and the NHS Executive Private Finance Unit or Regional Office can provide examples.

Timetable

5.32 The ITN should set out the NHS Trust's intended timetable for the selection process which should contain all key dates and also set deadlines by which individual meetings with longlisted or shortlisted parties must have been completed.

5.33 NHS Trusts may find it helpful at this stage to set the timetable for the ITN stage into the wider context of the scheme itself by including reference to milestone dates already achieved (for example, outline planning permission approval) and the overall timetable outlined for the delivery of the scheme. It is important that such a timetable is realistic and achievable.

5.34 It may be necessary to amend the timetable from time to time. Where this happens, care should be taken that any changes to the timetable do not contravene EU procurement regulations (including the principle of equal treatment of bidders).

5.35 The ITN should state the length of time for which bidders will be expected to guarantee a fixed bid price. This should be consistent with the timetable which the NHS Trust is proposing for the scheme up to financial close, although it should include an allowance for slippage. Asking for fixed priced bids for too long a period may result in higher prices due to the bidder needing to allow for the possibility of a longer period over which inflation and other cost uncertainties may apply. This is especially relevant to construction costs for the bidder. Asking for too short a period may result in the NHS Trust being faced with a possible price rise at a late stage due to slippage in the timetable up to financial close.

Term of contract

5.36 In order to facilitate comparisons between bids, the NHS Trust should propose a length of term for the PFI contract. Bidders should make a compliant bid based on the Trust's preferred contract term. However, this should not prevent bidders making

their own suggestions about the term in the form of a variant bid, which will take account of their proposed financing structure for the scheme.

The evaluation of bids

5.37 The main aim in evaluating bids received in response to the ITN is to award a contract that offers the most economically advantageous terms to the NHS Trust. A clear and detailed description of the methodology that the NHS Trust will be using in evaluating bids should be included in the ITN in order to enable bidders to appreciate the key issues they must address when preparing their bids.

5.38 It is a legal requirement that the ITN should set out the evaluation criteria which will be used in the assessment of bids. The ITN should also clearly indicate which evaluation criteria are absolute passes or fails, and which criteria will be assessed on a relative basis. The detail of the evaluation model itself to be used should not be included in the ITN.

5.39 The NHS Trust should also give a summary in the ITN of the way in which it intends to reduce the number of bidders during the procurement process when bids are received in response to both the Preliminary and Final ITNs.

Establishing lines of communication

5.40 The NHS Trust should establish clear lines of communication with bidders to enable swift and effective exchanges of information. For example, specified contact points should be identified for clarification of the ITN documents and to arrange access to any further information or meetings with NHS Trust officials. This will help in ensuring compliance with the procurement regulations and in securing equal treatment of bidders.

5.41 The names of contact points of the NHS Trust's professional advisers should also be included in the ITN documentation. Those aspects of the documentation that the advisers are empowered to answer questions on should be clearly explained, together with an explanation of the areas which are not within their remit. Advisers should be reminded of the need to keep the NHS Trust informed about requests for clarification and of any responses given. Information which is supplied to one bidder should also be shared with other bidders.

5.42 The documentation should include the name of the NHS Trust representative who has ultimate responsibility for the project, and the lines of accountability to the project team members and advisers. All other members of the project team should be named and it should be stated whether or not they may be contacted direct on any aspect of the project.

Bid requirements

5.43 The NHS Trust's requirements in relation to bids should be made clear to all parties. A bid that meets the minimum output requirements of the NHS Trust but goes no further may be referred to as a standard or reference bid. Variant bids (in terms of alternative ways of delivering the requirement) should be allowed and the contract notice should already have indicated that variant bids will be accepted.

5.44 NHS Trusts should seek to attract variant bids, as these can be a source of innovation. However, variant bids should only be considered if the same bidder has also submitted a compliant bid. It will be important not to waste bidders' time. In this

regard, NHS Trusts should not only give bidders a strong steer as to the variant bids that will not be acceptable (for example variant bids on alternative risk transfer, or bids which have already been rejected in the OBC), but also an indication of the weight that will be attached to variant bids. NHS Trusts should also outline what variant proposals for the scheme have previously been considered and why they were rejected by the NHS Trust. These may already be detailed in the OBC. Variant bids on the standard contract terms should not be encouraged without the prior approval of the NHS Executive Private Finance Unit.

5.45 NHS Trusts should be prepared to make key personnel available to bidders to discuss the types of variant bids that the NHS Trust will consider. However, care will need to be taken to ensure compliance with the procurement regulations.

5.46 In order to make the comparison of bids easier, bidders should be asked to state where variant bids vary from the design or other specifications set out in the ITN. This may be usefully set out in matrix form.

Implementation

5.47 The ITN should set out the means by which the NHS Trust will monitor the implementation of the contract, and then manage the contract once services start to be delivered. This is discussed further in Chapter 8 of this section of the guidance.

5.48 NHS Trusts will also need to agree with bidders the provision for the extent of open book accounting required of the project company throughout the contract period. This may be especially important when the NHS Trust requires to understand costs when the project company is undertaking benchmarking or market testing of individual services.

Change control

5.49 The ITN should set out the NHS Trust's proposals in respect of considering any variations and changes that it or the project company may wish to make during the construction and operating phases to works or services. The proposals should set out the proposed procedure, the proposed funding methodology and make reference to the application of the EU procurement rules. Reference should be made to the contractual requirements set out in *Commercial Issues* in relation to this point.

Bid format

5.50 It is easier for an NHS Trust to compare bids when they are presented in a common format with serial numbering of items. Bidders should be asked to present their bids accordingly.

Confidentiality and disclaimer

5.51 The ITN documentation should include a clear statement of the NHS Trust's obligation to maintain a dialogue with external parties and staff within the NHS Trust, and of its approach to the release of information for these purposes (see chapter 12 of *The Selection and Preparation of Schemes*). A clear statement should be made by the NHS Trust and commissioning HAs or PCGs to the effect that they disclaim liability for the accuracy of information provided. The disclaimers should also make clear that the NHS Trust is not responsible for any costs incurred by bidders during the bid process. The form of words used should be agreed with legal advisers.

5.52 The ITN should also make clear which of the information provided by the NHS Trust should be treated as confidential by the bidder. Items which must be treated as confidential by all parties include transferring employees' terms and conditions. NHS Trusts are advised that they may need to change their Data Protection Act registration in order to make certain information available to bidders.

5.53 The ITN should also make bidders aware that the Full Business Case and the contract for the scheme will be published, subject to exclusions on the grounds of commercial confidentiality and that the NHS Executive may use scheme specific contract clauses to develop the standard form contract further for future schemes.

Other relevant factors

5.54 Any external factors that might heavily influence the scheme will depend on the particular circumstances of the NHS Trust and should be identified in advance and incorporated into the process. For example, this may include planning constraints.

The Preliminary Invitation To Negotiate

5.55 The purpose of the Preliminary ITN is to seek further information from the longlisted bidders prior to asking for priced bids, and to explain to the bidders the NHS Trust's and commissioning HAs or PCGs' requirements. The intention of the Preliminary ITN stage is that further details can be sought from bidders without the private sector incurring excessive time and costs. The bidders should be asked to make submissions which demonstrate their proposed approach in a number of key areas which are set out below.

5.56 The draft sections of the Final ITN should be issued as the Preliminary ITN at this stage of the procurement process. After this stage, comments from bidders and any key issues raised should be taken into account and the documents should be reissued as the Final ITN.

5.57 A fully developed payment mechanism and performance regime should be available at the Preliminary ITN stage. These should be accompanied by a copy of the standard form contract customised to reflect scheme specifics together with a summary of its contents. If a non-standard contract is being used for smaller schemes, this will require the approval of the NHS Executive, and the contract terms should reflect those set out in *Commercial Issues*. The summary of the contract should then cover all of the main commercial issues in the project agreement in sufficient detail to enable the bidder to clearly understand how risks will be allocated. The contract summary should be prepared by the NHS Trust in close liaison with its legal advisers for the project. However, it should be prepared in non-technical language so that it can be easily understood by bidders.

5.58 In addition to the documents that will form part of the Final ITN, the Preliminary ITN should include a section on the information which is being sought from bidders at this stage, and the criteria against which they will be evaluated. Evaluation criteria are discussed further in Chapter 6 of this section of the guidance. Bidders should expect to be interviewed at this stage on the content of their submissions.

5.59 The areas in which bidders should be invited to submit information should include details of the consortia's:

- support for the NHS Trust's healthcare philosophy;
- proposed services approach;
- proposed design approach;
- proposed construction approach;
- proposed method of financing;
- acceptance of the allocation of risks in the contract;
- approach in other areas specific to the scheme, eg surplus land;
- treatment of staff transfer issues;
- treatment of IT and equipment.

These areas are detailed below.

Support for the NHS Trust's healthcare philosophy

5.60 Bidders should be asked to provide information on their overall approach to supporting the NHS Trust's healthcare philosophy.

Services approach

5.61 Bidders should be asked to give examples of how they propose to ensure quality and value for money over the lifetime of the contract. What are their Quality Assurance/Quality Control philosophy/techniques?

5.62 Bidders should be asked how they propose to manage the interface between services provided under the PFI contract and services which continue to be run by the NHS Trust.

5.63 Bidders should be asked to provide draft method statements for the provision of specified key services as an example of how well they understand and intend to meet the NHS Trust's output specifications.

Design approach

5.64 Bidders should be asked for examples of the proposed approach to design in certain key areas to demonstrate the overall philosophy on design, for example:

- how the delivery of non-clinical services will impact on the design of the hospital including clinical areas;
- illustrations showing the flexibility and adaptability of both the overall design and certain key areas.

Construction approach

5.65 Bidders should be asked to indicate the likely type of construction, timetable and proposed phasing and decanting arrangements for the proposed facilities. This could include an indication of whether the bidder envisages that new build or refurbishment would be proposed for any particular parts of the scheme (where relevant).

5.66 Bidders should also be asked to give an indication of how different consortium members propose to work together to ensure that the design, construction and provision of services will interact to provide serviced facilities that meet the NHS Trust's requirements.

Method of financing

5.67 Bidders should be asked for details of how they intend to secure finance and what sources of finance will be considered. This should include expectations of maturity of the debt, cover ratios, interest rates and margins.

Acceptance of the allocation of risks in the contract

5.68 Bidders and their consortium members should provide a statement that the summary contract terms and the principle of a standard form contract are acceptable to them. Bidders should also be asked to provide evidence that they will be able to secure finance based on the proposed contract terms. This should also confirm that the key bidding consortium members have undertaken, and commented upon, a commercial review of the contract summary.

Approach in other areas specific to the scheme, eg surplus land

5.69 Bidders should be asked whether they are willing to guarantee the value of existing sites at the time of tender.

5.70 Bidders should provide details of any development opportunities which the bidder contemplates on the additional land which is potentially available.

Treatment of staff transfer issues

5.71 Bidders should be asked to set out their proposals in respect of staffing issues, for example the application of TUPE, trade union recognition, and broadly comparable pensions.

Treatment of IT and equipment

5.72 Bidders should provide details of how they propose to meet the NHS Trust's requirements for IT and equipment within the scheme.

Shortlisting

5.73 Following receipt of the longlisted bidders' proposals, the NHS Trust must carry out an evaluation exercise in order to select the final three shortlisted bidders. The evaluation criteria used must be consistent throughout the ITN stage and should be aimed at selecting the most economically advantageous offer.

5.74 It is good practice to offer unsuccessful bidders a debriefing and the EU procurement regulations require that unsuccessful bidders, at whichever stage of the process, must be debriefed within 15 days of their having submitted a written request.

The Final Invitation To Negotiate

5.75 The purpose of the Final ITN is to seek firm priced bids from the three shortlisted bidders. At this stage, bidders should be asked to make an initial submission in response to the Final ITN which should include the following:

- Design: 1:500 plans, sketch plans, selected blow-ups, functional relationships, outline area schedule;
- Financial model: full financial model setting out costs, financing and ratios, etc;
- Contract: agreement on all key contractual issues affecting price and risk allocation, including the payment mechanism and performance regime;
- Financing: proposed method of finance with statement of support from proposed funders and third party equity providers. This should include draft term sheets and acceptance of key contract terms, payment mechanism and performance regime, financial model and the allocation of risks within the consortium.

The three bidders should then be reduced to two on the basis of the most economically advantageous offer. Unsuccessful bidders should be offered a debriefing.

5.76 The two remaining bidders will then be expected to continue working up their bids to provide a fixed price bid based on the following:

- Design: 1:500 plans, cross sections, site plans, area schedule, performance specifications;
- Financial model: full financial model;
- Contract: agreement on all key contractual issues affecting price and risk allocation, including the payment mechanism and performance regime, and agreement on all points of principle on specification;
- Financing: further statement of support from proposed funders and third party equity providers. This should include draft term sheets and acceptance of key contract terms, payment mechanism and performance regime, financial model and allocation of risks within the consortium.

At the end of this stage a preferred bidder should be selected, and the remaining bidder debriefed, if required, and asked to become reserve bidder.

5.77 NHS Trusts should be clear on the basis on which the price charged is quoted by bidders at each stage of the procurement process. In particular, NHS Trusts should ask bidders to confirm what areas of the price are fixed or may be subject to change later in the bidding process. This is discussed further in Chapter 6 in this section of the guidance.

Response to the Final Invitation To Negotiate

5.78 In their response to the Final ITN, all three shortlisted bidders should be requested to include the following in relation to the services comprised within a scheme:

- details of what is comprised within each service together with the proposed form of agreement;
- proposals for the management of the service;
- performance measures;
- quality measures;
- monitoring and reporting arrangements;
- details of how the service is to be delivered;
- the scope of the services offered and flexibility in the volume of outputs provided.

5.79 In choosing between bidders who respond to the Final Invitation to Negotiate, NHS Trusts must, in accordance with Department of Health policy, evaluate as part of the qualitative evaluation of bidders' proposals, those bidders' proposals in respect of:

- TUPE;
- staff management;
- pay, terms and conditions;
- training and labour relations;

to the extent that these are relevant to the delivery of the particular service required, and the provisions of the proposed contract. This evaluation will help the NHS Trust to establish the quality of service delivery implicit in bidders' proposals. Further advice on this process is in Chapter 13 of *Selection and Preparation of Schemes*.

Minimum consortium composition

5.80 The ITN should set out the NHS Trust's requirements in terms of the minimum composition of the consortium at this stage. By now the following members of the consortium should be identified and should have provided clear evidence of commitment to the project:

- lead building contractor;
- key sub-contractors to the building contractor;
- professional team;

- facilities manager;
- key service providers;
- private patients unit operator (if any);
- developer in relation to surplus land (if any);
- equipment and IT supplier(s) (if required);
- all proposed equity holders in the project company;
- lead funder.

Financial information from bidders

5.81 In response to the Final ITN, the bidders' financial proposals should consist of the tariff and charging arrangements for the service to be provided. There may also be a number of options depending upon contract length.

5.82 Bidders should be required to provide a financial model of their bid on disk in the appropriate format. Bidders should also be required to present the financial model so that the key criteria on which the evaluation of bids will be based are shown in a standard format. This will help the NHS Trust and its advisers to construct suitable spreadsheet models to allow sensitivity calculations, comparisons etc to be made.

5.83 NHS Trusts should also indicate to bidders the variables that they will seek to test. This will enable bidders to have regard to this when preparing their models and for both parties to check the accuracy of the model by carrying out the same checks. Financial models are also discussed in *Technical Issues*.

5.84 The key components of the financial evaluation include:

- the annual tariff to be charged and the profile of payments over time;
- an assessment of the key financial assumptions on which a bid is based;
- the method of financing (including assumptions on interest rates and hedging costs);
- an assessment of risks;
- sources of income;
- project timetable.

5.85 Bidders should be asked to state the interest rate assumptions on which the financial model is based. NHS Trusts should require bids to be returned with sensitivity analyses showing the effect of a rise of at least 0.5% above the relevant interest rates to the source of financing to be used. Bids should be requested so that, even by setting interest rates 0.5% above the relevant interest rate (also called an "interest rate buffer") they are within the NHS Trust's stated affordability ceiling at the time of submission of bids. This interest rate buffer should allow the NHS Trust some

flexibility if interest rates rise between when bids are received and financial close. By the time of Full Business Case submission, an interest rate buffer of 0.25% above the relevant interest rate at the time of FBC approval will be required.

5.86 The evaluation of bids is discussed in more detail in Chapter 6 of this section of the guidance.

Presentations and interviews

5.87 The success of the procurement process should not rely solely on written documentation. A presentation by the NHS Trust's project team at an early stage gives the opportunity for prequalified parties to gain a better understanding of the NHS Trust's requirements of the scheme and the procurement process to be followed.

5.88 The presentation is also a good opportunity to deal with confidentiality issues (eg explain the NHS Trust's external and internal communications plans and proposals for access to information), to underwrite the fairness of the process and to explain access arrangements for consulting with NHS staff and clinicians.

5.89 At the Preliminary ITN stage, the NHS Trust project team should interview bidders on the contents of their proposals. Given the numbers of bidders involved, it will most likely not be practical for consortia to interview NHS Trust management, clinicians and other staff during this phase.

5.90 Meeting representatives of the bidders gives a useful opportunity for the NHS Trust not only to hear about bidders' plans but also to make an assessment of the senior personnel that will be involved in future discussions and the likelihood of a good rapport being established between the public and private sector teams. The format for such interviews is largely up to individual NHS Trusts, but should be the same in all material respects for each bidder.

5.91 At the Final ITN stages the NHS Trust project team should interview the bidders in greater depth about their proposals. Shortlisted bidders should be given the opportunity to discuss their proposals and the requirements of NHS Trust management, clinicians and staff.

6. Evaluation and selection

Introduction

6.1 This chapter details how responses to the Preliminary ITN and the Final ITN should be compared and evaluated leading up to the selection of the preferred bidder. Evaluating the available options is extremely important and must be carried out with care and objectivity.

6.2 The evaluation framework and criteria used during the procurement process should be consistent at every stage. The details of evaluation at each stage of the ITN should always be explained to bidders in the documentation that is issued at that stage. Evaluation criteria are best listed in descending order of priority so that bidders have a clear idea of what is important to the NHS Trust. It is not necessary for bidders to be supplied with relevant weightings.

6.3 Key points to note at the ITN stage include:

- evaluation criteria must relate to the merits of the bid received and not to the economic and financial standing or technical capacity of the bidder. These issues should have been dealt with at the prequalification stage. However, account may be taken of a significant change in a bidder's financial, economic and/or technical status;
- evaluation criteria must be impartial and auditable;
- bidders should have been informed of the evaluation criteria in the Preliminary and Final ITNs;
- NHS Trusts and commissioning HAs or PCGs should interview consortia as part of the evaluation process.

The evaluation team

6.4 The evaluation team will usually be a part of, and report to, the existing project team, drawing on sub-groups for any technical help required. The evaluation team should be set up early in the procurement process and should draw up the evaluation criteria that will be published. It is recommended that the full membership of the evaluation team is involved in setting the evaluation criteria, which should be done before the scheme is advertised.

6.5 In order to be fully effective, the evaluation team should be kept to a manageable size. The evaluation team should represent all stakeholders in the scheme and will typically include:

- NHS Trust management (chief executive, project director, director of finance, human resources director etc);
- commissioning HAs or PCGs
- clinicians' representatives;
- the NHS Trust's financial, legal and technical advisers, as appropriate.

6.6 The evaluation team should also seek advice from the NHS Executive where it is felt that additional experience from other PFI schemes would be useful.

Evaluation criteria

6.7 The Public Services Contracts Regulations 1993 set out the criteria on which the NHS Trust may award a services contract. It will be on the basis of an offer that offers the lowest price or is most economically advantageous overall to the NHS Trust. NHS Trusts should seek to award their contracts on the latter basis and must expressly refer to this in their OJEC notice and/or in the ITN.

6.8 When the NHS Trust proposes to award the contract on the basis of economic advantage, it should state its evaluation criteria where possible in descending order of importance in the contract notice or the Invitation To Negotiate. If they are not in such order then this should be made clear.

6.9 The factors for evaluating economic advantage of the bid for a services contract are described in Regulation 21 of the Public Services Contracts Regulations 1993. They include:

- period for completion or delivery, quality, aesthetic and functional characteristics, technical merit, after-sales service, technical assistance and price.

6.10 Other evaluation criteria may be taken into account but these must be impartial, objective, and should be aimed at assessing best value for money (ie they must be directly relevant to the performance of the contract). A key criterion is also the acceptance of the proposed allocation of risks by the bidder. Full acceptance should be required for a bid to be compliant.

6.11 The evaluation team may define the minimum standards which bidders must attain for their bid to be considered further. In addition to or in place of minimum standards, the team should establish detailed criteria against which each bidder will be measured. Some will be given more weight than others. Any approach must be decided upon and the reasons for it fully documented before the evaluation criteria are issued.

Evaluation methodology

6.12 It is usually easiest to compare the different bids against the set evaluation criteria using a weighting and scoring matrix. The relative weightings of each criteria, and sub-criteria within them, should have been agreed by the evaluation team when the Invitation To Negotiate was being drafted and before the scheme was advertised.

The use of such a matrix will allow bids to be ranked in the order in which they best meet the evaluation criteria.

6.13 A clearly superior choice may not be immediately evident. Sometimes the choice will be between a bid offering lower costs but fewer benefits, and one at higher cost but with greater benefits or with greater risks of delivery. Determining the preferred bid will be a matter of judging the value of the additional benefits against the additional costs that would be incurred if that bid were selected against the set evaluation criteria.

6.14 The results of the evaluation should be documented, and the NHS Trust must allow sufficient time for the evaluation to be thoroughly and fairly carried out. Where bids are very close then more detail should also be recorded. This will be particularly important in order to leave a proper audit trail. If there are no adequate PFI bids, a record should be made of this with clear reasons given as to why bids are considered to be inadequate or unsuitable. The record should thoroughly explain the procurement process followed, the prequalification and shortlisting criteria, the output specification and ITN issued, the nature of inadequacies in the responses and, if potential partners have withdrawn during the process, their stated reasons.

6.15 The NHS Executive Private Finance Unit has examples of evaluation pro-formas used successfully on earlier schemes, which are available to NHS Trusts on request.

Evaluating Preliminary ITN submissions

6.16 It is important that evaluation criteria are consistent across all stages of the ITN process. When NHS Trusts are evaluating bids at the Preliminary ITN stage they will not have fully priced bids. Clearly, they will need to avoid a situation where the final bids are not affordable. In order to take account of price in the evaluation of bids at this stage, bidders should be asked to confirm in writing that the proposals set out in response to the Preliminary ITN will meet the quality standards set by the NHS Trust and that their bids will be affordable within the ceiling set out in the ITN document. Bidders who are unable to provide such a confirmation should not be taken forward to the next stage.

6.17 As detailed in Chapter 5 of this section of the guidance, the NHS Trust would have asked for bidders responding to the Preliminary ITN to set out their proposed approach in a number of areas, for example the services approach for the project. When setting the evaluation criteria for each of these areas, the evaluation team should define and agree the key aspects for the evaluation of responses.

6.18 Bidders should be clearly informed that their willingness to accept, and ability to demonstrate that they can deliver on, the proposed risk allocation will play a key part in evaluating the most economically advantageous proposals and whether their bid is compliant.

Evaluating Final ITN submissions

6.19 The same criteria and weightings should be used for evaluating Final ITN submissions as for Preliminary ITN submissions. This section looks at a number of factors which should be considered as part of the evaluation criteria. The list below is not intended to be exhaustive. It includes:

- design and services
- affordability
- capital costs
- risk allocation
- value for money
- non-financial factors
- payment mechanism
- term of contract
- guarantees
- contingency planning
- flexibilities and options.

Design and services

6.20 Does the design solution and the proposed service provision meet the NHS Trust's requirements as set out in the output specifications? Also, are the construction and service providers working effectively together and what additional benefits to the scheme will result from this?

Affordability

6.21 A clear picture of the revenue payments (ie tariff) will be required for each bid, including the profile of the payments over time. This must describe the nature of the payments to be made by the NHS, when payments will be made and how much will be paid. Payment mechanisms are discussed further in the section of the guidance on *Technical Issues*. NHS Trusts should be clear on the funding, interest rate and indexation assumptions in each bid on which costs are based.

Capital costs

6.22 Under the PFI proposals, if there are any proposals for public sector capital then these should be costed in when comparing bids. Similarly, if surplus land is to play a part in the scheme, the methods of incorporating it which are suggested by bidders will need to be compared.

Risk allocation

6.23 Comparing risks under the different proposals is partly an objective procedure, but it is also in part a subjective matter based on the judgements of the evaluators. Judgements need to be recorded, and should be reasonable and defensible. The recording of key judgements will be an important part of the Full Business Case. Judgements will need to be made on the values of risks, the level of risk transfer, and expected performance. A matrix of comparisons of the risk aspects of the evaluated proposals should help to clarify key differences.

6.24 Bidders are required to submit compliant bids which accept the risk allocation set out in the standard form contract and payment mechanism. The NHS Trust should also consider the position of bids in relation to the standard form contract. In particular, the effect on the allocation of risks within the project which may result from any variations proposed by bidders on scheme specific issues outside of the scope of the standard form contract should be considered. Variations should also be assessed on their consistency with the overall principles set out in *Commercial Issues*.

Value for money

6.25 The value for money analysis of different bids should be assessed taking into account risks which will be retained by the public sector. Bids should be evaluated on a net present value basis which includes the effects of risk transfer. This is discussed further in the chapter on risk in *Technical Issues*.

6.26 As explained in the Capital Investment Manual – Business Case Guide, it is appropriate to make comparisons in terms of Net Present Values. All figures should be expressed in real terms (ie in today's prices). Discounted values should be calculated using a 6% real discount factor. Where options have different life spans the Business Case Guide explains how they can be assessed using equivalent annual costs (EACs) and typical annual benefits.

Non-financial factors

6.27 While all the acceptable bids will meet the minimum criteria, there may be significant differences in some of the qualitative factors in the proposals. The Business Case Guide in the Capital Investment Manual contains further guidance on the use of weighting and scoring techniques to compare options. In general it will be appropriate to re-use or develop the weighting and scoring matrix that has been used in the option appraisal conducted at the Outline Business Case stage. There may be a need to add new criteria, or to divide the existing criteria into more detailed and specific sub-criteria to aid a more careful and rigorous evaluation of the differences between proposals.

Payment mechanism

6.28 This is a key part of the contract and the NHS Trust should consider the degree to which returned bids comply with the payment mechanism set out in the ITN. An assessment should be made of the strength and likelihood of any suggested system of performance deductions in variant bids which vary from the one prescribed by the NHS Trust in the ITN. If any payments are volume related, the NHS Trust should consider both the maximum amount that may be payable and the base case.

Term of contract

6.29 The period over which bids are to be evaluated should be the period over which the option is likely to be used by the NHS. Typically, the evaluation assessment will be over the primary contract period. If a subsequent contractual period can be foreseen then this could be included in the period over which the bids are assessed. The need to make assessments about secondary periods diminishes as the length of the primary period increases. The length of contracts could differ between bids, and they could also differ from the life span of the publicly funded option.

Guarantees

6.30 Where relevant, what guarantees in respect of surplus land are offered as part of the proposal and what is their strength? (This does not include performance guarantees.)

Contingency planning

6.31 Sensitivity analysis is important. A range of scenarios should be considered and “what if” assessments made. For example, what if commissioning HAs or PCGs needed to purchase more services from the NHS Trust? Or, what if new drug therapies reduced the need for the hospitalisation of certain cases? Or, what if energy cost inflation doubled? “What if” scenario analysis should prompt testing of the robustness of PFI options, and should highlight needs for contingency plans and risk management strategies. The NHS Trust should have carried out sensitivity analyses in preparing the Public Sector Comparator and should apply similar disciplines and tests at this stage.

6.32 This exercise should include assessing the overall quality of the design in terms of the flexibility and adaptability of the building to cope with change, together with the likely costs incurred.

Flexibilities and options

6.33 What extra flexibilities would be available under the proposals? What additional options are open? Are conditions attached to the exercise of certain options? The flexibilities and options available under PFI proposals should be described together with the situations in which it is envisaged that the NHS might take them up. The costs of taking them up should be set out, and the benefits of taking them up should be assessed, too.

6.34 This assessment will link back to the sensitivity analysis that has been carried out and to the “what if” scenarios. It will be particularly important to consider how flexibilities and options will help commissioning HAs or PCGs and users, allowing the NHS Trust to respond to changing healthcare needs, new pressures for efficiency improvements, etc. Judgements about the value attached to flexibilities and options are likely to be most appropriately dealt with through weighting and scoring techniques in a matrix assessment.

6.35 The risks of the different bids should be compared in the form of a matrix. The benefits of the various forms of risk reduction should be set out along with the other non-financial assessments of the bids. Ideally they should be brought together to form an overall benefit score for each of the bids. The bids can then be ranked in order of benefit.

Negotiating with bidders

6.36 Bidders will be expected to accept the standard form contract largely unamended, so that the contract should be substantially agreed by the time a preferred bidder is selected. Before selecting a preferred bidder and submitting a Full Business Case, the NHS Trust should develop the terms of the transaction to an advanced stage with the two shortlisted and then the preferred bidder. This will give the NHS Trust the maximum opportunity to achieve a key objective: to choose the bid that represents a solution that is the most economically advantageous to it and which is derived from a robust competitive process.

6.37 The NHS Trust will need to organise itself so that it can efficiently negotiate scheme specific contract terms with two bidders. The necessary time and resources will require careful prioritising by the NHS Trust if the process is to work successfully. The NHS Trust will also need to make sure that its advisers and particularly its legal advisers have sufficiently resourced the project to enable two sets of negotiations to continue contemporaneously.

6.38 There are no rules as to how negotiations should be conducted except that bidders should be treated in an even handed manner both as to the time allotted and to the broad balance of the positions adopted by the NHS Trust. The existence of a standard form contract should assist the NHS Trust in maintaining an even-handed approach to negotiations. The NHS Trust will have to strike a balance between the costs to both the NHS Trust and to the private sector as a whole of running negotiations with two bidders and the benefits that maintaining competition for longer bring.

6.39 The NHS Trust should be aware during negotiations that it should not engage in practices such as using one bidder's negotiating position as a bargaining counter in negotiations with the other shortlisted bidder. Neither should the NHS Trust divulge a bidder's negotiating position to its competitor either expressly or by implication. This would both be unfair and a breach of commercial confidence.

The importance of financiers

6.40 As providers of the capital that will be used to fund the development and other preparatory work, financiers play a pivotal role in PFI transactions. A key lesson from early schemes is that it is important to ensure that financiers are appropriately involved at the right time. The selection of financiers and the method of financing will be a decision taken by the bidder.

6.41 NHS Trusts should take the bidder's strategy in appointing financiers into account as part of the selection process and should make an assessment of the deliverability of the bidder's proposals. The following factors concerning the bidders' financiers should be considered:

- experience of privately financed infrastructure projects in health and other sectors;
- familiarity in dealing with public health bodies;
- acceptance of the NHS Trust's proposed contract terms;
- anticipated due diligence strategy;
- resources available to financiers in carrying out due diligence and involvement in other schemes which may impact on these resources.

6.42 NHS Trusts should insist that the minimum involvement of financiers during the bidding process is as follows:

Figure 6.1: Involvement expected from financiers at each stage of procurement

Stage of process	Minimum degree of involvement from financiers/bidders advisers
Prequalification	Details of who is going to advise bidder on financial issues including information and experience.
Preliminary ITN (where applicable)	Details of proposed financing approach from bidders advisers. Confirmation of equity to be provided by sponsors (other than third party equity providers). Evidence that consortium will be able to secure finance on the proposed contract terms.
Final ITN (shortlist of three)	Statement of support from proposed funders and third party equity providers including draft term sheet and acceptance of key contract terms, payment mechanisms and performance regime, financial model and allocation of risks within consortium.
Shortlist of two	Further statement of support including draft term sheets from funders and third party equity providers with acceptance of key contract terms, payment mechanisms and performance regime, financial model and allocation of risks within consortium.

6.43 It is recommended that NHS Trusts and commissioning HAs or PCGs meet each bidder's proposed financiers (both funders and third party equity providers) to a scheme before the shortlist of two is selected. This should be a two way process to enable the NHS Trust and commissioning HAs or PCGs to have a clearer understanding of the financiers approach to the scheme, and also for them to understand issues which are important to financiers.

6.44 Financiers should have undertaken a full contract review, economic analysis and commercial risk analysis prior to the NHS Trust selecting the shortlist of two. They will also need to carry out a number of further checks before they commit themselves to providing finance. The nature and extent of these checks will vary between financiers and will be influenced by the size of the scheme and the circumstances of the NHS Trust. However, it is likely that financiers will agree between themselves who is responsible for undertaking due diligence in separate areas of the scheme on behalf of all the financiers.

6.45 Typically financiers will employ specialist advisers to conduct the separate areas of due diligence. These advisers will need to go through the contract terms and ensure that the contract will operate in practice to the financiers' satisfaction (although financiers will already be required to sign off on the detailed commercial terms). The actual due diligence process may vary in length, but at this stage of development of PFI in the NHS can be expected to take around 12 weeks on major schemes. Financiers will then need to obtain internal authorisation (normally through

a credit committee) before a deal can be signed. It is expected that due diligence should commence upon appointment of the preferred bidder.

6.46 For schemes funded by bonds or other capital instruments, consortia may elect to buy an insurance wrap from a monoline insurer. Monoline insurers underwrite (or insure) the project risk against their own balance sheet for a lump sum fee. Where monoline insurers are used they will undertake the due diligence process.

6.47 NHS Trusts should confirm with bidders what aspects of the scheme financiers will require to be complete at different stages up to financial close. In particular, what level of detail in the design drawings will be needed before due diligence can be undertaken?

6.48 The different areas of the scheme which will generally be considered as part of due diligence include:

- financial;
- legal;
- healthcare;
- technical (including design, construction and services);
- insurance.

6.49 The financiers will be expecting the due diligence to include details of the following:

- the quality of the NHS Trust's management;
- the NHS Trust and commissioning HAs or PCGs' financial position;
- the NHS Trust and commissioning HAs or PCGs' strategy for the foreseeable future;
- the NHS Trust's business performance;
- the NHS Trust's internal commitment to change;
- the appropriateness of the scope and scale of the design solution to the NHS Trust's healthcare needs;
- the degree of cohesion and the allocation of risks within the consortium;
- the impact of the commercial deal on the financiers' ability to secure repayment and an investment return;
- an audit of the consortium's financial model.

The preferred bidder

6.50 At an appropriate stage in the negotiations following the submission of fully developed bids, the preferred bidder should be selected from the remaining two bidders. Before being selected as the preferred bidder, potential bidders should have:

- agreed all points of principle on contracts (including agreement from financiers);
- a full financial model;
- confirmed with financiers draft term sheets for financing the project with acceptance of all points of principle on the contract, financial model and the internal allocation of risks with the bidding consortium;
- presented proposals that best meet the output specification;
- quoted a firm price which is affordable to the NHS Trust and commissioning HAs or PCGs;
- provided the best value for money of the options available;
- agreed to bear substantially all price risk except for changes in underlying interest rates. (There should be no variation for, eg increased bid/development costs.)

The reserve bidder

6.51 When the preferred bidder has been selected, the remaining bidder should be asked to accept reserve bidder status. The reserve bidder may be recalled if negotiations with the preferred provider do not look likely to achieve an acceptable deal to the NHS Trust. Having a reserve bidder in place allows the NHS Trust to maintain a greater element of competitive pressure on the preferred provider. However, this pressure will diminish the longer the period after which the preferred provider was selected.

Developing the scheme

6.52 After selection of the preferred bidder, negotiations on detailed scheme-specific aspects of the contract will need to commence. This stage is likely to be time consuming and resource intensive both of the NHS Trust and its advisers and the NHS Trust will need to plan accordingly.

6.53 In negotiations with the preferred bidder, the NHS Trust may not make concessions on contractual points already agreed during earlier negotiations. Any significant change to the terms on which the preferred bidder has been selected is likely to prejudice the fairness of the procurement process. All changes in agreed contractual terms after the selection of the preferred bidder, eg variance from the standard form contract, should therefore be cleared with the NHS Executive before being approved by the NHS Trust.

Price

6.54 A fixed price must be agreed with the preferred bidder prior to submission of the FBC, together with a clear understanding of how long this is to be held for. At each stage of the procurement process leading up to this, NHS Trusts should be clear what areas of a bidder's price may not be fixed, and what factors may lead to a possible change. It is expected that any areas of price uncertainty should be minimised from when priced bids are first received, and that they should reduce as negotiations progress. There should be no scope for price changes as a result of increased bid or development costs. Bidders should remain aware at all times that bids must remain within the NHS Trust's stated affordability ceiling.

7. The Full Business Case

Introduction

7.1 Full Business Case (FBC) approval must be sought for a scheme before it proceeds to financial close. The delegated limits for the approval of schemes are set out in Appendix 1 in *The Selection and Preparation of Schemes*. This chapter covers the information that should be included in an FBC and at what stage in the development of a PFI scheme the FBC should be submitted for approval by the NHS Executive and by HM Treasury (where relevant).

7.2 Key issues to be considered at this stage include:

- the stage of development of the deal, ie what needs to be agreed prior to FBC submission and approval and what work remains outstanding before financial close can be achieved;
- when to share drafts of the FBC with the NHS Executive;
- the content of the FBC.

Approval requirements

7.3 A Full Business Case will be given approval when it has met all of the requirements of the Capital Investment Manual and only minor details of contractual agreement (ie anything that will not affect the price or level of risk transfer in the deal) are outstanding. In practice, this means that a significant majority of the contractual documentation, including schedules, will have been agreed in some detail with the private sector partner, and the financiers to the scheme will have agreed the key elements of the deal.

7.4 For an FBC to be given approval, the deal should be in such a position that will enable full financial close to be reached within two months after approval. This means that financiers' due diligence should have commenced prior to FBC approval.

7.5 A full checklist of what must be in place to secure FBC approval is at Appendix 6. Important considerations include:

- all of the consortium members must be identified. This includes the builder, the maintenance and facilities management providers, IT and major equipment providers, and any other key private sector stakeholders in the scheme such as property developers and private patients unit operator;
- the consortium must have selected debt and equity providers (each of whom should be identified) and the NHS Trust should confirm that the

key contractual terms have been accepted by them. Alternatively, if bond financing is to be used then the consortium should have demonstrably clear arrangements for this;

- up to date confirmation of explicit commissioner support must be given for the scheme. Any conditions of commissioner support should not be open ended and should be fully agreed with the NHS Trust and the Regional Office of the NHS Executive;
- the NHS Trust must be fully satisfied with the quality of the services to be provided, including the facilities associated with them. This means that 1:200 designs must have been completed as a minimum. Clinical support within the NHS Trust for the scheme and acceptance of the quality of services and facilities specified must also be given.

Interest rates

7.6 The interest rate on which the price to be charged by the bidder is based should be stated in the FBC. The NHS Trust should also be aware of how this assumption affects price in the bidder's financial model for the scheme. There should be an agreed protocol on how any interest rate fluctuations will affect price and the effect of these changes should be transparent within this model. It should be clear that any favourable movements in interest rates prior to financial close will be fully reflected in a lower price to the NHS Trust.

7.7 To allow for possible changes in interest rates that may lead to an increase in price up to financial close, the price of the scheme on which commissioner support is based in the FBC should include an interest rate buffer. This buffer should be 0.25% above the relevant interest rate ruling at the time of FBC approval. The relevant interest rate is most likely to be that used for the proposed hedging strategy. Once FBC approval is given NHS Trusts should not reduce the interest rate buffer prior to financial close without consulting the NHS Executive Regional Office (and NHS Executive Headquarters for schemes of £25m or over).

7.8 The FBC should also include sensitivity analysis of the effect of an increase or decrease in interest rates of each 0.25 percentage change over that assumed in the FBC.

7.9 The purpose of the buffer is to provide some certainty in the last weeks before financial close. Interest rates can move against the NHS Trust by up to 0.25%, yet the NHS Trust will still be able to progress the contract. NHS Trusts should note, however, that neither they nor the NHS Executive can guarantee that contracts will be approved if interest rates move against the NHS Trust by more than 0.25%. NHS Trusts in this position must consult the NHS Executive.

The Full Business Case approval process

7.10 Given that FBC approval will only be given at a highly advanced stage in the development of a deal, it is essential that early drafts of the FBC which reflect how the deal is developing are shared with the NHS Executive Regional Office and (for major schemes) Headquarters. Drafts of the FBC serve an important role in order that both the NHS Trust and the NHS Executive can ensure that the scheme develops in line with PFI policy.

7.11 Under current delegated limits, for schemes with a capital value over £10m, the process includes approval by:

- NHS Executive Regional Office;
- NHS Executive Headquarters;
- HM Treasury Health Expenditure Team;
- Ministers (for schemes over £50m capital).

7.12 The actual approval of the FBC for any significant scheme should be an iterative process in the stages leading up to the submission of the FBC. This should primarily be conducted through the Regional Office, who will involve headquarters as appropriate during this period.

7.13 In general, NHS Trusts should allow two months from the date of formal FBC submission to allow resolution of issues raised by the NHS Executive. This allows for the NHS Trust to also resolve any issues raised with the private sector partner where appropriate. This period may be shorter if the Regional Office and headquarters have been more closely involved in the period up to FBC submission. For major schemes, NHS Trusts should allow a further month for approval of a business case by the NHS Executive, Treasury and Ministers from the date when a satisfactory position has been reached on all issues raised by the NHS Executive.

7.14 It is expected that while the FBC is being considered for approval, the NHS Trust and private sector partner will continue to work up the detailed contractual documentation and that due diligence on behalf of the financiers will be continuing. NHS Trusts will be required to demonstrate that schemes are sufficiently close to financial close before FBC approval will be given.

7.15 The terms of a deal should not change significantly after FBC approval. Where, exceptionally, there is a material change, whether in terms of scope of the scheme, price, level of risk transfer or in commercial terms, then FBC re-approval will be required. This will be determined on an individual case-by-case basis.

Publication

7.16 NHS Trusts are required to make public the FBC one month after approval. This is detailed further in Chapter 12 of *Selection and Preparation of Schemes*.

7.17 Some of the information in the FBC is likely to be commercially sensitive. It is recommended that such information is, as far as possible, placed in appendices to the FBC which can be more easily taken out before publication. NHS Trusts must ensure that, when classifying information as commercially sensitive, they observe the principles set out in Chapter 12 of *Selection and Preparation of Schemes*.

FBC checklist

7.18 The checklist appearing in Appendix 6 in this section of the guidance sets out the information which is required in an FBC submission. NHS Trusts should follow the structure outlined in the checklist, although additional information should be

included where it is relevant to the scheme. Appendix 7 of this section of the guidance details key commercial issues which should be summarised in the FBC.

7.19 It should also be remembered that one of the key functions of the FBC is as the key document in the audit trail in recording the decision-making process culminating in the decision to proceed with the PFI scheme.

Further information

Business Case Guide, Capital Investment Manual, NHS Executive, 1994

8. Finalising the deal

Introduction

8.1 This chapter details the process which an NHS Trust is likely to encounter as it proceeds in the final stages towards financial close. It also explains the provision of a letter of explanation for major schemes and the certification of PFI contracts as Externally Financed Development Agreements (EFDAs) according to the NHS (Private Finance) Act 1997.

8.2 Key issues which should be considered at this stage include:

- what is required to finalise the contract documentation;
- what is required to enable financial close.

Finalising the contract documentation

8.3 NHS Trusts should not underestimate the complexity and quantity of legal documentation that needs to be finalised both by the NHS Trust, the project company and financiers before financial close can take place. The completion of the documentation will also be affected by any issues which are raised during the due diligence process. NHS Trusts should ensure that adequate time is set aside and sufficient resources allocated for this part of the process.

8.4 A list of the full set of contract documentation for both the private and public sectors for a major deal is set out in Appendix 8 of this section of the guidance as an example of the scale of documentation which can be expected on a deal.

Consortium and NHS Trust approvals

8.5 It is likely that individual consortium members may require authorisation to sign deals from each of their companies' head offices. The NHS Trust should be clear in advance what internal approvals within consortium members will be required and what is the timetable under which they will be sought.

8.6 The NHS Trust must also consider its own approvals for the contract. Not only are approvals needed within the NHS Executive; the NHS Trust will also need to convene a board meeting to agree the contract. The board will need to consider what delegated authority the NHS Trust Chief Executive will have to agree variations in the price from the FBC to that eventually agreed at financial close. NHS Trusts also need to consider the community's interests, and those of the CHC and other formal bodies.

Finalising the price

8.7 The final price will be dependent on the underlying interest rates at financial close. Prior to financial close a procedure should have developed between financial

advisers of the NHS Trust and the consortium on the mechanisms for agreeing the final price to be charged to the NHS Trust depending on the underlying interest rate at financial close. Following financial close the appropriate figures will be entered into the contract.

Pre-contract review

8.8 In addition, immediately prior to financial close, the NHS Executive will review the status of a project to ensure that the terms of the project fully reflect the terms on which FBC approval was given. This will include checking that:

- the scheme is value for money;
- the scheme is affordable;
- the assessment of the accounting treatment for the scheme remains unchanged;
- the scheme meets all final contractual positions in a form satisfactory to the NHS Executive.

This will not be a separate review process but is intended to be ongoing as the scheme moves from FBC approval to financial close. The review is limited to the purpose stated above. The NHS Executive does not undertake a comprehensive review of all the contract provisions and it is the responsibility of the NHS Trust with the assistance of its legal, financial and other professional advisers to ensure that the concession agreement in its entirety is acceptable commercially, and that it accords with the legislative and regulatory requirements to which the NHS Trust is subject.

8.9 For major schemes (with a capital value of £25m or over) a full copy of the final contract should also be sent to the NHS Executive Private Finance Unit at financial close.

Letter of explanation

8.10 In the case of major schemes (with a capital value of £25m or over), or for smaller schemes at the NHS Executive's discretion, the NHS Executive on behalf of the Secretary of State will, immediately prior to financial close, provide a letter of explanation (a sample of which can be found in Appendix 9 of this section of the guidance). This letter explains to the private sector parties involved the approval criteria, the logic behind the NHS (Residual Liabilities) Act 1996 and the statutory duties and powers of the Secretary of State to ensure that NHS Trusts fulfil their responsibilities and obligations in accordance with all the relative legislation. The position is not affected by the Health Act 1999.

8.11 This letter is not negotiable and cannot be amended (except for the names of the consortium and its funders) without the prior approval of the NHS Executive.

Certification under the NHS (Private Finance) Act 1997

8.12 The NHS (Private Finance) Act 1997 Act removes any doubt about the power of NHS Trusts to enter into PFI contracts, referred to in the Act as "externally financed development agreements" (EFDAs). An agreement is an EFDA if it is certified as such by the Secretary of State, or a senior civil servant on his behalf.

8.13 Certification will normally be contemporaneous with financial close. It cannot be completed after financial close. The NHS Trust and its private sector partners will have agreed a contract ready for signature. At financial close, the contract will be signed and a member of the Senior Civil Service, on behalf of the Secretary of State, will then sign a certificate to confirm that the signed contract is now an EFDA. A sample certificate is at Appendix 10 of this section of the guidance.

8.14 Typically, a major PFI scheme involves a contract between the NHS Trust and a project company, and a series of further contracts between the project company and its individual members. However, only the overarching project agreement – between the NHS Trust and the project company – can be certified. The certificate will list the constituent parts of the project agreement, but only the project agreement itself can be certified.

8.15 The certificate's wording is non-negotiable and cannot be amended without the prior approval of the NHS Executive.

8.16 Major variations to the contract agreed after the original certification may be covered by amending the overarching project agreement and issuing a new certificate. It will be the responsibility of the project company to trigger a request for a new certificate, to provide all the necessary information for the request to be considered and to demonstrate why a further certificate is necessary.

8.17 Low value contracts do not require certification. Individual NHS Trusts have thresholds (currently set in relation to their turnover) below which they can approve Full Business Cases without reference to the NHS Executive (Regional Office or headquarters). Contracts whose value is below an NHS Trust's delegated limit will not be certified. For the avoidance of any doubt, the Act makes clear that the validity of such contracts will in no way be affected by the lack of a certificate. NHS Trusts' delegated limits are set out in Appendix 1 of *Selection and Preparation of Schemes*.

Contract award

8.18 Once the NHS Trust and the NHS Executive are happy with the pre-contract review, the NHS Trust can proceed to financial close. Once the contract has been awarded, the NHS Trust must despatch a contract award notice to OJEC within 48 days.

Monitoring of the implementation of the contract

8.19 A PFI scheme should be considered a success not simply at financial close, but when a satisfactory level of services is delivered on an ongoing basis once construction is complete. There are two key areas where the NHS Trust should make arrangements to monitor the implementation of the contract, and the proposed arrangements should be set out in the ITN. These are:

- in the period up to completion of commissioning of the new PFI facility. This will include the phased hand over of any services to the private sector operator;
- during the operational phase of the contract.

8.20 NHS Trusts are recommended to appoint a monitor to ensure contract compliance in the period between financial close and the completion of commissioning of new facilities. The monitor should be provided in-house if the NHS Trust has the necessary expertise, or should otherwise be appointed externally.

8.21 The project company or a consortium member may engage a development or project manager to safeguard its interests, manage its constituent players and drive the contract forward. The financiers are also likely to appoint a technical adviser/auditor to monitor development during the construction and start up phases. However, the NHS Trust should also ensure that it has a monitor on site capable of managing issues on behalf of the public sector.

8.22 The role of the monitor would be to:

- safeguard the interests of the NHS for delivery of the capital works and start up of the soft and hard facilities management services;
- manage the change control process up to the operating date of the facility;
- broker the interests of all principal parties to the contract, minimising disputes and lengthy dispute resolution processes.

The aim of employing the monitor should be to add confidence to the delivery of the facility on time.

8.23 The NHS Trust should ensure that it considers the framework for the monitoring arrangements for the operational phase of the PFI contract when the scheme is being developed at an early stage. The detail of the monitoring arrangements may be agreed in full at a date closer to the operational period itself.

The monitoring arrangements should:

- measure the performance of the private sector operator. This may be done either using the operator's own systems or directly using the NHS Trust's systems. Whichever monitoring system is used should be fair, objective, cost effective and auditable;
- be able to respond to change control requirements throughout the life of the contract;
- provide information that can be taken into account when monitoring the value for money of services provided under the PFI contract (eg in market testing or benchmarking);
- include, as part of routine reporting arrangements, information from the private sector operator about changes in pay, terms and conditions and staff management practices from those previously advised to the NHS Trust; and
- provide information about TUPE issues as required under the contract or which have arisen for which the contract did not make provision.

Appendix 1: Indicative project timetable

Figure A.1 gives an example of the milestones and timetable for a major scheme from OJEC onwards which is following the procurement route whereby a Preliminary ITN is issued to a longlist of bidders. Figure A.2 gives an example of the procurement route whereby three bidders are shortlisted as a result of prequalification and the Final ITN is issued directly. The timetables should be regarded as indicative, and will need to be tailored to meet the needs of individual schemes.

Figure A.1: Indicative project timetable for major schemes

Task	Time of task	Cumulative time
OJEC notice despatched	1 day	1 day
Deadline for expressions of interest	37 days	38 days
Deadline for prequalification submissions	4 weeks (28 days)	66 days
Evaluation of prequalification submissions and longlist of up to 6	3 weeks (21)	87 days
Deadline for response to PITN	2 months (60)	147 days
Evaluation of responses and shortlist of 3	3 weeks (21)	168 days
Deadline for fully priced bids to FITN	2 months (60)	228 days
Evaluation down to two	3 weeks (21)	249 days
Negotiations with two	8 weeks (56)	305 days
Deadline for fixed priced bids	4 weeks (28)	333 days
Evaluation down to one	3 weeks (21)	354 days
Negotiations leading up to FBC submission	10 weeks (70)	424 days
FBC approval	3 months (90)	514 days
Financial close	1 month (30)	544 days 18 months (approx)

Figure A.2: Indicative project timetable for schemes not using a Preliminary ITN stage

Task	Time of task	Cumulative time
OJEC notice despatched	1 day	1 day
Deadline for expressions of interest	37 days	38 days
Deadline for prequalification submissions	4 weeks (28 days)	66 days
Evaluation of prequalification submissions and shortlist of three	3 weeks (21)	87 days
Deadline for fully priced bids to ITN	2 months (60)	147 days
Evaluation down to two	4 weeks (28)	175 days
Negotiations with two	2 months (60)	235 days
Deadline for fixed priced bids	4 weeks (28)	263 days
Evaluation down to one	4 weeks (28)	291 days
Negotiations leading up to FBC submission	3 months (90)	381 days
FBC approval	2 months (60)	441 days
Financial close	2 months (60)	501 days 17 months (approx)

Appendix 2: The public procurement regulations

The UK procurement regulations relevant to NHS Trusts involved in a PFI project are the:

- Public Works Contracts Regulations 1991 (SI 1991/2680)
- Public Services Contracts Regulations 1993 (SI 1993/3228)
- Public Supply Contracts Regulations 1995 (SI 1995/201)

These regulations enact EC directives as part of UK law. However, for most NHS procurements, the NHS Trust will not need to refer to these EC directives unless there is uncertainty over the interpretation of the UK public procurement regulations.

Value and aggregation of contracts

Before embarking on an advertisement, the NHS Trust should consider whether the regulations are relevant to its procurement. The regulations only apply to contracts with a value over certain thresholds. The current figures (relevant for NHS Trusts) that apply are:

- | | |
|-------------------|------------|
| ● Public works | £4,016,744 |
| ● Public services | £104,435 |
| ● Public supply | £104,435 |

These thresholds are updated every two years, and were last updated on 1 January 1998.

PFI contracts usually encompass a combination of works and services, works and supplies or supplies and services. Therefore, it is not immediately obvious which regulations should govern a PFI procurement. It is important that NHS Trusts take advice on this point to avoid a potentially serious regulatory breach. (This guidance assumes that the NHS Trust has chosen to advertise its PFI scheme as a “services” contract).

Contract award procedures

The three procedures that may be used for the award of works, services and supplies contracts under the regulations are the open, restricted and negotiated procedures. Within the works regulations, there are separate rules dealing with public works concession contracts. A public works concession contract is a public works contract that gives to the private sector partner a right to exploit the works being carried out under the project. An example would be a toll bridge.

NHS Trusts must seek legal advice on whether the proposed arrangements for procuring the works/services should follow the public works concession contract procedure rather than the public works or services contract procedure. Generally speaking, it would be unusual for NHS Trusts to choose this procedure.

The main characteristics of the three award procedures are:

Open

This procedure allows any contractor responding to the OJEC contract notice advertisement to make an offer to enter into the advertised contract. It does not allow pre-qualification so it can attract an unwieldy number of potential bidders. It is recommended only for simple contracts and is therefore unsuitable for PFI projects.

Restricted

This procedure allows NHS Trusts to select a number of contractors from all those that respond to the contract notice to submit tenders. However, the ability to hold discussions with bidders is limited to issues of clarification. There is, therefore, only limited scope for meaningful negotiation.

Negotiated

Under this procedure, the NHS Trust is permitted to pre-qualify all those that respond to the initial contract notice and to select a number of them with whom to negotiate the contract. Use of the negotiated procedure is not an automatic right of the NHS Trust. It can only be used in certain exceptional circumstances specified in the regulations and NHS Trusts should note that they are legally obliged to justify their selection of the negotiated procedure. With this in mind, it is vital that appropriate and timely legal advice is sought.

As negotiations with bidders are a critical part of a PFI project, NHS Trusts are strongly advised to use the negotiated procedure whenever conditions are met.

Accelerated procedures

Under certain circumstances, the minimum periods can be reduced. In the case of the negotiated procedure, the 37 day period may be reduced to not less than 15 days. This procedure must only be used when it can be fully justified on grounds of urgency and it is highly unlikely that NHS Trusts will face such circumstances in relation to a PFI procurement.

Appendix 3: Example Memorandum of Information

[] NHS TRUST

MEMORANDUM OF INFORMATION

Contents

1. Executive summary
2. Scope of the project
3. Opportunities for the private sector
4. The procurement process
5. Outline timetable
6. Strategic context
7. Allocation of project risks
8. The Public Sector Comparator
9. The NHS Trust
10. The commissioner(s)
11. Other sources of income
12. Existing property and sites
13. Staff transfer issues
14. The public sector team
15. Enquiries and responses
16. Glossary of terms

1. Executive summary

This section should introduce the Memorandum of Information and set out a brief summary of the key elements of the project.

2. Scope of the project

The objective of this section is to provide the bidder with the background to the project. Sufficient detail should be provided to enable the bidder to take an informed decision as to whether to continue with the bidding process.

This section should set out the broad scope of the project (for example, site rationalisation) and what the private sector will be expected to deliver. It should also state that variant bids will be welcome and considered. Also, that responses must comply with the requirements of the Private Finance Initiative. Finally, there should be a statement that the NHS Trust is not bound to accept any tender, that the NHS

Trust has the right to cancel the scheme at any stage and that the NHS Trust cannot be held responsible for any bidder's costs of tendering.

The text below gives an example of an introduction:

In 1997, Anytown Health Authority published their plans for the delivery of acute health services to the population of the town and a finalised strategy taking account of public opinion was approved in January 1998.

In particular these plans foresee that one of the three existing sites will close and the main site redeveloped to become the new hospital. Of the two remaining sites, one will continue to be owned and operated by the NHS Trust as a community hospital. The remaining site will no longer be required.

The NHS Trust has now invited, by means of notice in the Official Journal of the European Communities ('S' series dated 14.2.9x), applications from candidates who can fulfil the requirements of designing, building, financing and operating (DBFO) the new hospital. The contract will be awarded under the negotiated procedure applicable to Services Contracts under the 1993 Public Services Contracts Regulations.

The following principles will be adhered to in any forthcoming proposals:

- the provision of all non-clinical services listed in this document may be provided by the private sector in such a way that a high level of co-operation will exist between the NHS Trust and the bidders;
- the design of the redeveloped hospital must allow flexibility and adaptability to accommodate future health care needs and must, at a minimum, meet existing statutory requirements for hospital design;
- all proposals must comply with the NHS Executive's requirements with regard to value for money and show a substantial transfer of risk to the private sector.

3. Opportunities for the private sector

This section should aim to describe the opportunities of the project that are likely to be attractive to potential bidders. It should give detail of:

- the non-clinical services which the bidder will be expected to provide;
- any further non-clinical services which the bidder may optionally provide (Note: the transfer of "soft" services is no longer automatically required in order to achieve an off-balance sheet opinion. The extent of transfers will depend on the requirement to achieve value for money);
- a summary of the level of IT and equipment that will be required (for example whether items of major medical and scientific equipment will be included in the project);
- commercial opportunities (for example car parking, retail and staff social and leisure facilities);
- surplus land.

4. The procurement process

The purpose of this section is to set out the procurement process which the NHS Trust intends to follow from prequalification onwards. In particular, it should state whether the NHS Trust intends to longlist bidders and issue a Preliminary Invitation To Negotiate before shortlisting, or to shortlist 3 bidders directly to whom the Final Invitation To Negotiate will be issued.

This section should set out the NHS Trust's proposals for dialogue with interested parties and its approach to making information available for this purpose.

This section should also set out the selection criteria that will be used during the prequalification process and in the evaluation of bids.

5. Outline timetable

This section should provide the bidder with a clear indication of the expected timetable for the procurement. This will enable the bidder to assess the investment of time they will need to make to complete the bidding process. The timetable should include milestone dates and key periods of work for both bidders and the NHS Trust. It should also set out the present position of the procurement process including the date of approval of the Strategic Outline Case (where applicable) and the Outline Business Case.

A suggested list of events which could be included in the timetable is given below:

- return to the NHS Trust of responses to the Memorandum of Information and the Prequalification Questionnaire;
- prequalification of bidders by the NHS Trust;
- issue of the Preliminary ITN and date responses due;
- outline negotiations with bidders;
- evaluation of responses by the NHS Trust;
- issue of the Final ITN and date responses due;
- development of the scheme and negotiations with 3 bidders;
- evaluation and selection of final 2 bidders;
- development of the scheme and negotiations with 2 bidders;
- deadline for fixed price bids;
- evaluation of proposals;
- selection of preferred bidder;
- final negotiations;
- submission of Full Business Case;
- approval of Full Business Case;
- financial close;
- start on site;
- commissioning of the new facility;

- delivery of full services to the NHS Trust;
- monitoring and evaluation.

The indicative timetable can be taken from the NHS Trust's Outline Business Case.

6. Strategic context

The objective of this section is to provide the bidder with an understanding of the strategic context within which the project fits. This should include an overview of the Health Improvement Plan and service strategy prepared by the main commissioning HAs or PCGs, any reviews or strategies (for example, any carried out by the Regional Office of the NHS Executive), and any relevant national initiatives (eg Care in the Community, the Calman Report), which impact on the project. Where a significant proportion of the NHS Trust's services are purchased by more than one commissioning HA or PCG then details from other commissioning HAs or PCGs should be involved where relevant.

Other related projects (by the NHS Trust or other NHS Trusts) either under way or proposed should be referred to in this section as being of relevance to the scheme. In addition, trends in health care generally which may affect the development of the scheme eg the trend towards shorter lengths of stay or the move towards expanded role of primary care providers could be included. All of this information should be presented at a high level, so as to provide a "picture" of the project in context.

The other important element in this section is a statement of commitment to the project from the NHS Trust management and from the local commissioning HA or PCG(s). Commissioner commitment is particularly important, since potential bidders will be keen to gain a clear understanding of commissioning HAs or PCGs' intentions.

The information required for this section should be available in the Outline Business Case.

6.1 Health Authority acute services strategy

Example text is given below:

In 1999 the Health Authority undertook a review of acute services provision with a view to establishing a strategic framework within which these services would be delivered in the future.

The review envisaged a significant shift from in-patient to day patient care and from secondary to primary care settings. These measures, coupled with the rapid development of new techniques will lead to a concentration of staff expertise and high cost equipment on fewer sites and the need for fewer beds. They will also result in the closure of out-dated and unsuitable hospitals.

Based on this review, the chosen option for the NHS Trust envisaged the rationalisation of the existing NHS Trust services onto one main site with a community hospital setting at a second site.

6.2 Commitment of NHS Executive and Health Authority

Example text is given below:

The strategic position described above is reinforced by the commitment of the NHS Executive and the Health Authority as primary commissioner, who have approved the NHS Trust's Outline Business Case and who are working closely with the NHS Trust.

The position of both parties with regard to this strategy is set out in supporting documents.

7. Allocation of project risks

This section should summarise the key risks that the private sector will be expected to bear under the PFI contract. These should be consistent with Appendix 1 of *Technical Issues*, and the standard form contract.

8. The Public Sector Comparator

This section should summarise details of the Public Sector Comparator from the Outline Business Case. It should include the following points:

- the affordability ceiling as agreed with the commissioning HA or PCG within which the project must be developed;
- a brief summary of the key points of the output specifications for the buildings and services.

9. The NHS Trust

The objective of this section is to provide the bidder with information regarding the business and financial position of the NHS Trust. It will help the bidder to gain an understanding of activity levels of the NHS Trust and its financial stability. Detailed information (for example, financial data or detailed activity flows) should not be presented in the main body of the text, but should be available in attachments or appendices.

This section sets out the business context in which the scheme will be taken forward and provides information on the NHS Trust's current Business Plan, the Outline Business Case approved in 1998, and historical financial and activity data.

9.1 Business plan

Example text is given below:

The NHS Trust provides a wide range of acute and maternity services to the local population of Anytown. In addition many services have a specialist component and attract patient referrals from a wider catchment area. The NHS Trust's income for the year was £xxxm.

Current forecasts indicate that in [date range]:

- xx,000 inpatients will be treated;
- xx,000 day cases will be seen;
- xx,000 new outpatients will be seen;
- xx,000 Accident and Emergency attendances will take place.

The NHS Trust's [most recent] Business Plan is included in the Appendices.

9.2 [Strategic Outline Case and] Outline Business Case

Example text is given below:

The [Strategic Outline Case and] Outline Business Case was based on a range of assumptions resulting from the main commissioning HA or PCG's Acute Services Strategy. These assumptions have been reviewed in conjunction with the main commissioning HA or PCG to consider and agree the NHS Trust's likely activity levels and market share in the future.

The Outline Business Case sets out whole-life revenue cost estimates (including an allowance for risk), capital cost and capital charge equivalent estimates for the project.

9.3 Historical financial data

Example text is given below:

Historical financial information is set out in Appendix []. This shows the composition of income and expenditure, balance sheets and cash movements summarising the NHS Trust's working capital position.

9.4 Historical activity and performance data

Example text is given below:

The NHS Trust's provision of services to each commissioning HA or PCG is shown on the tables in Appendix [] giving the percentage breakdown for inpatients, day cases and outpatients and new outpatients, based on activity delivered during 199x/9x.

Reports used by the NHS Trust's Medical Advisory Committee have been reproduced in Appendix [] to show inpatient workload and quality measures – throughput, turnover interval, occupancy and length of stay.

10. The commissioning HA or PCG

The objective of this section is to provide the bidder with information regarding the business and financial position of the NHS Trust's main commissioning HA or PCG. It may be appropriate for this section to be drafted by the Health Authority. Where an NHS Trust has more than one significant commissioning HA or PCG or groups of commissioning HAs or PCGs then information on these may be broadly summarised. Detailed information should be annexed separately.

This section should include details of the commissioning HA or PCG's business plan and/or corporate contract and purchasing intentions. Also, a brief summary of the local demographics and the forecast demand for healthcare should be set out (if additional information to that set out under Section 9 on the NHS Trust would be helpful).

11. Other income sources

This section should describe other income sources not covered above which are relevant to the project. This may include teaching and research income, and existing revenue streams from activities such as retail and catering units run on the NHS Trust's premises.

12. Existing property and sites

The purpose of this section is to provide the bidder with an understanding of the physical state of the existing estate and buildings, including planning restrictions and any other limitations. It should enable the bidder to consider potential areas for alternative development, should land or buildings be vacated during the course of the project. This section should also provide information regarding which clinical services the hospital provides and from which sites.

Example text is given below:

This section sets out the position with regard to the existing hospital services, properties and sites. In order that bidders are fully informed of the development potential of sites which will be vacated following the completion of the new hospital, information is included on estates and planning issues for these sites. A plan showing the location and structure, condition and internal configuration of the existing sites referred to is included in Appendix [].

12.1 Description of existing sites

The construction of the new hospital will allow for the rationalisation of services currently provided on all the NHS Trust hospital sites thus freeing one site for disposal. The NHS Trust is seeking the bidders' views on the redevelopment of these sites and the part that this will play in their overall proposals.

Site details:

- location – this site is located in the centre of town;
- description – the site covers x hectares and is extensively developed. The total gross internal areas is in excess of xx,000 square metres;
- condition – there is a wide range in the condition of the buildings within the site, with several buildings in a condition requiring considerable expenditure to upgrade basic structures;
- planning – some of the buildings on the site are the subject of listing.

12.2 Location of clinical services

The following clinical specialities are currently provided on the various NHS Trust hospital sites together with the full range of clinical support services.

Main site

Accident & Emergency Services

General Surgery

General Medicine

Vascular Surgery	Cardiology
Orthopaedic Trauma	Dermatology
Cardiac Surgery	Gastro-Enterology
Ophthalmology	Haematology
Gynaecology	Respiratory Medicine
Maternity Services	Geriatric Assessment
Neonatal Care	Geriatric Long Stay
ENT Surgery	Infectious Diseases
Thoracic Surgery	
etc for other sites	

13. Staff transfer issues

This section should set out essential considerations regarding staff transfers, eg the NHS Code of Practice on fair treatment of staff (see Chapter 13 of *Selection and Preparation of Schemes*); the requirement for existing union recognition agreements to transfer; and the requirement for broadly comparable pensions on initial and subsequent transfers. (NHS Trusts may find it helpful to append the Treasury Guidance “A Fair Deal for Staff Pensions”, and the associated Statement of Practice by the Government Actuary, which set out the pension requirements in detail).

14. The public sector team

This section should give brief details of the project board and team, and of the NHS Trust’s professional advisers.

15. Enquiries and responses

Example text is given below:

All enquiries on the project should be made in writing to: []

and all enquiries will be responded to in writing.

The NHS Trust will make available the following information at their offices:

[]

A data/briefing room will be set up in the project offices and arrangements to view the above documentation between the hours of 9.00 am to 5.00 pm Monday to Friday should be made with [].

[Ten] copies of the Prequalification submission must be delivered by mid-day on x March 199x to: []

16. Glossary of terms

This section should set out definitions of commonly used terms in the document which may be unfamiliar to someone who does not work in the NHS, for example, commissioning HA or PCG and community health council.

~~Appendix 4: Model Prequalification Questionnaire for use by all NHS Trusts undertaking PFI procurements~~

~~PFI REDEVELOPMENT~~

~~(OJEC NUMBER: x/xxxxx/xxxx/xxx)~~

~~PREQUALIFICATION QUESTIONNAIRE~~

~~[date]~~

~~INTRODUCTION~~

~~The Prequalification Questionnaire has been produced to enable the NHS Trust to evaluate the economic and financial standing and ability and technical capacity of organisations which have responded to [refer to relevant OJEC notices]. It should be read in conjunction with the Memorandum of Information, which provides candidates with appropriate information about the NHS Trust, its Commissioners and the project.~~

~~The resources, range and depth of skills needed to provide the services to the NHS Trust under this PFI project are such that it is thought likely that organisations may wish to collaborate to form a consortium with a lead organisation or special purpose vehicle ultimately contracting with the NHS Trust. This does not preclude a single organisation offering all of the services. The NHS Trust does not require the consortium to form a legal entity at this stage, although it will prior to awarding any contract. For the purposes of evaluation, it needs information about each of the members of any proposed consortium.~~

~~The term "Relevant Organisation" refers to each organisation which wishes to bid for the project or which it is intended will be a member of any consortium which wishes to bid. Each Relevant Organisation may not be able to give all of the information requested because it does not have the relevant experience. In this case please specify in the reply which Relevant Organisation is providing that information.~~

~~Collectively each entity which wishes to bid (whether it is a single organisation or a consortium) is referred to as a Candidate.~~

~~The questionnaire has been split into 6 sections.~~

~~Section A requests details of the Candidate, how it is organised and where appropriate what the relationship is between its Relevant Organisations, information regarding court actions and/or industrial tribunals and confirmation regarding eligibility to tender under procurement Regulations.~~

~~Section B asks for financial and economic information on each Relevant Organisation.~~

~~Section C as supplemented by Sections D to F asks for information that will be used in determining whether the Relevant Organisation meets the NHS Trust's minimum standards of ability and technical capacity. The required information must detail its experience in PFI and its technical experience in undertaking its designated role within Candidate's proposals. Section C also includes questions relating to pension schemes and should be read with the comments on that subject in the Memorandum of Information.~~

~~Sections D and E are included to further inform the NHS Trust on the Candidate's technical capacity and ability to deliver the project. Section D asks for details on the experience of each Relevant Organisation of working on similar projects and Section E asks for details on the experience and capacity of key individuals proposed by the Candidate and methods of working.~~

~~Section F is included to inform the NHS Trust on the experience of the Candidate in raising project finance and the proposed approach for this project.~~

~~Candidates are requested to include the attached questionnaire as an index. The page number where specific responses can be found should be referenced on the index.~~

~~A. GENERAL INFORMATION~~

~~A1: Provide details of the Candidate and each of its Relevant Organisations. This should include the name of the principal contact with address, telephone and fax number and email, registered office if different and registered number and date of registration if a company.~~

~~A2: Specify those services which each Relevant Organisation will deliver.~~

~~A3: Provide an organisation chart and details of the internal relationship between the Relevant Organisations and whether this may change during the design, construction and operational phases of the contract.~~

~~A4: Provide details of the likely shareholding of each Relevant Organisation.~~

~~A5: Provide details of any court actions and/or industrial tribunal hearings in which any Relevant Organisation has been involved over the last three years.~~

~~A6: Provide details of any such court actions and/or industrial tribunal hearings which are currently outstanding against any Relevant Organisation.~~

~~A7: Provide confirmation that there are no grounds applicable to any Relevant Organisation pursuant to which a bidder may be rejected under Regulation 14 of the Public Services Contracts Regulations 1993 (SI 1993/3228). The NHS Trust may seek evidence at a later date, in confirmation of your answer.~~

~~B. FINANCIAL AND ECONOMIC INFORMATION FOR EACH RELEVANT ORGANISATION~~

~~B1: Provide copies of the previous three financial years audited accounts.~~

~~B2: Provide a statement of overall turnover and the turnover for PFI type projects or concession projects for the previous three financial years.~~

~~B3: Provide a statement of overall turnover and the turnover for building projects for the previous three financial years.~~

~~B4: Provide a statement of turnover on long term operation or facilities management contracts for the previous three financial years.~~

~~B5: Provide a statement, as at the last reporting date, of any contingent liability or loss (where not otherwise reported) which would require disclosure in accordance with International Accounting Standard 10.~~

~~B6: Provide similar financial/economic information (re: B1 – B5 above) in relation to the ultimate holding company of any Relevant Organisation. When a guarantor identified in F3 is different from the holding company then similar financial/economic information (re: B1 – B5 above) should be provided in relation to the guarantor.~~

~~C: ABILITY AND TECHNICAL CAPACITY OF RELEVANT ORGANISATIONS~~

~~C1: Provide a description of the major PFI type projects and concession projects undertaken over the past three years. Such description should include, for each such major project, the extent of the services or works for which the Relevant Organisation was responsible and the date when the Relevant Organisation's involvement started. Also state whether each scheme is at bidding stage, at preferred bidder, has reached financial close, has completed construction or has been cancelled.~~

~~C2: Provide a statement of any contracts over [£X million] where there has been a failure to complete the contract on time or at all, or where there have been claims for damages or where damages have been deducted or recovered, in either case only where the amounts exceed [£100,000]. This statement should only take account of incidents in the last three years.~~

~~C3: Provide statement for each Relevant Organisation showing:~~

- ~~● number of staff employed permanent and casual;~~
- ~~● their skills by numbers (e.g. management/supervision, operational);~~
- ~~● the number currently involved directly in PFI type projects or concession projects;~~
- ~~● details of staff turnover as a percentage of workforce for the last 3 years.~~

~~C4: Provide a statement of each Relevant Organisation's average annual manpower and the number of managerial staff over the previous three years.~~

~~C5: Each Relevant Organisation which may, in connection with this PFI Project, potentially be a future employer of any of the NHS Trust staff should provide, (taking account of the policies on pensions described in the Memorandum of Information):-~~

- ~~● details of any relevant existing pension scheme that it has in place;~~
- ~~● confirmation as to whether or not that scheme has been previously assessed for "broad comparability" with the NHS Pension Scheme by the Government Actuary's Department;~~
- ~~● if so, the outcome of that assessment;~~
- ~~● details of how the transfer of accrued benefits to the scheme are dealt with.~~

~~C6: If any such Relevant Organisation does not have a pension scheme, confirmation that it would in principle be willing to provide one (again taking account of the policies on pensions described in the Memorandum of Information).~~

~~D: EXPERIENCE OF WORKING ON SIMILAR PROJECTS~~

~~D1: Provide details as to whether Relevant Organisations have worked or are working together on other projects. Disclose the date when the Relevant Organisation's involvement started and whether the scheme is at bidding stage, at preferred bidder, has reached financial close, has completed construction or has been cancelled.~~

~~D2: Provide details where new relationships are being formed to create a Candidate.~~

~~D3: Identify any potential conflicts of interest which may arise if the Candidate were selected (taking into account all Relevant Organisations).~~

~~D4: Provide a statement of any material pending or threatened litigation or other legal proceedings on similar projects against any Relevant Organisation that may affect the Candidate's ability to deliver on this project.~~

~~E: DETAILS OF THE CANDIDATE'S METHODS OF WORKING~~

~~E1: Provide details of all the key persons who are likely to be involved in the management structure of the Candidate and if different those who will be involved in negotiations with the NHS Trust. Include CVs and identify key people.~~

~~E2: Provide details of the nominated project manager for the project. Include CV.~~

~~E3: Provide details of the capacity of each key person to allocate sufficient time to the project. Identify any existing or future potential time conflicts for each key person, particularly those prior to financial close.~~

~~E4: Provide details of the Candidate's proposed method of working with the NHS Trust.~~

~~E5: Provide details of existing or likely legal and financial advisors.~~

~~E6: Please give a brief outline of your policy regarding the use of sub-contractors and if applicable, the extent to which you might envisage using them for this project.~~

~~E7: Provide a statement of the expected approach to the design, planning, construction, management, maintenance and operation of the hospital which approach should include quality management, safety, environment and aesthetics.~~

~~F: FINANCING~~

~~F1: Provide details that demonstrate the Candidate's or Relevant Organisation's experience in raising finance on similar projects.~~

~~F2: Provide a preliminary indication as to how the Candidate would go about securing finance. Candidates are not expected to submit a financing plan. They are asked, however, to indicate what the contribution of each Relevant Organisation is likely to be and the willingness of each to put capital in the Project; the readiness, if appropriate, of the parent company to guarantee the obligations of a subsidiary; and the likely sources of funds (ie bank debt, institutional finance or equity).~~

~~F3: Provide a statement of the readiness, if appropriate, of the parent company to guarantee the obligations of a subsidiary and the identification of the ultimate guarantor. This statement should set out the relationship of the guarantor to the holding company identified in B6.~~

Appendix 5: Invitation To Negotiate checklist

The following sets out an example of the information that should be included in the Invitation To Negotiate for a PFI scheme. The presentation of information should be tailored to suit individual schemes.

The checklist is applicable to both schemes which are using the Preliminary ITN stage and those which are not. The Preliminary ITN should also include a draft of the Final ITN, and a separate section is set out under the headings below to cover the specific requirements of the Preliminary ITN.

1. Foreword (by chairperson)

2. Executive Summary

3. Confidentiality Statement and Disclaimer

3.1 Statement regarding confidentiality and release of information in the bid process.

3.2 Disclaimer by NHS Trust (and commissioning HA or PCG) regarding liability for bid costs, inaccurate information, etc.

3.3 Explanation of information that will be published (eg the FBC and contract).

4. Introduction

4.1 The background and objectives to the scheme.

4.2 Summary of the project milestones reached so far.

4.3 An overview of the NHS Trust's timetable to delivery of services.

5. Bidding Process

5.1 Specification of the remaining bidding process to be followed.

5.2 Statement that for the Preliminary ITN, the requirements of bids are set out in the separate section on the Preliminary ITN below, and that the other administrative bid requirements set out below apply to the Final ITN only.

5.3 Statement of degree of involvement required at different stages of the procurement process of financiers and key companies forming part of the bidding consortium.

5.4 Suggested format for bids.

5.5 Minimum bid requirements.

5.6 Reference bid requirements.

5.7 Variant bid requirements.

5.8 Clear statement of consequences of non-compliance.

6. Timetable

- 6.1 Timetable for the remaining stages of the procurement process to financial close.
- 6.2 Indicative timetable from financial close to delivery of services.
- 6.3 Statement of minimum period for which prices of fixed bids must be held prior to financial close.
- 6.4 Details and timetable of the approvals process for the scheme.

7. Establishing Lines of Communication

- 7.1 Name, address, telephone and fax numbers and email address of NHS Trust's principal point of contact.
- 7.2 Name, address, telephone and fax numbers and email address of commissioning HA or PCG's principal point of contact.
- 7.3 Name, address, telephone and fax numbers and email address of principal point of contact at NHS Trust's key advisers.
- 7.4 Information provided in data room.
- 7.5 Proposed discussions with trade unions, staff representatives and external parties (eg CHCs).

8. The Evaluation of Bids

- 8.1 Summary of methodology and evaluation process.
- 8.2 Evaluation criteria.
- 8.3 Evaluation of variant bids.

9. Financial Information From Bidders

- 9.1 Request for details of bidders financing strategy.
- 9.2 Request for confirmation of proposed shareholders (ie sponsor companies only) of project company.
- 9.3 Request for format of financial model to be used.
- 9.4 Request for details of assumptions used in bidders financial model.
- 9.5 List of model assumptions which NHS Trust will test.

10. Glossary of terms

11. Background information on the NHS Trust

- 11.1 The NHS Trust's business objectives.
- 11.2 The current configuration of the NHS Trust's services.

11.3 The NHS Trust's forecast requirements based on the preferred option.

11.4 The NHS Trust's management structure, including NHS Trust board membership and details of the composition of the project board.

11.5 Financial information on the NHS Trust (such as the NHS Trust's most recent accounts).

11.6 Activity and performance data.

11.7 Information on the existence of contracts with incumbent service providers.

12. Background information on the commissioning HA or PCG(s)

12.1 The commissioner's business objectives.

12.2 Current and future commissioning intentions.

12.3 The commissioner's management structure.

12.4 Financial information on the commissioner (such as the commissioner's most recent accounts).

12.5 Confirmation of commissioning HAs or PCGs' support for the project.

13. Background information on other sources of the NHS Trust's income

13.1 Details of any teaching income.

13.2 Details of any research income.

13.3 Details of any other income streams (eg from retail lets, car parking).

14. Main project details

14.1 Summary of scheme objectives.

14.2 The functional content of the scheme.

14.3 List of non-clinical services to be provided under the contract.

15. Affordability

15.1 Statement of affordability ceiling which bids will be required to fall within.

15.2 Details of relevant assumptions used in affordability analysis (eg estimated rate of inflation).

16. Contract Structure and Documentation

16.1 *Overview* of contract structure.

16.2 Statement of areas of contract which are non-negotiable (ie the standard commercial terms).

17. Allocation of risks

- 17.1 Description of allocation of risks.
- 17.2 Risk matrix reflecting the draft contract.
- 17.3 Details of any specific risks which bidders are asked to bid against.

18. Payment Mechanism

- 18.1 Details of payment mechanism.
- 18.2 Details of performance monitoring regime.
- 18.3 Specified method of indexation.
- 18.4 Specified method of market testing or alternative such as benchmarking.

19. Land and buildings

- 19.1 Details of the NHS Trust's existing land and buildings.
- 19.2 Details of any surplus land available.
- 19.3 Details of existing (outline) planning permissions and other relevant information.

20. Equipment and IM&T

- 20.1 Summary of the NHS Trust's equipment strategy.
- 20.2 Details of equipment to be provided as part of the scheme (see also the section on output specifications) and audit of existing equipment.
- 20.3 Summary of the NHS Trust's IM&T strategy.
- 20.4 Details of IM&T to be provided as part of the scheme (see also the section on output specifications).

21. The Public Sector Comparator

- 21.1 Details of the Public Sector Comparator.

22. Output specifications for facilities and services to be provided

- 22.1 Output specifications for the facilities.
- 22.2 Output specifications for each of the non-clinical services to be provided under the contract.
- 22.3 Output specifications for the services (both clinical and non-clinical) which will continue to be provided by the NHS Trust.
- 22.4 Details of the interface arrangements between services to be provided under the contract with clinical and other non-clinical services.
- 22.5 Output specifications for equipment (where relevant).

23. Staff transfer issues

23.1 Requirement for existing union recognition agreements to transfer.

23.2 Requirement for broadly comparable pensions.

23.3 Request for bidders proposals in respect of these requirements and also in respect of TUPE, staff management, pay terms & conditions, and training.

24. Drafts of legal documentation

24.1 Project agreement (usually standard form contract)

24.2 Schedules to project agreement (eg leases, payment mechanism etc.).

24.3 Any other relevant documentation (eg direct agreement with financiers).

25. Requirements of the Preliminary ITN

(This section is for issue with the Preliminary ITN only)

25.1 Details of the Preliminary ITN approach

25.2 Description of areas where responses are sought (eg services approach).

25.3 Standard form contract and Summary of contractual terms.

26. Format for responses

26.1 Suggested format for bids.

26.2 Minimum bid requirements.

26.3 Request for confirmation that bids will be capable of being delivered within the NHS Trust's stated affordability ceiling.

27. Evaluation of bids

27.1 Summary of methodology and evaluation process for the Preliminary ITN stage.

Appendix 6: Full Business Case checklist

1. Executive summary

A brief self-standing statement of:

- 1.1 The background and service objectives to the scheme.
- 1.2 A description of the preferred option.
- 1.3 The results of the economic and financial appraisals.
- 1.4 The key points of the PFI deal.
- 1.5 The key milestones and timetable to delivery of services.

2. Strategic context

- 2.1 Description of the NHS Trust and a statement of the objectives of the NHS Trust and the project.
- 2.2 Description of the strategic context of the proposal, including a description of the commissioning HA or PCG's strategic plans and how the NHS Trust's proposal intends to fulfil the commissioning HA or PCG's service requirements.
- 2.3 Review of key assumptions underlying the strategic analysis and effects of any changes since the Outline Business Case (OBC).
- 2.4 Description of present catchment population and present level of service activity.
- 2.5 Description of the market for services, the competitive position of the NHS Trust and of other service providers.
- 2.6 Description of the size and scope of the project.
- 2.7 Justification of the assessment of future services and functions required by reference to commissioning HAs or PCGs requirements, projected catchment population and other factors influencing the demand for services.

3. The Outline Business Case

- 3.1 Summary of the OBC including description of the long list of options.
- 3.2 Description of short list of options considered including results of the economic appraisal, benefits analysis, financial appraisal and sensitivity analysis.
- 3.3 Review of assumptions underlying OBC to demonstrate how any changes have affected the ranking of options, including any changes to the assessed benefits of the scheme.

4. The Public Sector Comparator

- 4.1 Description of how the Public Sector Comparator (PSC) has been derived and updated from the preferred option in the OBC.

4.2 Explanation of any updates that have been made in order to place the PSC on the same base as the PFI option.

5. The PFI procurement process

5.1 Description of the procurement methodology undertaken.

5.2 Details of advisers used by the NHS Trust.

5.3 Description of the prequalification and longlisting/shortlisting process.

5.4 Brief summary of the Invitation To Negotiate document including the evaluation process and criteria used at each stage of selection in the procurement process.

5.5 Explanation of the choice of preferred bidder.

5.6 A copy of the original OJEC contract notice should be annexed to the FBC.

5.7 Description of the arrangements for involving staff, their representatives and external stakeholders in dialogue throughout the process, explaining how issues raised during dialogue were addressed.

6. The preferred PFI solution

6.1 Description of the project company and its members.

6.2 Description of the PFI solution including a brief description of the design, construction and services provided. This should also give details of how the NHS Trust will work together with the private sector partner over the lifetime of the contract.

6.3 Timetable for securing outstanding planning permission and details of what happens if planning permission is not achieved.

6.4 Timetable from FBC to financial close and delivery of services.

6.5 Details of when the price quoted in the PFI bid is fixed until.

6.6 Details of the assumed interest rate on which the price of the scheme is based, including the interest rate buffer at the time of FBC submission.

6.7 Sensitivity analysis of the effect on price of an increase or decrease in interest rates.

7. Economic appraisal (value for money analysis)

7.1 Net present value (NPV) comparison of the PSC, and the PFI option. If the different options have different life spans then the equivalent annual cost (EAC) of the options should be shown. The risk adjusted NPVs or EACs should also be shown separately. It may also be appropriate to include details of the do-minimum option from the OBC for comparative purposes.

7.2 An explanation of the reasoning why the preferred option is better value for money as demonstrated in the NPV analysis.

- 7.3 Description of assumptions made for the economic appraisal.
- 7.4 Details of how the PSC was calculated, including updated information from the OBC on how the capital expenditure schedules, lifecycle costs and other operating costs were calculated. Explanation should be provided if the risk adjustments are not consistent with those for similar schemes.
- 7.5 Description of the quantification of costs and benefits included in the appraisal.
- 7.6 Description of the non-quantified costs or benefits in the scheme, including a weighting and scoring analysis where appropriate.
- 7.7 Sensitivity analysis, and scenario modelling of the key assumptions behind the economic appraisal.

8. Risk analysis

- 8.1 A risk allocation matrix showing which party is responsible for managing which risk. The risk matrix should reconcile back to the relevant paragraphs of the project agreement.
- 8.2 A list of the key individual risks including an explanation of what each one means, and how the values and probabilities of those risks occurring were determined.
- 8.3 An NPV analysis of the risks retained by the public sector under each of the options considered. This should be based on a probability analysis of the quantifiable risks.
- 8.4 An assessment of the total risks associated with the project including those risks which are non-quantifiable in the form of a weighting and scoring matrix.
- 8.5 Sensitivity analysis of the key assumptions underlying the risk analysis.

9. Financial appraisal (affordability analysis)

- 9.1 Quantification of the revenue implications of the scheme for the PSC, and the PFI option. This should include details of the price (or tariff) charged by the project company upon delivery of services and the method of indexation used.
- 9.2 Analysis of the impact of the proposals on the NHS Trust's I&E account, balance sheet and cash flow. This should highlight any peaks or troughs in individual years during the primary contract period.
- 9.3 Where NHS Trusts are or are projected to be in financial deficit, an agreed strategy for achieving financial recovery should be set out.
- 9.4 Description of assumptions made for the financial appraisal and an explanation of the methodology used to project both income and expenditure.
- 9.5 Explicit and up to date confirmation of commissioner support to the financial, strategic and service configuration aspects of the proposals. A letter from the Health Authority chief executive is required confirming the unequivocal support of the full Health Authority board.
- 9.6 Description of the NHS Trust's income from other sources such as teaching and research, including both Exchequer and non-Exchequer funding.

9.7 Position on VAT treatment of the scheme, including details of clearance from HM Customs & Excise.

9.8 Description of how land and buildings included in the PFI scheme have been treated, and what assumptions have been made.

9.9 Details of and justification for the writing off of any of the NHS Trust's debt and/or assets from existing use value to open market value and (where appropriate) from open market value to nil.

9.10 Details of the savings generated by the scheme (such as the closure and replacement of existing facilities) and savings due to efficiency gains.

10. Summary of the contract structure

10.1 Description of the contractual framework of the PFI scheme.

10.2 A diagram of the legal relationships between the various parties to the deal.

10.3 Summary of the main provisions of the project agreement, the position reached on the key issues and any points that are outstanding. This should include confirmation that the principles set out in *Commercial Issues*, as reflected in the standard form contract, have been agreed.

10.4 Confirmation that a copy of the relevant contract documentation has been sent to NHS Executive headquarters for major schemes (with a capital value of £25m or over).

11. Financing of the scheme

11.1 Summary of the proposed funding structure for the scheme including details of how far this has been agreed with debt and equity providers.

11.2 Level of bank debt and details of debt providers and principal terms if available or details of principal terms regarding proposed method of bond financing.

11.3 Details of shareholders and value of investment and principal terms if available. This should also state the rates of return for the different components of funding, and for the project as a whole.

11.4 Details of when all funding is to be drawn down.

11.5 Details of the lending terms (although the NHS Executive will respect a consortium's wish that these should be treated as commercial in confidence and may be provided separately from the FBC).

11.6 Details of the financial model. This should include summaries of the key assumptions underlying the project company's financial model: inflation rates; interest rates including margins and the financial cost of the buffer; hedging policy; taxation assumptions; length of contract; term of debt; basis of calculation of unitary payment; dividend policy; bank cover ratios.

11.7 This section should include confirmation from the NHS Trust's financial advisers that they have reviewed the financial model and are satisfied that it has been audited.

12. Accounting treatment of the PFI scheme

12.1 An assessment of the proposed accounting treatment of the scheme in respect of the NHS Trust's balance sheet by the NHS Trust's Director of Finance, backed up with a detailed explanation of the appropriate professional advice taken from the NHS Trust's external auditors or a major accounting firm. ~~It is expected that schemes will be considered to be off-balance sheet.~~ This should include a summary of the rationale and key elements underlying the off-balance sheet accounting opinion.

12.2 There must be a written indication from the NHS Trusts' external auditors that they have no objections to the proposed accounting treatment of the scheme. (See also TR 2/97 from the Audit Commission).

13. Project management arrangements

13.1 Description of the project management and control arrangements both throughout the construction and the operation phases of the project.

13.2 If the scheme involves any significant changes to the numbers and mix of staff employed, a human resource change management plan should be included.

14. Benefits assessment and benefits realisation plan

14.1 Description of the benefits to be delivered under the scheme, including an indication of differences in the levels of benefits delivered under the PSC and the PFI options.

14.2 A thorough and complete benefits realisation plan.

15. Human resources

15.1 Description of involvement of trades unions and other staff representatives since the commencement of the project including compliance with the positions on human resources set out in *Commercial Issues*.

15.2 Confirmation that a revised recognition agreement has been concluded between relevant trades unions and relevant companies within the project company.

15.3 Details of consortium's plans for managing the transfer of employees under TUPE.

15.4 Details of the consortium's general intentions in respect of transferring employees terms and conditions after transfer.

15.5 Details of independent pension advice provided to employees' prior to transfer.

15.6 Confirmation that a Government Actuary's Department (GAD) certificate has been provided in respect of any pensions offered to transferring staff by the consortium.

15.7 Details of any assumptions made as to the take up of the GAD approved pension after transfer.

15.8 Summary of project company's policies on equal opportunities, health and safety and staff training.

16. Information technology

16.1 A description of the NHS Trust's IM&T strategy and how it relates to the project under consideration.

16.2 If a major redevelopment does not include a specific IM&T component, an outline of how the IT strategy will be delivered including any affordability implications.

16.3 If the preferred option includes an IM&T component, then details should be given of how this is incorporated into the deal. See also HSG(95)48: IM&T Procurement and Private Finance. A separate business case is not required.

17. Equipment

17.1 An explanation of how equipment will be provided for the new scheme, and what equipment is in the PFI contract.

17.2 A summary of how equipment within the PFI contract is handled.

17.3 Details of how equipment not in the PFI contract will be paid for.

17.4 Confirmation that an equipment strategy has been suitably developed in line with Appendix 5: The Equipping of Construction Schemes in the Management of Construction Projects volume of the Capital Investment Manual.

18. Risk management strategy

18.1 Details of plans for managing risks which might arise during the implementation of the project. This will cover all potential risks retained by the public sector.

19. Post project evaluation plan

19.1 A plan for monitoring the progress and completion of the project, and for evaluating the outcome following implementation.

20. Conclusion

20.1 A statement of the preferred option in the FBC for which approval is being sought.

Further information

Business Case Guide, Capital Investment Manual, NHS Executive, 1994

PFI – Provision of accounting views, Audit Commission Technical Release TR 2/97

Information Management and Technology Procurement and Private Finance, HSG (95) 48, NHS Executive, November 1995

Management of Construction Projects, Capital Investment Manual, NHS Executive, 1994

Appendix 7: Key commercial issues to be summarised in the Full Business Case

This appendix sets out the key commercial issues which should be summarised in the FBC. Each section should also contain cross references to the relevant clauses in the actual contract documents themselves.

1 Contract structure and documentation

- 1.1 Confirmation that standard form contract being used.
- 1.2 Length of contract and details of any break points.
- 1.3 Description of the main provisions within the contract documentation, including any variations to standard contract, covering:
 - design and construction;
 - treatment of time and cost overruns;
 - information technology;
 - services;
 - maintenance;
 - equipment;
 - description of methods of monitoring and measures of performance;
 - insurance and treatment of uninsurable risks.
- 1.4 Summary of areas of non-conformity with the standard form contract.

2 Payment mechanism

- 2.1 A thorough description of the payment structure and payment mechanism.
- 2.2 Summary of any benchmarking provisions.
- 2.3 Description of the indexation provisions, including the base date to which these will be applied.
- 2.4 Details of deductions or cessation of payment for:
 - poor performance;
 - non-performance.
- 2.5 Examples of how the payment mechanism will work in practice.
- 2.6 Invoicing and payment terms (eg monthly in arrears).

3 Change of law and variations

3.1 Confirmation that standard form contract provisions have been used.

3.2 Summary of allowable expenses provisions as shared between NHS Trust and project company.

4 Delay Events, Relief Events and Force majeure

4.1 Confirmation that the standard form contract definitions of delay events, relief events and force majeure has been used.

4.2 Description of any approved project specific additions to or deletions from relief events.

4.3 Description of the compensation payable to the project company following termination for force majeure during:

- construction phase;
- operating phase.

5 Corrupt gifts

5.1 Confirmation that standard form contract clause has been used.

5.2 Description of compensation payable to project company following termination under corrupt gifts clause.

6 Termination and step-in

6.1 Explanation of the circumstances under which the project company may terminate for NHS Trust default.

6.2 Details of compensation and timing of payment(s) to funders/project company in the event of NHS Trust default.

6.3 Treatment of property interests/right to occupy on termination for NHS Trust default.

6.4 Explanation of the circumstances under which the NHS Trust may terminate for project company default.

6.5 Summary of step-in rights for funders in Direct Agreement.

6.6 Summary of step-in rights for NHS Trust.

6.7 Details of compensation and timing of payment(s) to funders/project company following project company default (dependent on whether step-in rights have been exercised) during:

- construction phase;
- operating phase.

7 Expiry of contract

7.1 Description of break options for the NHS Trust, indicating what benefits these give and what costs, if any, may be incurred if they are exercised.

7.2 Description of the different options available to the NHS Trust on expiry of contract, and what costs, if any, are involved.

8 Human Resources

8.1 Confirmation that TUPE provisions will apply to any staff transferring to the private sector as a result of the project.

8.2 Details of any terms regarding subsequent transfers at market testing intervals.

8.3 Description of terms regarding trade union recognition.

8.4 Description of terms regarding requirement for broadly comparable pensions for staff upon transfer.

9 Other

9.1 Details of how surplus land transfers are treated in the contract, including:

- Timing of transfer and guarantees against non-delivery of services;
- Value to be underwritten by the project company and how this relates to market (or District Valuer's) valuation of the land;
- Details of effect of transfers on:
 - a) the NHS Trust's balance sheet;
 - b) the NHS Trust's ability to recover VAT;
 - c) the project company's position on corporation tax.

Appendix 8: List of contract documentation

A list of the contractual documentation which can be required for a major scheme is set out below. It covers documentation between the NHS Trust and the private sector, as well as documentation which must be in place between the private sector parties associated with the deal before financial close can be achieved. The list of documentation is given as an example of the complexity of contracts only and should not be regarded as definitive. The form and nature of the documentation will also differ according to the individual characteristics of deals.

Indicative list of documents for a major PFI scheme

NHS Trust and project company documentation in accordance with the standard form contract (see the section of this guidance on *Commercial Issues*)

1. Project or Concession Agreement
2. Schedule - Definitions and Interpretation
3. Schedule - Completion Documents
4. Schedule - Custody Agreement (for deposit of financial model)
5. Schedule - Project Company's Key Works Personnel
6. Schedule - Disaster Plan
7. Schedule - Funders Direct Agreement
8. Schedule - Land Matters (including leases and surplus land agreements)
9. Schedule - Construction Matters (including planning consents, NHS Trust's construction requirements, project company's proposals, design documents and quality plans)
10. Schedule - Programme for design, construction and commissioning
11. Schedule - Review Procedure (for review of design)
12. Schedule - Collateral agreements (direct agreements between NHS Trust and project company's sub-contractors and any supporting guarantees)
13. Schedule - Outline Commissioning Programme
14. Schedule - Equipment List
15. Schedule - Service Requirements (NHS Trust's specifications, project company's method statements and services quality plan)
16. Schedule - Independent Tester Contract
17. Schedule - Performance Monitoring System
18. Schedule - Market Testing or Benchmarking Procedure

19. Schedule - Payment Mechanism
20. Schedule - Financial Model
21. Schedule - Availability Deduction Mechanism (if appropriate)
22. Schedule - Insurance Requirements
23. Schedule - Variation Procedure
24. Schedule - Compensation on Termination
25. Schedule - Handback procedure
26. Schedule - Record Provisions (for retention of records)
27. Schedule - Dispute Resolution Procedure
28. Schedule - Project company information
29. Schedule - Certificates (pro forma certificates of commencement, practical completion and handback)
30. Attachment - Site Plan
31. Attachment - Trust Policies
32. Attachment - Financial Model
33. Attachment - Full Planning Permission

Additional documentation which may be required on a scheme specific basis

1. Retained Buildings Procedure
2. Income Generation Schemes
3. Maintenance Plan

Other documentation relevant to the project agreement

1. Section 106 Agreement
2. Section 278 Agreement
3. Other Consents
4. Written approval of HM Treasury
5. Written approval of Secretary of State for Health
6. Section 38 of the Landlord & Tenant Act 1954 Orders
7. Written approval of Health Authority

8. Parent Company Guarantees
9. Disclosure Letters (re warranted information)
10. Letter of Undertaking between the Building Contractor and the NHS Trust
11. Letter of Undertaking between the Facilities Management Provider and the NHS Trust
12. Board Resolutions of all parties and parent companies, including the NHS Trust
13. Secretary of State's Certificate pursuant to the NHS (Private Finance) Act 1997
14. Letter of explanation by the Secretary of State (for major schemes)
15. Accounts of all parties
16. Correspondence with HM Customs & Excise and/or Inland Revenue
17. Recognition Agreement

Project company and sub-contractors documentation

1. Construction Contract and parent company guarantee
2. Service Agreement(s) and parent company guarantee(s)

Project company and banks documentation (for debt and equity financed schemes)

1. Loan Facility Agreement
2. Debentures
3. NHS Trust Deed
4. NHS Trust Direct Agreement
5. Contractor Direct Agreement
6. Commissioning HA or PCG Letter
7. Facilities Management Direct Agreement
8. Operation Management Direct Agreement
9. Account Bank Agreement plus documentation
10. Intercreditor Agreement
11. Shareholder Support Agreement

12. On-Loan Security
13. Hedging Agreement
14. Form required under section 395 Companies Act 1985
15. Front end Fees Letter
16. Agency Fees Letter
17. Trustee Fee Letter
18. Technical Bank Fee Letter
19. Account Bank Fee Letter

Bond finance documentation

1. Offering Circular
2. Subscription Agreement
3. Paying Agency Agreement
4. Bond Trust Deed
5. Temporary Global Bond
6. Permanent Global Bond
7. Bond Policy
8. Insurance and Indemnity Agreement
9. Collateral Deed
10. Debenture
11. Share Pledge
12. Security Trust Deed
13. Shareholders' Undertaking
14. Building Contract Guarantee
15. Facilities Provision Contract Guarantee
16. Investment Management Agreement
17. Accounts Agreement
18. Direct Agreement

19. Standby Commitment

PFI in the NHS

20. Equity Letters of Credit

Project company shareholders documentation

1. Subordinated Loan Stock Agreement
2. Original Investors Security Letter of Credit or Letter of Comfort
3. Shareholders Agreement
4. Shareholders Parent Company Guarantee

Reports and opinions

1. Financial Model
2. Project Company's Technical Opinions
3. Due diligence reports of the technical advisers, insurance advisers and the healthcare advisers as appointed by the banks
4. Construction Budget
5. Brokers letter of undertaking
6. Signed cover notes in respect of insurances
7. Audit letter of the Banks Model Auditor

Appendix 9: Sample letter of explanation for major PFI schemes

The [Project Company]

The [Lead Bank]

[other Banks]

[Third Party Equity]

and the other Funders from time to time

providing finance or funding in respect

of the [xxxx] Hospital Project, including any

counter party to any interest rate hedging

arrangement and any assignee or transferee

of any of them.

[XXXX] HOSPITAL PROJECT

I am aware that [Project Company] is the nominated preferred bidder for the above PFI project and that it has entered into or is shortly to enter into the project documentation relating to the same. I am also aware that financing for the project is some £[x] million comprising senior debt, subordinated debt and equity. The financing will be non-recourse to the shareholders of [Project Company].

In recognition of the foregoing, I thought it would be helpful if I wrote to clarify the statutory responsibilities of the Secretary of State for Health in relation to the NHS in general and to NHS Trusts in particular.

The enclosed paper sets out those statutory responsibilities and also some of the financial obligations of NHS Trusts; the strict financial controls under which NHS Trusts operate; and the range of remedial actions which are open to the Secretary of State to ensure NHS Trusts continue to meet their financial objectives. More detailed information is contained in a guide for potential private sector investors (1) produced by my Department's Private Finance Unit.

In particular, you should note that all PFI projects valued at £1 million and above are scrutinised and approved on my behalf by the NHS Executive and that PFI schemes valued at £10 million and above are also scrutinised by and must receive Treasury approval. Approval will not be given for any project unless it is economically sound; demonstrates value for money against the Public Sector Comparator by delivering, throughout its contractual life, ongoing efficiency savings in line with Government objectives; its financial terms, including ongoing costs and termination arrangements, are acceptable; it is both affordable and consistent with the financial objectives for the NHS Trust; there are clearly identified benefits for patients; and it is, therefore, in the interests of the health service to enter into and perform the project contracts.

~~My Department's legal advice has always been that NHS Trusts have the power to enter into PFI contracts under the National Health Service and Community Care Act 1990. The matter has been put beyond doubt by the National Health Service (Private Finance) Act 1997. This Act explicitly states that an NHS Trust has power to enter into an "externally financed development agreement". A contract will constitute an externally financed development agreement when it has been certified as such by the Secretary of State. The Secretary of State may so certify if~~

- ~~a) in his opinion the purpose or main purpose of the agreement is the provision~~

~~of facilities in connection with the discharge by the NHS Trust of any of its functions; and~~

- ~~b) a person proposes to make a loan, or provide any other form of finance for, another party in connection with the agreement.~~

~~The Act further explicitly states that an NHS Trust may enter into an agreement with a person who falls within (b) above in relation to the externally financed development agreement.~~

~~The issue of a certificate in respect of a PFI contract therefore removes any doubt concerning an NHS Trust's vires to enter into that contract. However, it should be emphasised that any lack of a certificate in no way invalidates a PFI contract. This is stated explicitly in the 1997 Act and, as I mentioned above, our advice is that NHS Trusts have always had powers to contract in this way.~~

~~The NHS Executive, acting on behalf of the Secretary of State, seeks to ensure that NHS Trusts are always able to fulfil their responsibilities. The Secretary of State has a range of powers available to him in this regard, including increased financial support for commissioning HAs or PCGs or NHS Trusts, management changes, mergers and dissolution. It is important to make clear that the intention of the NHS "commissioner/provider" system is not to affect adversely the position of third party creditors and that all valid third party claims have been, and will continue in the future to be, paid. Accordingly, although the Secretary of State has wide duties of consultation in respect of NHS Trust mergers and dissolutions and cannot fetter his discretion as to how he exercises his powers, if any NHS Trust were unable to meet its obligations (including its liabilities to its PFI contractors or their financiers), the Secretary of State would want to intervene in a timely manner to ensure that either the NHS Trust itself, or any body to which its liabilities are transferred in accordance with the relevant legislation, is in a position to meet its liabilities on time and in full.~~

~~The proposition that the Secretary of State would stand by and do nothing in circumstances where an NHS Trust was unable to meet its obligations is untenable given the statutory responsibilities of the Secretary of State for Health.~~

~~Finally, the principles of public accountability and of public law require the Secretary of State always to act reasonably in the exercise of his statutory powers.~~

~~While nothing in this letter or the enclosed paper should be construed by you as a guarantee by the Secretary of State of the obligations or liabilities of any NHS body, nor as a restriction on the way in which the Secretary of State would exercise his~~

~~discretionary powers in any particular case, I hope you will find them a helpful guide to the statutory responsibilities of the Secretary of State and the powers available to him.~~

~~Signed by authority of the Secretary of State for Health~~

~~{H } }~~

~~Signature Date~~

~~A member of the~~

~~Senior Civil Service~~

~~Department of Health~~

~~Enclosure: The duties and powers of the Secretary of State for Health and the obligations of NHS Trusts.~~

~~**THE DUTIES AND POWERS OF THE SECRETARY OF STATE FOR HEALTH AND THE OBLIGATIONS OF NHS TRUSTS**~~

~~**Statutory responsibilities of the Secretary of State**~~

~~1. The principal statutory responsibilities of the Secretary of State are set out in the National Health Service Act 1977 (“the 1977 Act”). That Act:~~

- ~~● places a fundamental duty on the Secretary of State to “continue the promotion in England and Wales of a comprehensive health service ... and for that purpose to provide or secure the effective provision of services in accordance with [that] Act.” (Section 1(1))~~
- ~~● gives the Secretary of State power: “(a) to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by [that] Act; and (b) to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty”. (Section 2)~~
- ~~● places a duty on the Secretary of State to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, various types of accommodation and services. (Section 3)~~

~~2. The Secretary of State’s functions under sections 2 and 3 of the 1977 Act have been delegated to Health Authorities. Since the introduction of the National Health Service and Community Care Act 1990 (“the 1990 Act”), Health Authorities have been able to discharge their function of providing services under sections 2 and 3 of the 1977 Act by making arrangements with NHS Trusts under NHS contracts. (Section 4 of the 1990 Act)~~

~~3. The functions and duties retained by the Secretary of State are carried out on his behalf and in his name by senior officials in the Department of Health/NHS Executive (including its Regional Offices), which for legal purposes are equivalent to the Secretary of State.~~

Statutory obligations of NHS Trusts

4. ~~The statutory obligations of NHS Trusts are set out in the NHS and Community Care Act 1990 and secondary legislation made under that Act. In particular:~~

- ~~“An NHS Trust shall carry out effectively, efficiently and economically the functions for the time being conferred on it by an order under section 5(1) of this Act and by the provisions of this schedule ...” (Paragraph 6(1) of Schedule 2 to the 1990 Act).~~
- ~~“Every NHS Trust shall ensure that its revenue is not less than sufficient, taking one financial year with another, to meet outgoings properly chargeable to revenue account.” (Section 10(1) of the 1990 Act).~~

5. ~~The NHS Trusts Finance Manual sets out the financial responsibilities of NHS Trusts, their boards and senior officers and requires the adoption of and adherence to adequate Standing Orders and Standing Financial Instructions. A model set of Standing Financial Instructions is provided in the Manual.~~

6. ~~NHS Trusts are statutorily obliged to comply with directions given by the Secretary of State in the preparation of their annual report and annual accounts. The NHS Trusts Manual for Accounts, issued to all NHS Trusts' Directors of Finance, gives guidance in meeting this obligation. The annual report and accounts conform to a standard comparable to that required of private sector companies under the Companies Acts and to Generally Accepted Accountancy Practice (GAAP). NHS Trusts must publish their annual report and their Audited Annual Accounts must be presented to public meetings.~~

7. ~~In common with other similar institutions, NHS Trusts are expected to have robust internal audit arrangements and an internal audit committee chaired by a non-executive director. The accounts of each NHS Trust are audited by the Audit Commission; and the National Audit Office is responsible for auditing the consolidated accounts of NHS Trusts and laying them before Parliament.~~

Accountability of NHS Trusts

8. ~~NHS Trusts are directly accountable to the Secretary of State, who delegates to the Chief Executive of the NHS responsibility for the supervision of NHS Trust performance. The Chief Executive of the NHS is accountable both to the Secretary of State and, in his accounting officer role, directly to Parliament. A similar dual accountability applies to the chief executives of NHS Trusts, who are responsible both to their boards and, via the Chief Executive of the NHS, to Parliament.~~

9. ~~All chief executives of NHS Trusts are answerable to Parliament through the Chief Executive of the NHS for the propriety and regularity of public finances in the NHS; for the keeping of proper accounts; for prudent and economical administration; for the avoidance of waste and extravagance; and for the efficient and effective use of all the resources in their charge.~~

Financial monitoring and scrutiny

10. ~~In order to fulfil his statutory obligations, the Secretary of State needs to monitor and manage the NHS and is given wide powers for this purpose.~~

11. ~~The financial performance of NHS Trusts is monitored on a systematic basis by the NHS Executive acting on behalf of the Secretary of State. In order to allow this~~

monitoring to take place, NHS Trusts must prepare an Annual Financial Plan which must be approved by the NHS Executive. Checks ensure that NHS Trusts are planning to meet their financial duties; and the financial position of the NHS Trust and its forward plans are scrutinised in the context of its overall service objectives. This ascertains whether the NHS Trust is capable of delivering its objectives within the resources available to it, and requires a careful scrutiny of past as well as projected performance. As part of this monitoring, NHS Trusts must report on their position as regards their statutory financial duties.

12. The NHS Executive monitors the in-year performance of individual NHS Trusts against their Annual Plans. NHS Trust directors of finance are responsible for providing the NHS Executive with timely and accurate monitoring reports, in a form and at intervals which the NHS Executive determines. Monitoring reports are currently submitted quarterly to the NHS Executive, which carries out an analysis of each NHS Trust's reported financial position to ascertain whether the NHS Trust is meeting its financial duties.

13. NHS Trusts that enter into PFI schemes are subject to the NHS Executive's Capital Investment Manual, which sets out the structured and disciplined approach to capital investment in the NHS. A Full Business Case must demonstrate convincingly that the project is economically sound (through an option appraisal); is financially viable (affordable to the NHS Trust and purchasers); and will be well managed. In addition, a business case for any investment should show that the proposal has clearly identified benefits for patients and is supported by purchasers. All PFI schemes valued at £1 million and above are scrutinised by the NHS Executive, and PFI schemes valued at £10 million and above are also scrutinised by and must receive Treasury approval.

Control of NHS Trusts in financial difficulties

14. If an NHS Trust does run into financial problems, monthly monitoring returns are submitted to the NHS Executive. The NHS Trust draws up a robust recovery plan for approval and monitoring by the NHS Executive. The NHS Executive reviews the NHS Trust's progress formally, and further measures may be taken if adequate progress is not made. This could include management changes or restructuring (for example, merger with another NHS Trust).

15. NHS Trusts may, where appropriate, negotiate contracts for PFI projects which give financiers rights to certain information — such as that provided to the NHS Executive in monitoring returns. Such information would be provided to financiers by the NHS Trust concerned; and would enable financiers to make representations to the NHS Executive or the Secretary of State.

16. Since the first NHS Trusts were established in 1991, a number of NHS Trusts have been dissolved and reconfigured to form new NHS Trusts. Financial concerns were a contributory factor in a number of these cases.

The NHS (Residual Liabilities) Act 1996

17. The Secretary of State has a statutory power to dissolve an NHS Trust if he considers it appropriate in the interests of the health service to do so or on the application of the NHS Trust concerned. (Paragraph 29 of Schedule 2 of the 1990 Act). In the event of an NHS Trust ceasing to exist, the NHS (Residual Liabilities) Act 1996 provides that liabilities have to be transferred to another NHS Trust; a Health Authority; a Special Health Authority; or the Secretary of State.

Publications

The following publications may be obtained from
The Stationery Office, PO Box 276, London SW8 5DT
(telephone 0171 873 9090):

~~National Health Service Act 1977~~

~~National Health Service and Community Care Act 1990~~

~~National Health Service (Residual Liabilities Act) 1996~~

~~NHS Executive Capital Investment Manual 1994~~

Appendix 10: Sample certificate for externally financed development agreements

Certificate issued pursuant to the National Health Service (Private Finance) Act 1997

I, [], hereby certify that the documents set out in the schedule to this certificate comprise, and each of them respectively comprises, an externally financed development agreement for the purposes of section 1 of the National Health Service (Private Finance) Act 1997 and accordingly the NHS Trust is authorised to enter into each of them.

Signed by authority of the Secretary of State for Health

[] []

Signature Date

A member of the

Senior Civil Service

Department of Health

[Schedule]

[Schedule would typically refer to....

the Project Agreement,

the Land Sales Contracts,

the Lenders Direct Agreement, and

the Lease....]