
7 CONTRACT STRUCTURE AND KEY COMMERCIAL ISSUES

7.1 Introduction

- 7.1.1 The Trusts have received advice that, as statutory bodies, they do not have the necessary powers to enter into obligations on behalf of one another for requirements above and beyond their own. This means that the Trusts cannot assume joint, or joint and several liability for their obligations or be liable for contingent liabilities of the other Trusts in discharging their respective functions.
- 7.1.2 The Trusts, therefore, propose that there be a single Project Agreement, granting a single concession, awarded with each Trust having liability to Project Co limited to its service requirements only.
- 7.1.3 The Project Agreement will address both the overall project requirements and the specific needs of each Trust. Where possible, there will be a co-ordinated and generic approach to services and drafting.
- 7.1.4 Recognising the benefits of a co-ordinated approach to the Project, a formal joint venture agreement ("the Interface Agreement") will be agreed between the Trusts, governing the relationship between them during the duration of the concession. The Interface Agreement will reflect the project agreement and the obligations that the Trusts have under it to Project Co. The arrangements under the Interface Agreement will not be a matter for Project Co. It is intended that the interface between the Trusts and Project Co will be maintained to a single point of contact wherever possible.

7.2 Confirmation and acceptance of project agreement

- 7.2.1 A draft Project Agreement is set out in Volume 6. This is based on the Standard NHS PFI contract as issued in December 1999 (and amended in October 2000 and August 2003).
- 7.2.2 Bidders are required to confirm, in writing, their acceptance of the Project Agreement and the generic Schedules (including, in particular, Schedules 6, 23 and 29) together with similar confirmation from all members of their consortium and their funders. This is to be regarded as a pass/fail test such that failure to give such confirmation will mean a bid being regarded as non-compliant. Should bidders elect to hold a funding competition then they will be required to confirm that it will be a condition of such competition that funders agree to be bound by the contract Bidders have signed up to.
- 7.2.3 The only exception to this is where there are genuine project specific reasons for an amendment from the standard form, for example, to the extent required to deal with all building, equipment and IM&T commissioning issues. An exhaustive list of such points (as opposed to a marked up copy of the Project Agreement) should be provided together with justification for the need for such change. These amendments should be set out in the form of Appendix A to this PITN as part of the Reference Bid. It is not sufficient merely to say that the amendment has been agreed on other projects as the Project Agreement and Schedules, which follow the standard form, have been amended to incorporate both project specific elements and all Department of Health PFU approved standard form changes and, thus, reflect the market position.
- 7.2.4 No amendments to standard drafting will be considered unless revised standard form drafting is issued or made available by the Department of Health PFU prior to commercial close. Bidders should also be aware that the Trusts have no power to accept suggested improvements to the standard form drafting nor will the Trusts be permitted to discuss alternative methods of dealing with standard form concepts.
- 7.2.5 Bidders should be aware that all negotiation in relation to the Project Agreement with the Trusts Preferred Bidder will focus almost entirely on project specific design, commissioning, technical and service issues. This will primarily be required in order to develop and complete all of the requisite Schedules to the Project Agreement.

7.2.6 Bidders should consider carefully all of the above, when formulating their responses to the Trusts requirements listed below in Appendix A. In addition, Bidders should note that, in the event that they are selected as the Trusts Preferred Bidder, this does not imply that any of the Trusts accepts or will accept some or any of that Bidder's proposed amendments to the draft Project Agreement or Schedules.

7.2.7 In support of their legal response in accordance with Appendix A, Bidders are requested to complete Appendix A, Table 4 with details of any project specific points that they may wish to raise together with their justification for these.

7.3 Project specific issues

7.3.1 The Trusts reserve the right to develop the Project Agreement in line with the particular requirements of the Project, including arrangements between themselves, such that a more detailed document is likely to form part of the FITN. Further information on the development of the Project Agreement will accompany the draft document issued as Volume 6.

7.3.2 The Trusts are seeking to ascertain the extent to which the Bidders' proposals comply with the risk transfer position set out by the Trusts in the draft Project Agreement.

7.3.3 Where Bidders would seek to change risk allocation, they should clearly set out in their Bid those risks that they cannot accept, providing sufficient detail to enable the Trusts to ascertain the nature and extent of the change requested; the reasons for requesting such change; and the consequences for the Trusts if they accept such a change.

7.4 Staff transfer issues

7.4.1 Staff transfer issues will be dealt with in accordance with the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector, incorporating Treasury Guidance on the treatment of staff pensions, ("A Fair Deal for Staff Pensions") and a Statement of Practice by the Government. The staff transfers will occur at the point of service transfers.

7.4.2 The Trust will follow the standard RoE contract drafting developed by the Department of Health.

7.4.3 The drafting will also deal with those staff that transfer under TUPE, in respect of whom Bidders will be required to comply with all of their obligations under TUPE, as amended, including any obligations that may be introduced as a result of any further amendments to TUPE.

7.4.4 In relation to pensions benefits, the contract will require that all employees who transfer from any of the Trusts and who are members of, or entitled to become members of, the NHS Pensions Scheme, are offered:

- A broadly comparable pension for future service, both on the initial transfer and on second and subsequent transfers. The Government Actuary's Department must certify that the benefits offered by the scheme are broadly comparable;
- The option to move any accrued credits to the scheme by means of a bulk transfer on a day for day past service credit basis;
- Enhanced redundancy terms on premature retirement at age 50 or over, as are currently enjoyed by NHS employees under the NHS Pension Scheme Regulations.

7.4.5 Bidders will be required to confirm their commitment to entering into a recognition agreement with the local Trade Unions.

7.5 Allocation of risks

7.5.1 The Trusts' approach to risk allocation is underpinned by the principle that each risk should be assumed by the party best able to manage it on an ongoing basis. This will depend on each party's ability to accurately predict and control the factors underlying that risk. The Trusts will take full responsibility for demand risk with regard to clinical services. In addition, the Trusts will retain the risks directly associated with the performance of the clinical and clinical support services it continues to provide, or that it commissions directly from third parties.

- 7.5.2 The Trusts' chosen PFI partner will carry the risks associated with the availability of facilities and for the performance of those services it provides to the Trusts. The Trusts expect to achieve a largely similar level of risk transfer on all parts of its estate, during the operational phase of the concession, irrespective of whether the buildings being managed by the PFI partner have been newly built or are transferred existing accommodation.
- 7.5.3 Bidders will be invited to work with the Trusts on achieving this risk allocation on a value for money basis. Bidders should be aware that the Trusts are required to use the standard form project agreement, version 3, as the basis for the allocation of all risks.

7.6 Payment mechanism

- 7.6.1 The Trusts will adopt the standard NHS Payment Mechanism issued by the DoH. This has been modified to reflect the fact there will be three separate payment streams to the Project Co. The payment stream from each Trust will cover those services it receives.
- 7.6.2 A draft of the Payment Mechanism is set out in Schedule 18 of the Project Agreement. Bidders, their sub-contractors and their funders will be required to confirm their acceptance of this Schedule as part of their response to this PITN.

7.7 Insurance

- 7.7.1 The Trusts have undertaken a review of the insurable and uninsurable risks emanating from the Project. As a result of this exercise, the Trusts currently take the view that, subject to value for money considerations continuing to be satisfied, Project Co shall be obliged to effect and maintain in force certain types of insurance, either throughout the duration of the Project or for particular activities undertaken during its course.
- 7.7.2 Underlying the Trusts' insurance requirements is the objective to achieve the optimal risk allocation and level of risk transfer to Project Co. In terms of physical damage to the Project assets and liability arising out of their use, this is to be at the risk of Project Co at all times throughout the duration of the Project, including whilst the assets are in the custody and control of the Trusts.
- 7.7.3 The insurance requirement is broadly classified as follows:
- Property Damage "All Risks"
 - Contractors "All Risks"
 - Third Party Public and Products Liability
 - Delay in Start-Up and Business Interruption
 - Compulsory Insurances
- 7.7.4 Schedule 21 represents the Trusts' current position on required insurances for the Project. It reserves the right, however, to change its requirements, following consultation with Project Co or at any time during the contract period.
- 7.7.5 The minimum insurance requirements detailed within Schedule 21 should in no way be seen as limiting Project Co from considering other additional forms of insurance.
- 7.7.6 For the purpose of demonstrating compliance with the Trusts' requirements bidders are required to provide the following minimum information as part of their bid: -
- Formal acceptance of the PFU's mechanism on insurance cost sharing contained within Schedule 21 (Part 3 & 4) of the Standard Form Project Agreement Version 3, plus confirmation of whether any risk/contingency premium will be required.
Bidders should note that no alternative cost sharing mechanism will be acceptable.
 - Confirmation of whether composite panels will be used as a construction material.
Due to the problems associated with combustibility and insurance of certain types of composite panels, bidders should note that only panels containing non-combustible material will be acceptable to the Trusts. Examples are panels with rockwool/rockfibre insulant.

- The Trusts are currently undertaking a review to identify whether they may have a project-specific exposure to indirect losses. Such indirect losses may arise from a requirement to maintain the healthcare/clinical services of the Trusts following loss or damage committed by Project Co during the Construction Phase.

As a result of this review, the Trusts may seek confirmation from bidders that a project-specific amendment can be made to the Project Agreement to allow the Trusts to recover such losses under the public liability insurance arrangements required in accordance with Schedule 21.

Bidders are asked to raise any objections or concerns they may have concerning this.