



SCOTTISH CAPITAL INVESTMENT MANUAL

PPP Guide : Section 2

From OJEU to Contract Award

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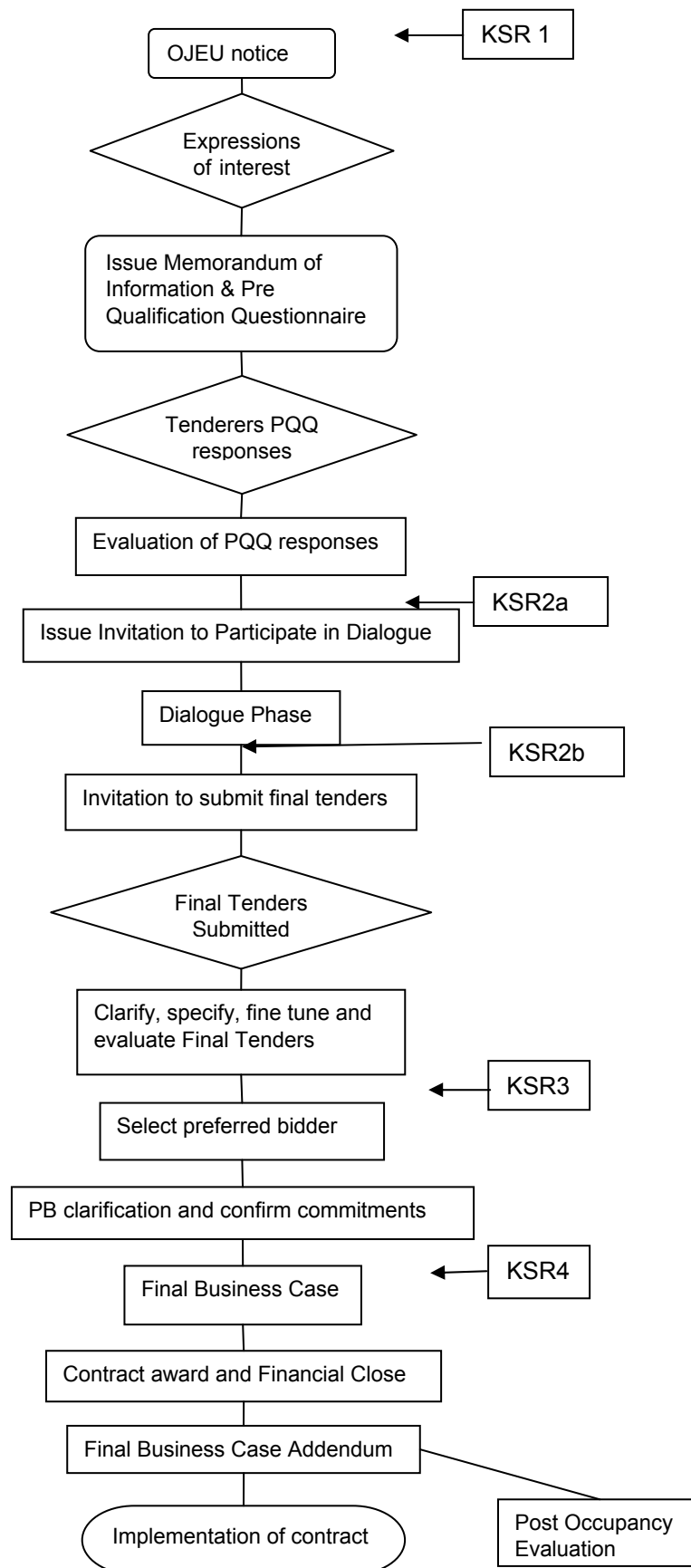
1. Introduction

- 1.1 This section of the guidance sets out the procurement process which should be followed for schemes under Public Private Partnerships (PPP) in the NHS in Scotland. It sets out the procedures from first approaching the marketplace prior to formally advertising a scheme through to shortlisting participants and on to financial close and monitoring contract implementation.
- 1.2 This section of the guidance assumes that the need for a scheme has been fully demonstrated and that approval to proceed has been obtained from the Scottish Government Capital Investment Group (CIG). These steps are outlined in [Preparing for PPP Procurement](#).
- 1.3 Guidance on developing the Initial Agreement (IA), Outline Business Case (OBC), Full Business Case (FBC) and Full Business Case Addendum (FBC(A)) is contained within the [Business Case Guide](#).
- 1.4 The practical guidance in this section covers:
- the main steps involved, from placing an advertisement to the evaluation of tenders;
 - structuring the procurement process;
 - defining the requirements of NHSScotland.
- 1.5 Procuring bodies in the NHS should seek the appropriate professional advice before undertaking any procurement as well as reading this guidance.
- 1.6 [Section 1](#) of this PPP guidance should be referred to.

2. An overview of the PPP procurement process

- 2.1 The different stages involved in taking a scheme from publication of the OJEU notice to financial close are set out in Figure 1 overleaf.
- 2.2 An illustrative schedule of the tasks and timetable for a PPP procurement is shown in **Appendix 1** of this section of the guidance.
- 2.3 Guidance on work to be completed after the scheme is completed is set out in the [Post Project Evaluation](#) section.

Figure 1: The NHS PPP procurement process



3. Advertising the project

Introduction

- 3.1 This chapter sets out the steps which an NHSScotland body 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 Union (OJEU). This should be done concurrently to Outline Business Case (OBC) preparation and should be continued during the approvals process.
- 3.2 Key issues for consideration in this process include:
- taking informal soundings from the market place;
 - confirming the procurement route and procedure to be used;
 - issuing a Prior Information Notice (if applicable);
 - placing a contract notice in OJEU.

Relevant EU procurement directives must be complied with. NHS bodies should seek legal guidance in respect of this.

Commencing the procurement

- 3.3 Once a scheme has received OBC approval and subject to Key Stage Review (KSR) requirements, the NHSScotland body can then commence formal procurement procedures under the European Union public procurement rules. Further information on these is set out in **Appendix 2** of this section of the guidance. NHSScotland bodies should take their own legal advice during the procurement process and must leave a clear audit trail at all relevant stages.
- 3.4 The procurement process must be conducted in accordance with the EU public procurement rules. As noted in **Appendix 2** of this section of the guidance, the rules which must be observed when an NHSScotland body is involved in a PPP project are the Public Contracts (Scotland) Regulations 2006 (the Regulations).

Prior Information Notice

- 3.5 The first formal step in the public procurement process is for the NHSScotland body to consider issuing a Prior Information Notice (PIN). The format of any PIN issued should follow that required by the procurement Regulations. The issuing of a PIN is not compulsory other than in exceptional circumstances.
- 3.6 Including the project in the PIN is a useful way 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 participants throughout the European Community would thereby have an opportunity of recording their interest).

Market sounding - informally approaching the market

- 3.7 This topic is covered in Appendix 2b of [Section 1](#) of the PPP guidance and this section should be read in conjunction with it.
- 3.8 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 and appropriate timing for the scheme from potential participants prior to issuing a contract notice.
- 3.9 It is also appropriate to approach the market informally while the Outline Business Case is being developed, in particular to take soundings on whether the scheme proposals are likely to be feasible under PPP. This is best done once the preferred public sector option and scope have been identified and the opportunity can be described to the private sector. Further guidance is included in [Section 1 Appendix 2b Informal Market Soundings Exercise](#).
- 3.10 Approaching the market should enable the NHSScotland body to gain insight into the likely level of interest in the market but without giving any one potential participant a head start in the procurement process. The NHSScotland body should ensure that its actions do not prejudice the future procurement process.
- 3.11 NHSScotland bodies 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 PPP market may also be approached. The NHSScotland body'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 NHSScotland body itself may usefully be provided. NHSScotland bodies should ensure that in providing information, they do not give any potential participants an unfair competitive advantage.
- 3.12 Potential participants 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 NHSScotland body might also give consideration to appointing professional property advisers. Surplus land should not be included in a PPP unless it represents value for money to do so. Further guidance on the treatment of land and buildings within PPP schemes is included within Chapter 8 of [Section 3](#) of this guidance.
- 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, NHSScotland bodies should discuss with the SGHFD how to proceed further.

Advertising the project

- 3.15 A contract notice must be placed in OJEU for schemes which have a value above the thresholds set out in the Regulations and which are detailed in **Appendix 2** of this section of the guidance. It is expected that in general PPP schemes will be advertised using the competitive dialogue procedure, although NHS bodies should always take legal advice first.
- 3.16 The Competitive Dialogue award procedure is provided for in regulation 18 of the

Regulations and was introduced for the award of complex contracts, where a contracting authority is not objectively able to define the technical means capable of satisfying its needs or objectives or to specify either the legal or financial make-up of a project.

- 3.17 The contract notice can be filled out and submitted electronically on the eNotices section of the European Commission's SIMAP website (<http://simap.europa.eu/enotice/changeLanguage.do>). There is no charge for the inclusion of a notice in the OJEU and notices are generally published within 2 - 5 days of their being submitted online.
- 3.18 If the NHS body uses other advertisements, for example, in the specialist press or the national media, these adverts must not appear before the OJEU version has been despatched and must not contain any additional information to that contained in the OJEU notice. Any such adverts should refer to the date of the despatch of the advertisement to OJEU. It is also good practice for all schemes to be additionally advertised in [Government Opportunities](#).
- 3.19 It is important that careful attention is paid to the detailed drafting of the contract notice. The OJEU notice should provide a brief description of the project. 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.
- 3.20 The contract notice should emphasise that the project is a PPP 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 tenders are acceptable. Variant tenders are discussed in **Chapter 5** of this section of the guidance.
- 3.21 When the NHSScotland body uses the competitive dialogue procedure and issues the contract notice electronically a minimum of 30 days must be allowed from the date of despatch of the contract notice to the last date that is allowed for requests (PQQ submissions) to be received. In the event that this 30 day period ends on a Saturday, Sunday or public holiday, it should be extended to expire on the next working day.
- 3.22 Relevant guidance on issuing an OJEU may be found at the OGC website [EU public procurement law in the UK \(OGC website\)](#) January 2006.
- 3.23 Note that procurement rules and regulations can change, therefore, NHS bodies should always take professional advice in this area.

Further information

[OGC website](#)

[Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on PPPs and Community Law on Public Procurement and Concessions](#)

[Government Opportunities](#), Business Information Publications, tel 0141 332 8247, fax 0141 331 2652

Public Contracts (Scotland) Regulations 2006 -

http://www.opsi.gov.uk/legislation/scotland/ssi2006/ssi_20060001_en.pdf

4. Prequalification

Introduction

- 4.1 This chapter sets out the process by which an NHS body should reply to expressions of interest received in response to the contract notice placed in OJEU. This is done by issuing a Prequalification Questionnaire (PQQ) to potential participants together with a Memorandum of Information (MOI) which sets out details of the NHS body and of the proposed scheme. Where the NHS body is using the competitive dialogue procedure the Memorandum of Information is the equivalent to the "descriptive document" for the purposes of the Regulations. The aim of this stage is to prequalify a number of participants, normally between three and eight, who will progress to the later stages of the bid process i.e. to be invited to participate in dialogue. The decision on whether to longlist or shortlist participants at this stage depends upon the choice of procurement route taken at the Invitation To Participate in Dialogue (ITPD) 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;
 - methodologies for evaluation and selection of potential participants.

The Memorandum of Information and the Prequalification Questionnaire

- 4.3 The number of expressions of interest received in response to the contract notice placed in the OJEU 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 participants 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 body: the Memorandum of Information.
- 4.4 The NHS body 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 OJEU.
- 4.5 The Memorandum of Information and the accompanying Prequalification Questionnaire should aim to:
- enable potential participants to decide whether they want to continue to be involved in the bidding process by providing appropriate information about the NHS body, 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 participants are technically and financially capable of delivering the project. PPP contracts are complex and expensive to procure. NHSScotland bodies must ensure that only consortia with the appropriate resources and skills-base are selected;
 - enable the NHSScotland body to gain an understanding of the economic, financial and technical status and previous experience of the potential

participants.

- 4.6 NHSScotland bodies 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. It is recommended that in order to pre-qualify 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 the project sponsors, the providers of equity and junior debt, the funding structure for the proposed project company, but not necessarily explicitly identified funders and third party risk capital providers. However, where funders are not identified, the consortia should have specified how they plan to raise such capital and the timetable for this.
- 4.7 Sponsors should be identified for the proposed project company at this stage. The private sector participant must demonstrate it has the resources to see the bid through to completion.
- 4.8 There is no preference on the part of the Scottish Government 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 PPP projects and jointly led by contractors, service providers and/or financial institutions. The PPP marketplace continues to evolve and future bidding consortia and the type of companies leading consortia will not necessarily be the same as those involved in PPP today.
- 4.9 For smaller schemes, consortia may sometimes be professionally led by architects, project management companies or developers. There may also be the intention to tender aspects of the PPP deal, e.g. 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, and the procurement vehicle being adopted to deliver them, the prequalification criteria should not be set so as to rule out such consortia. However, extreme caution must be exercised in such circumstances and participants 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 NHSScotland bodies receive tenders 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 public version of the Outline Business Case should be made available on request to potential participants at this stage. The public version of the business case is discussed further in **Chapter 9** of [Preparing for PPP Procurement](#). Detailed information about both the CPAM, shadow bid model and affordability should be removed, however, the NHSScotland body should be prepared to disclose information about how the CPAM, shadow bid model and affordability have been developed in order to reassure participants that they are robust.

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

<p>Information about the project</p> <p>This part must provide enough information to enable the participant to understand:</p> <ul style="list-style-type: none">• The strategic context of the project• The scope of the project and expected services configuration• The opportunities for the private sector (i.e. capital required, scope of services)• The procurement vehicle i.e. PPP, NPD or an alternative structure• The procurement process• An outline timetable• The intended allocation of risks
<p>Information about the NHS body</p> <p>This should include:</p> <ul style="list-style-type: none">• Details of the NHSScotland body (including information on existing and forecast income and activity)• Other sources of income (including commitments in respect of the project from other public sector bodies)• Existing property and sites• The public sector team

- 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 NHSScotland body's efforts to attract the best quality participants.

Content of the Prequalification Questionnaire

- 4.13 The Prequalification Questionnaire serves two main purposes:
- it asks whether there are any grounds pursuant to which the NHSScotland body is either required by the Regulations to reject the participant (mandatory exclusion criteria) or may otherwise wish to reject the participant under Regulation 23 of the Regulations;
 - it establishes whether participants 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 OJEU notice to be taken forward to ITPD stage.
- 4.14 The Standard Prequalification Questionnaire (PQQ) can be accessed through the [SGHD Capital Planning and Investment website](#). It is not envisaged that any changes will be required in respect of the Standard PQQ and scoring methodology save project specific reasons. Any non project specific changes must be discussed with [Capital Planning and Asset Management Division](#).

Prequalification

- 4.15 The grounds for eliminating a participant from further participation in the procurement process are set out in Regulation 23 of the procurement Regulations. They include circumstances where a participant has been convicted of a criminal offence relating to the conduct of his business, where a company has been wound up, has failed to pay relevant social security contributions etc. Participants should be asked to confirm in their response to the prequalification questionnaire that none of the grounds set out in Regulation 23 apply to any member of the relevant consortium. Participants should also be required to inform the NHSScotland body during the bid process if any of these grounds apply subsequently. NHSScotland bodies should note that certain of the grounds listed in Regulation 23, in particular those relating to criminal activities, will result in mandatory rather than discretionary elimination of a participant from the process.
- 4.16 The other central purpose of the prequalification questionnaire is to assist the NHSScotland body to determine which of those participants who are not disqualified under Regulation 23 grounds should be selected to compete in the next round of the procurement competition, the ITPD stage.
- 4.17 In selecting participants to go forward to the ITPD stage, NHS bodies may only take in to account factors relating to the economic and financial standing, ability and technical capacity of participants. Factors relating to the award of the contract itself (for example, a participant's approach to design issues etc.) may only be considered at the ITPD stage. Similarly, at the ITPD stage *only* factors relating to the award of the contract itself may be taken into account in selecting participants to progress further in the competition. Factors relating to the economic and financial standing, ability and technical capacity of participants may only be considered at stages after prequalification where there has been a significant change in a participant's status or where it is necessary to seek confirmation in respect of details already provided. Note that the financial standing PQQ tests should be reconfirmed at Preferred Bidder selection and prior to entering into Financial Close.
- 4.18 The information which may be taken into consideration to determine the outcome of pre-qualification is set out in the Public Contracts (Scotland) Regulations 2006. Where the information referred to in the Regulations is not appropriate to a particular case, then they may ask for other information. Supplementary information may also be asked for but only in the circumstances specified in Regulation 26 of the Regulations.
- 4.19 The time allowed for the participants to respond to the PQQ will vary with the information asked for by the NHSScotland body, but a period of four weeks from the date the OJEU notice closes will normally be long enough for participants to collate their responses.
- 4.20 If a submission is borderline or unclear, the NHSScotland body can ask for more information for clarification. Such requests must be very specific and kept to a minimum. NHSScotland bodies may consider interviewing prospective participants as part of the PQQ process.

5. Invitation To Participate in Dialogue and Invitation to Submit Final Tenders (ITPD & ISFT)

Introduction

5.1 The competitive dialogue procedure involves the following phases in the procurement process:

- Phase 1: Prequalification
- Phase 2: The dialogue phase is initiated by issuing an Invitation to Participate in Dialogue (ITPD). This will incorporate a number of stages where Tenderers will provide submissions to the contracting authority for evaluation.
- Phase 3: The dialogue phase is continued by issuing an Invitation to Submit Detailed Proposals (ISDP)
- Phase 4: Invitation to Submit Final Tenders (ISFT), and appointment of Preferred Bidder (PB)
- Phase 5: Full Business Case & Financial Close

5.2 This section of the manual outlines the stages associated with each of the above phases and the information the NHSScotland Body should provide to Participants and the information they should expect back.

Degree of commitment expected of participants

5.3 Figure 2 overleaf sets out the information that should be sought from Participants at the different stages of the procurement process under a competitive dialogue procurement.

Figure 2: Commitment expected at each stage of procurement from Participants on major projects

Procurement stage	Number of Participants at <u>end</u> of stage	State of contract discussions at <u>end</u> of stage	Designer	Design and construct sub-contractor	Services Sub-contractor	Bidding consortium	Financial & Economic Standing/ Funding
<u>Phase 1</u> Prequalification	At least three	n/a	None	Demonstrate capacity and capability	Demonstrate capacity and capability	Complete PQQ	Confirm financial & economic standing Demonstrate capability to raise funds
<u>Phases 2 & 3</u> Invitation to Participate in Dialogue & Dialogue Phase Note: this will include a number of submissions from Tenderers	Two or Three	Confirmation of acceptance of key positions in contract summary. Statement of acceptance of standard contract in principle.	1:1000 plans with key depts at 1:500 moving to 1:500 with key departments at 1:200	Construction approach	Services approach	Confirmation that standard contract terms set out in ITPD will be acceptable to consortium members and sub-contractors.	Proposed method(s) of finance
<u>Phase 4</u> Invitation to Submit Final Tenders (ISFT)	One (and reserve bidder)	Agreement on all key contractual issues affecting price and risk allocation, including payment mechanism and performance regime.	1:200 plans with key departments at 1:50	Confirmation of acceptance of draft contract, payment mechanism, performance regime and allocation of risks within consortium.	Confirmation of acceptance of draft standard contract, payment mechanism, performance regime and allocation of risks within consortium.	Full financial model. Agreement on all points of principle on specifications.	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.
<u>Phase 5</u> Preparation of Full Business Case	One	Fully developed contract drafts.	As at ISFT above.	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.		All contracts and major sub-contracts in place.			Due diligence complete.

- 5.4 The following sections provide further detail of the activities to be undertaken at each stage of the procurement process and the information to be requested from the participants.

Invitation to Participate in Dialogue (“ITPD”)

- 5.5 The ITPD needs to comply with regulation 18 of the Regulations and must include:

- The information contained in the Memorandum of Information and any supporting and additional documentation;
- A reference to the published OJEU notice (including the publication reference number and date)
- The date of the start of “consultation”. The date of the “consultation” is the first date when any form of interaction between participants and the contracting body occurs. This could be participant meetings or submissions by participants of their initial proposals (i.e. what is currently the submission of PITN responses for larger schemes with greater than £60m capital expenditure.)
- The address(es) applicable to the consultation. This may be the location of participant meetings and/or the address to which initial proposals should be submitted (i.e. usually the contracting body’s Project Office.)
- The language to be used for the purpose of dialogue confirmed (as issued in OJEU).
- The criteria for the award of contract.
- Information on weighting of the award criteria (unless weighting is not possible in which the criteria must be listed in descending order of importance);
- A reference to any additional documents required from participants to update information on financial or technical standing which was submitted at the PQQ stage.

- 5.6 The Memorandum of Information to be included within the ITPD is the document which defines the contracting authority’s needs and requirements. This need not be a single document but can evolve to include a series of updated and/or more detailed descriptive documents issued as the dialogue process progresses. However, the overall scope of the project must not change. The ITPD will contain the information set out in the Information Memorandum and, although not essential, can be accompanied by any additional information which further defines the contracting body’s requirements. Details of this information is provided below:

Information to be provided by the NHS body in the ITPD

- 5.7 Key issues on which the NHSScotland body should provide information to the participants in the ITPD should follow a standard form:

- Volume 1: Instructions to Participants (include schedule of deliverables, weightings and contact details)

- Volume 2: Standard Form Project Agreement including project specific amendments
- Volume 3: Technical Specification for Construction Works
- Volume 3 Annex A: Clinical Output Specifications
- Volume 3 Annex B: Non-clinical Output Specification
- other standard documents will form further appendices

5.8 Given that the content of the ITPD will dictate the shape of the final deal, NHSScotland bodies are strongly recommended to involve professional advisers where required when both documents are being drafted, rather than only at a later stage in the procurement process. The appointment of advisers is explained in **Chapter 6** of [Preparing for PPP procurement](#).

5.9 This document provides a framework for the prequalified participants to develop their detailed proposals during the dialogue process. A well drafted and comprehensive ITPD is vital to the smooth running of a project. It will help the participants produce accurate proposals and will avoid misunderstandings that can lead to later problems. The NHSScotland body should have substantially completed its proposed ITPD including the draft contract, NPD principles, payment mechanism and performance regime prior to advertising for the scheme in the OJEU. In particular, areas such as the development of output specifications are very time consuming to produce and the NHSScotland body should have completed work on these before commencing the formal procurement process.

5.10 If not requested at the previous stage by potential participants, copies of the public version of the OBC should be provided to potential participants unless there are demonstrable circumstances that would make publication detrimental to competition during the procurement process.

Establishing lines of communication

5.11 The NHSScotland body should establish clear lines of communication with participants to enable swift and effective exchanges of information. For example, specified contact points should be identified for clarification of the ITPD and ISFT documents and to arrange access to any further information or meetings with NHSScotland body officials. It is likely that standard documents such as Request for Information (RFI) Forms and full programme of meetings will be attached as appendices to the ITPD. This will help in ensuring compliance with the procurement regulations and in securing equal treatment of participants.

5.12 Direct contact between Participants and Authority Advisers should be avoided where practicable. Ideally all communication should be through the Project Office using the standard RFI procedure. Information which is supplied to one participant should also be shared with other participants.

5.13 The documentation should include the name of the NHSScotland body 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.

5.14 A Key Stage Review must be completed prior to the issue of the ITPD.

- 5.15 The dialogue phase commences once the ITPD has been sent to short-listed participants. The aim of the dialogue is to *"identify and define the means best suited of satisfying [the contracting bodies'] needs."* This stage formally acknowledges the need in complex projects to talk around solutions, develop ideas and explore options as part of the tender process. All aspects of the project can be discussed and discussion can constitute far more than round table meetings (which could be implied by the terminology). It can include, for example, formal presentations, written bid type responses, development of design, formal clarification and negotiations of solutions and contract terms. It is important to recognise that the dialogue phase is the phase in the procedure which offers the greatest flexibility. It should therefore continue until the contracting body is satisfied that it has identified the solution or solutions capable of meeting its needs and requirements with sufficient precision to enable Final Tenders (which fully meet these requirements) to be submitted.
- 5.16 The NHSScotland body's requirements (legal, technical and financial) in relation to bids will have been made clear to all parties within the ITPD. A bid that meets the minimum output requirements of the NHSScotland body but goes no further may be referred to as a standard or reference bid. During the dialogue phase variant bids (in terms of alternative ways of delivering the requirement) may be developed in dialogue with the procuring body. If these are acceptable participants may submit these as variant bids in the ISFT.
- 5.17 NHSScotland bodies should seek to attract variant bids, as these can be a source of innovation. However, it is important not to waste participants' time. In this regard, NHS bodies should give participants a strong steer as to the variant bids that will not be acceptable (because options have already been rejected in the OBC or that the variant does not demonstrate greater Value for Money) and also an indication of the weight that will be attached to variant bids. NHSScotland bodies should also outline what variant proposals for the scheme have previously been considered and why they were rejected by the NHSScotland body. These may already be detailed in the Outline Business Case. Variant bids on the standard contract terms should not be encouraged without the prior approval of the Scottish Government Health Directorate (SGHD).
- 5.18 In order to make the comparison of bids easier, participants should be asked to state where variant bids vary from the design or other specifications set out in the ITPD and ISFT. This may be usefully set out in matrix form.

Successive Stages

- 5.19 The dialogue may be conducted in successive stages which means that it is permitted to reduce, in stages, the number of solutions (which can be the equivalent to proposed tenders/bids) discussed and/or participants involved. This reduction must be carried out by applying the award criteria which are either set out in the OJEU notice or the ITPD or "Memorandum of Information" issued to participants at the start of the dialogue phase. The OJEU Notice and "Memorandum of Information" must indicate that there is an intention to use successive stages. There is no limit on the number of stages which can be used provided that, at the end of the dialogue, there are sufficient participants to allow for a genuine competition (usually a minimum of 2).

Equal Treatment

- 5.20 The contracting body must ensure equal treatment throughout and cannot provide information in a discriminatory manner which may give some participants an advantage over others.

Confidentiality

- 5.21 The contracting body cannot reveal one participant's solution or other confidential information to other participants without their permission.

Conclusion of Dialogue

- 5.22 The dialogue continues until the contracting authority can identify the solution or solutions capable of meeting their requirements. The contracting authority must declare when the dialogue is concluded and inform participants of this fact. Where the procurement is concluded in successive stages, the conclusion of the dialogue can occur after submission, clarification and evaluation of initial tender responses and as a reduction in the number of tenderers as a result of that evaluation (i.e. prior to the final formal round of tendering.)
- 5.23 The dialogue phase is not dissimilar to the FITN and ITN phases previously used under the competitive negotiated procedure.
- 5.24 It is vital that the dialogue continues until the contracting body has clearly identified and specified its detailed requirements, the solution(s) capable of meeting its needs and this, the basis upon which final tenders should be submitted. It must be confident that the remaining participants have sufficient information/clarity to be able to submit fully developed and "final" tenders as the next stage only permits "fine tuning" as discussed below.
- 5.25 The procuring body must formally declare when the dialogue has been concluded and to notify those participants remaining that this has occurred. For audit trail purposes, it is recommended that this declaration is notified in writing to all participants.

Information to be provided by the Participants during the dialogue process

- 5.26 During the dialogue process the participants may be invited to submit information on the following details of the consortia's proposals:
- support for the NHSScotland body's healthcare philosophy;
 - proposed services approach;
 - proposed design approach;
 - proposed construction approach;
 - proposed method of financing;
 - NPD principles and proposals;
 - acceptance of the allocation of risks in the contract;

- approach in other areas specific to the scheme, e.g. surplus land;
- treatment of IT and equipment.

These areas are detailed below.

Support for the NHSScotland body's healthcare philosophy

- 5.27 Participants should be asked to provide information on their overall approach to supporting the NHSScotland body's healthcare philosophy.

Services approach

- 5.28 Participants 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?
- 5.29 Participants should be asked how they propose to manage the interface between services provided under the PPP contract and services that will continue to be run by the NHS body.
- 5.30 Participants 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 NHSScotland body's output specifications.

Design approach

- 5.31 Participants 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

- 5.32 Participants 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 participant envisages that new build or refurbishment would be proposed for any particular parts of the scheme (where relevant).
- 5.33 Participants 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 body's requirements.

Method of financing

- 5.34 Participants 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.

NPD Principles

- 5.35 Participants should be requested to confirm their acceptance to the NPD proposals including the mandatory clauses to be included within the Memorandum and Articles of Association; the standard NPD contract. They should be asked to provide further details regarding their incentivisation processes for management; their approach to charitable donations and to detail any additional proposals they have in support of the NPD structure – for example, to provide a share of the refinancing gain to the charity or to provide additional donations to the charity.

Acceptance of the allocation of risks in the contract

- 5.36 Participants 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. Participants 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, e.g. surplus land

- 5.37 Participants should be asked whether they are willing to guarantee the value of existing sites at the time of tender.
- 5.38 Participants should provide details of any development opportunities which the participant contemplates on the additional land which is potentially available. **Chapter 8** on Land and Buildings in PPP schemes in [Section 3](#) of this guidance on Technical & Commercial Issues should be referred to.

Treatment of IT and equipment

- 5.39 Participants should provide details of how they propose to meet the NHSScotland body's requirements for IT and equipment within the scheme.

Shortlisting during the Dialogue Process

- 5.40 Following receipt of the shortlisted participants' proposals where the ITPD is used, the NHS body may carry out an evaluation exercise in order to select a shorter list of participants to whom a ISFT is to be issued. The evaluation criteria used must be consistent throughout the ITPD and ISFT stages and should be aimed at selecting the most economically advantageous offer.
- 5.41 The ISFT should be issued to the remaining participants and should follow the format as previously outlined in **Information to be provided by the NHSScotland body in both the ITPD and ISFT**. It will take into account the results of the dialogue process and reflect the any comments from participants and any key issues that were raised at the earlier stage. All parties should be aware that following submission of the Final Bids only clarification, specification and fine tuning changes will be permitted in the Preferred Bid and only to the extent that these are not material and do not distort the competitive process.

- 5.42 It is good practice to offer unsuccessful participants a debriefing and the EU procurement regulations require that unsuccessful participants, at whichever stage of the process, must be debriefed within 15 days of their having submitted a written request. NHSScotland bodies should also take account of Alcatel standstill requirements (see paragraph 6.57 of this Section of the guidance).

Invitation to Submit Final Tenders (ISFT)

- 5.43 Following the declaration that dialogue has been concluded, the procuring body should invite the remaining participants to submit their final tenders based on the solutions they identified during the dialogue phase. Variant bids are permitted so more than one solution can be presented by each participant. Confidentiality of solutions must be preserved.
- 5.44 These tenders are equivalent to ITN responses under the negotiated procedures. However, unlike previously key issues cannot be negotiated following submission of final tenders.
- 5.45 The formal invitation to submit final tenders should include:
- A reference to the published OJEU number (including publication reference number and date)
 - The criteria for award of the contract and information on the weighting of the criteria (unless weighting is not possible in which case they should be listed in descending order of importance which should not vary from the original OJEU notice.)
 - The deadline for receipt of final tenders.
 - The address to which final tenders must be sent; and
 - The language of the tenders.
- 5.46 If the descriptive document or specification has been updated during the course of the dialogue this should be reissued.

Additional information to be provided by the Participants in the Invitation to Submit Final Tenders

- 5.47 The Participants will be expected to continue working up their bids to provide a fixed price bid based on the following:

Design:	1:200 plans and 1:50 for key areas, 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 as well as draft due diligence reports.

- 5.48 NHSScotland bodies should be clear on the basis on which the price charged is quoted by participants at each stage of the procurement process. Permitted changes following submission of Final Tenders are noted below. However, participants should be aware that material changes to the project, bid or price tendered will not be permitted following submission of Final Tenders.
- 5.49 In their response to the ISFT, participants 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 services are to be delivered;
 - the scope of the services offered and flexibility in the volume of outputs provided;
 - pricing and risk details in respect of individual services.

Transfer of Staff

- 5.50 NHS bodies should put in place procedures within the ITPD and ISFT to address requirements of the SE/STUC staffing protocol. As part of the evaluation of participants' responses to the ISFT, NHS bodies are required to evaluate participants' proposals for the scheme in question in respect of:
- the arrangements for managing the application on TUPE where transfer of employees is involved;
 - the management arrangements for the workforce;
 - pay, terms and conditions of transferees and new appointees to the workforce, including pension arrangements;
 - workforce training and development;
 - the framework for, and conduct of, employee relations including their approach to trades union recognition and facilities, such as the deduction of union subscriptions at source;
 - health and safety;
 - equal opportunities;

- the principles contained within any human resources strategies and guidelines which;
- the identification and approach to the use of subcontracted labour, including being assured that there will be safeguards to prevent individuals being wrongly classified as self-employed.

Further information on the SE/STUC Staffing Protocol is contained in **Chapter 10** of [Preparing for PPP Procurement](#).

Minimum consortium composition

- 5.51 The ISFT should set out the NHSScotland body'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 providers of risk capital to the project company;
 - lead funder.

Financial information from Participants

- 5.52 In response to the ISFT, the participants' 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. These will be submitted as variant Final Bids. Detailed advice will be provided by the Project's financial adviser.
- 5.53 Participants should be required to provide a financial model of their bid in the appropriate format. Participants 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 NHSScotland body and its advisers to construct suitable spreadsheet models to allow sensitivity calculations, comparisons etc to be made.
- 5.54 NHSScotland bodies should also indicate to participants the variables that they will seek to test. This will enable participants 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 [Section 3](#) Technical & Commercial Issues.

5.55 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 the bid is based;
- the method of financing (including assumptions on funding and hedging costs);
- an assessment of risks;
- sources of income;
- project timetable.

5.56 Participants should be asked to state the interest rate assumptions on which the financial model is based. NHSScotland bodies should require bids to be returned with sensitivity analyses showing the effect of a rise of 0.25% and 0.5% above the relevant interest rates to the source of financing to be used. Bids should be requested so that, including an interest rate buffer, they are within the NHSScotland body's stated affordability ceiling at the time of submission of bids. This interest rate buffer should allow the NHS body 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.

5.57 The evaluation of bids is discussed in more detail in **Chapter 6** of this Section of the guidance.

Invitation to Submit Final Tenders (ISFT), and appointment of Preferred Bidder (PB)

5.58 Final tenders must include *"all elements required and necessary for the performance of the project"*

5.59 The contracting body can clarify, specify and fine tune tenders once they have been received provided that this *"does not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect."* This process cannot result in changes to the basic features of the Final Tenders and cannot distort competition or seen to be having a discriminatory effect. These conditions would rule out for example, most instances of pricing changes other than those imposed by outside factors such as the placing of the interest rate swap.

5.60 Legal advice should be taken on what constitutes clarifying, specifying and fine tuning but it may include the following:

Standard Contract Documents

- 5.61 It should still be permissible to discuss and clarify issues identified in the relevant participant's mark-up after Final Tenders have been submitted. However, amendments to the standard contract are discouraged and require to go through a derogation process.

Inconsistencies or Errors in Tenders

- 5.62 These may arise where a participant has misunderstood the tender requirements or there is ambiguity regarding a Tenderers response. Adjustments to clarify issues arising from this may be possible if they fall within the definition of "fine tuning."

Provision of further information and additional details

- 5.63 Additional details may be required from participants if these were not originally requested or because the information provided is not sufficiently detailed. These may be permitted if they fall within the definitions of "fine tuning".

Changes to specifications, conditions etc..

- 5.64 Only immaterial changes to the specifications and conditions may be permitted once final tenders have been received.
- 5.65 Final tenders once clarified, specified and fine tuned must be assessed on the basis of the award criteria stated within the OJEU notice and tender documents in order to select the most economically advantageous bid.
- 5.66 Although the submission of final tenders has emphasised the limited ability to make changes post submission of the bids the following aspects may be open to further development:

Design Development

- 5.67 The design at Final Tender stage must be sufficiently developed to enable the best tender to be selected but does not need to be at the level of detail which would be expected at contract signature stage. The process of design development, provided it has no or minimal impact on overall cost, should be regarded as clarification of design which should still be permissible under competitive dialogue.

Detailed site surveys

- 5.68 While some ground investigations and due diligence will be completed prior to final tender, the Preferred Bidder will normally wish to undertake additional examination. The impact of these surveys may impact upon the cost of the bid. It would be both unduly costly and disproportionate to require all participants to complete such surveys prior to submission of final tenders. These should still be able to be dealt with at Preferred Bidder stage.

Investigation of Legal Title

- 5.69 The same principles as for site surveys should apply.

Lenders and due diligence

- 5.70 The prospective lenders should have carried out broad due diligence at the time the Final Tenders are submitted. However, full technical due diligence and detailed negotiations on term sheets will need to be progressed at the preferred bidder stage. It would be disproportionately costly for all funders to undertake this level of due diligence prior to submission of Final Tenders. These aspects should therefore be capable of being dealt with following appointment of Preferred Bidder providing that they do not result in material changes to the tender, distort competition or have a discriminatory impact. As far as possible, any cost impact arising from the funders due diligence should be processed through a preagreed costing methodology to ensure that there is no distortion of competition.

Detailed Planning Applications

- 5.71 Detailed planning applications are not normally progressed until appointment of preferred bidder. A refusal to grant planning permission or the imposition of conditions may require changes to design, cost and project timetable. Provided such changes do not impact upon the basic features of the Final Tender they are not discriminatory and should not distort competition. They should therefore be acceptable under the competitive dialogue process.

Performance Mechanism

- 5.72 It may not be possible to undertake final calibration of the payment mechanism until final due diligence has been performed and the final service methodology agreed. It is important that the parameters for completion of the performance mechanism and the risks to be borne by the participants are established by the time that final tenders are submitted. If this is the case, the final due diligence may be viewed as clarification of the Final Tender.

Finance

- 5.73 At the time of the Final Tender, the financial model should be at an advanced stage. It will however often be based upon indicative term sheets and an assumed rate for the interest rate swap. The process of confirming the funding and entering into the interest rate swap should be possible following submission of final tenders as it can be interpreted as confirmation of the Preferred Participant's commitments.

Interest Rate Swap

- 5.74 Lenders generally offer a floating rate of interest on their finance which is then fixed at financial close through an interest rate swap. The rate of interest is then inserted into the financial model and the financial model re-optimised. The rate of interest will be the market rate on the day of financial close. The process therefore does not distort competition or amount to discrimination and should still be permitted under competitive dialogue.
- 5.75 Following selection of the Preferred Bid, the Tenderer may be requested to *"clarify aspects of its [final] tender or confirm commitments contained in the [final] tender."* This is provided that the process does not *"does not have the effect of modifying substantial aspects of the [final] tender or the call for [final] tenders does not risk distorting competition or causing discrimination."*

5.76 The above implies that it is possible to have small amendments and discussion with the preferred bidder prior to contract award. However, this will be more restrictive than under negotiated procedures.

6. Evaluation and selection

Introduction

- 6.1 This chapter details how responses during the dialogue period and to the IFT 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 the dialogue process and IFT should always be explained to participants in the documentation that is issued at that stage. It must be consistent with the evaluation criteria indicated within the OJEU and pre-qualification documentation.
- 6.3 Proposals which are submitted in the course of the dialogue need not cover "*all matters necessary for the performance of the contract*" as this is only a requirement at the Final Tender stage. The evaluation of such proposal must nevertheless be based upon the award criteria specified in the OJEU notice or "descriptive documents."
- 6.4 Clearly, if not all elements are considered when evaluating proposals in the course of the dialogue then not all elements of the award criteria will be relevant. For example, the first stage of the dialogue may not consider price although price will inevitably be one award criterion, to be applied at a later stage.
- 6.5 The award criteria themselves and their relative importance should not change in the course of the process – as this would be contrary to the principles of equal treatment and transparency. There should however, be sufficient scope within the weightings attached to the criteria to take account of the flexible nature of the dialogue phase and the fact that not all elements of the contract may be considered when reducing the number of participants and/or solutions in the course of the dialogue. It may therefore be preferable to express the weighting attributable to award criteria as a range (as is permitted by the Directive) to cover any variance in weightings applicable at the successive stages of the dialogue and the Final Tender processes.
- 6.6 In addition, and to observe principles of transparency and equality, it should be clear to participants at each stage of the process (whether during the dialogue or subsequently) the criteria which will be applied when evaluating proposals and the applicable weighting for that particular stage.
- 6.7 Key points to note include:
 - evaluation criteria must relate to the merits of the submissions and Final Bids 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;
 - commissioning health bodies should interview consortia as part of the evaluation process.

The evaluation team

- 6.8 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 be involved in setting the evaluation criteria, which should be done before the scheme is advertised.
- 6.9 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:
- NHSScotland body management (chief executive, project director, director of finance, human resources director etc);
 - NHSScotland body representative;
 - clinicians' representatives;
 - the NHSScotland body's financial, legal and technical advisers, as appropriate.
- 6.10 The evaluation team should also seek advice from the PFCU if it is felt that additional experience from other PPP schemes would be useful.

Evaluation criteria

- 6.11 The Public Contracts (Scotland) Regulations 2006 set out the criteria on which the NHSScotland body 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 NHSScotland body. NHS bodies should seek to award their contracts on the latter basis and must expressly refer to this in their OJEU notice, the ITPD and IFT.
- 6.12 When the NHSScotland body 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, ITPD and IFT. If they are not in such order then this should be made clear. As noted above, the weightings may be expressed as a range to reflect the dialogue process.
- 6.13 The factors for evaluating economic advantage of the bid are described in Regulation 30 of the Public Contracts (Scotland) Regulations 2006. They include: period for completion or delivery, quality, aesthetic and functional characteristics, technical merit, after-sales service, technical assistance and price.
- 6.14 Other evaluation criteria may be taken into account but these must be impartial, objective, and should be aimed at assessing best value for money (i.e. 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 at the Final Tender stage.
- 6.15 The evaluation team may define the minimum standards which participants must attain for their bid to be shortlisted and a Final Bid requested. 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. The evaluation criteria must be consistently weighted throughout the duration of the contract.

Evaluation methodology

- 6.16 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 ITPD 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.
- 6.17 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.
- 6.18 The results of the evaluation should be documented, and the NHSScotland body 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. The record should thoroughly explain the procurement process followed, the prequalification and shortlisting criteria, the output specification and ITPD and IFT issued, the nature of inadequacies in the responses and, if potential partners have withdrawn during the process, their stated reasons.

Evaluating Submissions During the Dialogue Period

- 6.19 It is important that evaluation criteria are consistent across all stages of the procurement process. When NHS bodies are evaluating proposals or submissions during the dialogue period they may not have fully costed proposals. 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 submissions/proposals at this stage, participants should be asked to confirm in writing that the proposals set out in response will meet the quality standards set by the NHSScotland body and that their bids will be affordable within the ceiling set out in the ITPD document. Participants who are unable to provide such a confirmation should not be taken forward to the next stage.
- 6.20 As detailed in Chapter 5 of this section of the guidance, the NHSScotland body would have asked for participants responding during the dialogue period 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.

- 6.21 Participants 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.
- 6.22 The dialogue phase provides the greatest flexibility for bid developments and discussion. It is important that the Body is happy that a number of participants have developed acceptable solutions which will require minimum development following submission of Final Tenders. No material changes can be made to bids following submission of final tenders, unlike the previous negotiated procedures approach adopted in many PPP projects.

Evaluating Final Submissions

- 6.23 The same criteria and weightings should be used for evaluating Final submissions as for submissions received during the dialogue period. 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;
- comparability;
- risk allocation;
- value for money;
- non-financial factors;
- payment mechanism;
- term of contract;
- NPD principles
- guarantees;
- contingency planning;
- flexibilities and options;
- in-house bid evaluation (where applicable).

Design and services

- 6.24 Does the design solution and the proposed service provision meet the NHSScotland body'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? In all circumstances the [Achieving Excellence Design Evaluation Toolkit](#) will be followed.

Affordability

- 6.25 A clear picture of the revenue payments (i.e. unitary payments) 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 NHSScotland, when payments will be made and how much will be paid. Payment mechanisms are discussed further in **Chapter 5** of [Section 3](#) of the guidance on Technical & Commercial Issues. NHS bodies should be clear on the funding, interest rate and indexation assumptions in each bid on which costs are based.

Comparability

- 6.26 Under the PPP 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 participants will need to be compared. Further guidance on surplus land is included in Chapter 8.

Risk allocation

- 6.27 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.
- 6.28 The NHSScotland body should also consider the position of bids in relation to the contract terms set out in the ITPD. In particular, the effect on the allocation of risks within the project which may result from any variations proposed by participants 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 [Section 4](#), A Guide to the Scottish Standard Form Project Agreement. Changes to risk allocation that are not related to project specific issues are generally unacceptable.

Value for money

- 6.29 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. The Scottish Government Value for Money guidance for the procurement level must be applied. This is discussed further in the Chapter on risk in [Technical & Commercial Issues](#).
- 6.30 When undertaking NPD projects, Procuring Bodies should refer to the PFCU to obtain guidance of the approach to be adopted to assess VfM.
- 6.31 All figures should be expressed in real terms (i.e. in today's prices). Discounted values should be calculated using a 3.5% 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

- 6.32 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](#) contains further guidance on the use of weighting and scoring techniques to compare. 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. This should be completed prior to issue of the OJEU as the OJEU will provide an indication of how proposals will be evaluated.

Payment mechanism

- 6.33 This is a key part of the contract and the NHSScotland body should consider the degree to which returned bids comply with the payment mechanism set out in the ITPD. 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 NHSScotland body in the ITPD. If any payments are volume related, the NHSScotland body should consider both the maximum amount that may be payable and the base case position. A robust calibration model is fundamental to agreement, acceptance and understanding of the payment mechanism.

Term of contract

- 6.34 The period over which bids are to be evaluated should be over the primary contract period.

NPD Principles

- 6.35 The proposals must be evaluated in accordance with the NPD evaluation criteria included within the ITPD. This is likely to include factors such as the level and deliverability of the proposed donations; the extent to which the Bidder has embraced the NPD principles and the extent to which they have accepted the mandatory provisions.

Guarantees

- 6.36 What guarantees are offered as part of the proposal and what is their strength? (This does not include performance guarantees.)

Contingency planning

- 6.37 Sensitivity analysis is important. A range of scenarios should be considered and "what if" assessments made. For example, 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 PPP options, and should highlight needs for contingency plans and risk management strategies. The NHSScotland body should have carried out sensitivity analyses in preparing the CPAM and should apply similar disciplines and tests at this stage.

- 6.38 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

- 6.39 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 PPP proposals should be described together with the situations in which it is envisaged that NHSScotland 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.
- 6.40 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 allow the NHSScotland body 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.
- 6.41 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 participants

- 6.42 Before inviting Final Bids, selecting a preferred bidder and submitting a Full Business Case to the Capital Investment Group, the NHSScotland body should develop the terms of the transaction to an advanced stage with the shortlisted participants and hence with the preferred bidder. This will give the NHSScotland body 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.
- 6.43 The NHSScotland body will need to organise itself so that it can efficiently negotiate scheme specific contract terms. The necessary time and resources will require careful prioritising if the process is to work successfully. This process should be largely complete by the time Final Tenders are invited. The NHSScotland body will also need to make sure that its advisers and particularly its legal advisers have sufficiently resourced the project to enable two or three sets of negotiations to continue contemporaneously.
- 6.44 There are no rules as to how negotiations should be conducted except that they should be largely complete at the point of issue of the IFT and participants 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 NHSScotland body. The existence of a standard form contract should assist the NHSScotland body in maintaining an even-handed approach to negotiations. The NHSScotland body will have to strike a balance between the costs to both the NHSScotland body and to the private sector as a whole of running negotiations with a number of participants and the benefits that maintaining competition for longer bring.

- 6.45 The NHSScotland body 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(s). Neither should the NHSScotland body 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

- 6.46 As providers of the finance that will be used to fund the development and other preparatory work, financiers play a pivotal role in PPP 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.
- 6.47 NHS bodies 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 require consideration in respect of funders' proposals:
- experience of privately financed infrastructure projects in health and other sectors;
 - familiarity in dealing with public health bodies;
 - acceptance of the NHS body's proposed contract terms;
 - experience of the NPD PPP structure, if applicable;
 - anticipated due diligence strategy;
 - resources available to financiers in carrying out due diligence and involvement in other schemes which may impact on these resources;
 - acceptance of timetable to financial close.
- 6.48 NHS bodies should insist that the minimum involvement of financiers during the bidding process is as follows in the Table 6.1 on the following page:

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

Stage of process	Minimum degree of involvement from financiers/participants advisers
Prequalification	Details of who is going to advise the bidder on financial issues including information and experience.
Submissions during the dialogue period	Details of proposed financing approach from participants advisers. Confirmation of pinpoint equity (very small/nominal amount of pure equity) and junior debt 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.
Submission of Final Bids	Further statement of support including draft term sheets from funders and third party equity providers with acceptance of key contract terms (including NPD provisions where applicable), payment mechanisms and performance regime, financial model and allocation of risks within consortium.

- 6.49 Financiers should have undertaken a full contract review, economic analysis and commercial risk analysis prior to the NHSScotland body 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 NHSScotland body. 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.
- 6.50 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 PPP 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 detailed due diligence should commence upon appointment of the preferred bidder.
- 6.51 For schemes funded by bonds or other capital instruments, consortia will normally 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 fee. Where monoline insurers are used they will undertake the due diligence process.
- 6.52 NHS bodies should confirm with participants 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?

6.53 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.

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

- the quality of the NHSScotland body's management;
- the NHSScotland body's financial position;
- the NHSScotland body's strategy for the foreseeable future;
- the NHSScotland body's business performance;
- the NHSScotland body's internal commitment to change;
- the appropriateness of the scope and scale of the design solution to the NHSScotland body'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.

Funding is covered in more detail in [Section 3](#), Technical & Commercial Issues.

The Invitation to Submit Final Tenders and Selection of the Preferred Bidder

6.55 At an appropriate stage in the dialogue period following the development of comprehensive bids, the Invitation to Submit Final Proposals should be issued. It is important that all parties appreciate that Final tenders cannot change significantly once submitted. Before being invited to submit final bids, potential participants should have:

- an affordable and Value for Money proposal;
- 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 NHSScotland body;
- provided the best value for money of the options available.

6.56 These areas should be confirmed within the final bids. The final bids will be evaluated in accordance with the evaluation methodology. The factors noted above will all be covered in the relevant Key Stage Review Assessment.

Unsuccessful/reserve bidders

6.57 The Public Contracts (Scotland) Regulations 2006 contain an obligation on contracting authorities to respect a mandatory 10 day standstill period between the award decision and the conclusion of a contract with the party to whom the award is made. A notice (an "Alcatel Letter") must be issued to unsuccessful bidders as soon as the award decision document is made, and the 10 day period must then be observed prior to the signing of a contract. 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 NHSScotland body. Having a reserve bidder in place allows the NHSScotland body 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

6.58 After selection of preferred bidder, negotiations on detailed scheme-specific aspects of the contract will need to commence. The areas which can be negotiated are outlined within **Chapter 5** of this manual. This stage is likely to be time consuming and resource intensive both of the NHSScotland body and its advisers and the NHSScotland body will need to plan accordingly.

6.59 In negotiations with the preferred bidder, the NHSScotland body 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 should be cleared with Capital Planning and Asset Management Division before being approved by the NHSScotland body.

Price

6.60 A fixed price must be agreed with the submission of Final Tenders, together with a clear understanding of how long this is to be held for and how the Tender price will be adjusted in the event of delays. At each stage of the procurement process leading up to this, NHS bodies 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. Participants

should remain aware at all times that bids must remain within the NHSScotland body's stated affordability ceiling.

7. The Full Business Case Approval

Introduction

- 7.1 Full Business Case (FBC) approval from the Scottish Government Capital Investment Group must be sought for a scheme before it proceeds to financial close. Information on what should be included in the FBC is detailed in the [Business Case Guide](#).
- 7.2 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.
- 7.3 Other 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, junior debt and if applicable, equity providers (each of whom should be identified) and the NHSScotland body 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;
 - the consortium must have confirmed their acceptance of the NPD principles and the NPD related documentation is well progressed. This will include areas such as the mandatory clauses to be included within the Memorandum and Articles of Association and the management incentives to ensure donations are delivered.
 - up to date confirmation of explicit NHSScotland body support must be given for the scheme;
 - the NHSScotland body 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 NHSScotland body for the scheme and acceptance of the quality of services and facilities specified must also be given.

Interest rates

- 7.4 The interest rate on which the price to be charged by the preferred bidder is based should be stated in the FBC. The NHSScotland body should also be aware of how this assumption affects price in the preferred 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 or RPI swap rates, if applicable, prior to financial close will be fully reflected in a lower price to the NHSScotland body.

- 7.5 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 Scottish Government 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.
- 7.6 The FBC should also include sensitivity analysis of the effect of an increase or decrease in interest rates of each 0.25% and 0.5% change over that assumed in the FBC.
- 7.7 The purpose of the buffer is to provide some certainty in the last weeks before financial close. Interest rates can move against the NHSScotland body by up to 0.25%, yet the NHSScotland body will still be able to progress the contract. NHS bodies should note, however, that neither they nor the SGHD can guarantee that contracts will be approved if interest rates move against the NHSScotland body by more than 0.25%. NHS bodies in this position must consult the SGHD.

The Full Business Case approval process

- 7.8 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 [Capital Planning and Asset Management Division](#). Drafts of the FBC serve an important role in order that both the NHSScotland body and the Scottish Government can ensure that the scheme develops in line with PPP policy.
- 7.9 It is expected that while the FBC is being considered for approval, the NHSScotland body 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 bodies will be required to demonstrate that schemes are sufficiently close to financial close before FBC approval will be given.
- 7.10 Where the terms of a deal do change significantly after FBC approval, 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.

Requirements on openness and publication are covered in the [Approval Guidelines](#) of the Scottish Capital Investment Manual.

Further information

[Business Case Guide](#), Scottish Capital Investment Manual (insert link)
[Approval Guidelines](#), Scottish Capital Investment Manual (insert link)

[VfM Guidance on the SG Investments Infrastructure website](#)

8. Finalising the deal – Preferred Bidder to Financial Close

Introduction

- 8.1 This chapter details the process which an NHSScotland body is likely to encounter as it proceeds in the final stages towards financial close.
- 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 bodies should not underestimate the complexity and quantity of legal documentation that needs to be finalised both by the NHSScotland body, 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 bodies 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 from 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 NHSScotland body approvals

- 8.5 It is likely that individual consortium members may require authorisation to sign deals from each of their companies' head offices. The NHSScotland body should request that it be made clear in advance what internal approvals within consortium members will be required and the timetable under which they will be sought.
- 8.6 The NHSScotland body must also consider its own approvals for the contract. Not only are approvals needed within the SGHD; the NHSScotland body will also need to convene a board meeting to agree the contract. The board will need to consider what delegated authority the NHSScotland body Chief Executive will have to agree variations in the price from the FBC to that eventually agreed at financial close. NHS bodies also need to consider the community's interests, and those of the CHP and other formal bodies. In particular, if Local Authorities' funds are part of a project, additional sign offs will be required.

Finalising the price

- 8.7 The final price is likely to be dependent upon the underlying interest rates at financial close. Prior to financial close a procedure should have developed between financial advisers of the NHSScotland body and the consortium on the mechanisms for agreeing the final price to be charged to the NHSScotland body depending on the underlying interest rate at financial close. At financial close the appropriate figures will be entered into the contract.

Contract award

- 8.8 Once the NHSScotland body and the Scottish Government are happy with the pre-contract review, the NHSScotland body can proceed to financial close. SGHD will issue an Externally Financed Development Agreement (EFDA) Certificate (see *Appendix 5 for a sample EFDA*). The NHSScotland body should prepare a draft based on this sample and submit to PFCU for authorisation. As timing is crucial, liaison with PFCU should take place as soon as a date for financial close is known. Once the contract has been awarded, the NHSScotland body must despatch a contract award notice to OJEU within 48 days.
- 8.9 A pre-Financial Close Key Stage Review must be completed as part of this process.

Monitoring of the implementation of the contract

- 8.10 A PPP 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 NHSScotland body should make arrangements to monitor the implementation of the contract, and the proposed arrangements should be set out in the ITPD. These are:
- in the period up to completion of commissioning of the new PPP facility. This will include the phased hand over of any services to the private sector operator;
 - during the operational phase of the contract.
- 8.11 NHS bodies 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 NHSScotland body has the necessary expertise, or should otherwise be appointed externally.
- 8.12 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 NHSScotland body should also ensure that it has a monitor on site capable of managing issues on behalf of the public sector.
- 8.13 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;
 - oversee any staff transfers.

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

- 8.14 The NHSScotland body should ensure that it considers the framework for the monitoring arrangements for the operational phase of the PPP 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 NHSScotland body'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 PPP contract (e.g. in market testing or benchmarking).

NPD Proposals

- 8.15 The NHSScotland body should ensure that the NPD principles are not being breached. This will primarily be achieved through the Independent Director and the Stakeholder Director. The NHSScotland body should ensure that they have the procedures in place for the nomination of the Stakeholder and Independent Director prior to financial close and that these procedures will be sufficient for the duration of the concession.
- 8.16 The levels of surpluses donated to charities should be monitored.

Appendix 1: Indicative project timetable

Figure A.1 gives an example of the milestones and timetable for a major scheme from OJEU onwards which is following the competitive dialogue. The timetables should be regarded as indicative, and will need to be tailored to meet the needs of individual schemes. Note that Alcatel standstill requirements must be factored into the Preferred Bidder selection process. Relevant Key Stage Reviews must also be factored in.

Figure A.1: Indicative project timetable for major schemes

Stage	Duration	Cumulative Duration
OJEU Dispatch	-	-
Deadline for expression of interest & submission of PQQ submission	4 weeks	4 weeks
Evaluation of PQQ submissions and determine shortlist	4 weeks	8 weeks
Issue Invitation to Participate in Dialogue – Submission of First Tender	7 weeks	15 weeks
Evaluate Stage 1 submissions & Issue Stage 2 Instructions	4 weeks	19 weeks
Prepare & submit Stage 2 Submissions	7 weeks	26 weeks
Evaluate Stage 2 submissions & Issue Stage 3 Instructions	4 weeks	30 weeks
Prepare & submit Stage 3 Submissions	7 weeks	37 weeks
Evaluate Stage 3 submissions & Issue Stage 4 Instructions	4 weeks	41 weeks
Prepare & submit Stage 4 Submissions	7 weeks	48 weeks
Evaluate Stage 4 submissions & Issue Invitation to Submit Final Tender	4 weeks	52 weeks
Preparation and Submission of Final Tenders	7 weeks	59 weeks
Evaluate Final Tenders Prepare Key Stage review Announce Preferred Bidder	8 weeks	67 weeks
Finalise Contract Prepare FBC	10 weeks	77 weeks
FBC Approval and Award of Contract	1 week	78 weeks

Overall Procurement Period: Approximately 18 months

This indicative timetable will be used to assess the NHSScotland bodies' proposed timetable during the Key Stage Review process. The actual timetable will be performance benchmarked thereafter.

Appendix 2: The public procurement regulations -

The EC Procurement Directives, which are implemented into UK legislation by means of Statutory Instruments (SI), establish detailed procedural rules which must be observed when a NHSScotland body is involved in a PPP project. The most important public sector Procurement Directive is Directive 2004/18, implemented in Scotland under the Public Contracts (Scotland) Regulations (SI 2006 No 1). It is these Regulations which must be observed by an NHSScotland body in the context of a PPP procurement.

For most NHS procurements, the NHSScotland body will not need to refer to the EC Directives unless there is uncertainty over the interpretation of the Scottish public procurement regulations.

NHS bodies should take their own legal advice during the procurement process and must leave a clear audit trail at all relevant stages.

Value and aggregation of contracts

Before embarking on an advertisement, the NHSScotland body should consider whether the regulations are relevant to its procurement. The regulations only apply to contracts with a value over certain thresholds. The current threshold figures that apply are contained within [Scottish Procurement Policy Note SPPN 11/2009](#). These thresholds are updated every two years.

PPP contracts usually encompass a combination of works and services, works and supplies or supplies and services. Therefore, it is not immediately obvious which of the above thresholds should apply to a PPP procurement. It is important that NHSScotland bodies take advice on this point to avoid a potentially serious regulatory breach, but it would in practice be unusual for the value of a PPP procurement to fall beneath any of these thresholds. (This guidance assumes that the NHSScotland body has chosen to advertise its PPP scheme as a "services" contract under the competitive dialogue).

Contract award procedures

The four procedures that may be used for the award of works, services and supplies contracts under the regulations are the open, restricted, competitive dialogue and negotiated procedures.

The main characteristics of the four award procedures are:

Open

This procedure allows any contractor responding to the OJEU 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 PPP projects.

Restricted

This procedure allows NHS bodies 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.

Competitive Dialogue

This procedure is designed to be used by public authorities for projects which are considered to be “particularly complex” and in respect of which authorities consider that the use of the open or restricted procedure will not allow for the award of the contract. The EU directive provides examples of such projects, including projects which involve complex or structured financing the financial and legal make up of which cannot be defined in advance. The NHSScotland bodies should note that they are legally obliged to prepare a statement justifying their use of the competitive dialogue procedure.

Under the procedure, an authority invites a number of interested parties (at least three) to participate in a dialogue around the authority’s needs and requirements. During that dialogue, the authority will conduct parallel discussions with each participant with a view to developing detailed solutions upon which the authority is prepared to accept final bids (at which point the dialogue will be closed). The contract should thereafter proceed to signature with only limited scope for further alteration.

Negotiated

This procedure allows the selection of a number of interested parties with whom to negotiate a contract. However, the procedure can only be used in certain exceptional circumstances specified in the Regulations. NHSScotland bodies should note that these exceptional circumstances are not typically found in a PPP procurement and accordingly the negotiated procedure will generally be unsuitable for such projects.

Given the background noted above, it is expected that in general PPP schemes will be advertised and awarded under the competitive dialogue procedure. However, it is vital that NHSScotland bodies seek appropriate and timely legal advice in order to confirm the appropriate procedure in each case.

Appendix 3: Example Memorandum of Information

[] NHSSCOTLAND BODY (CHECK OVER)

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. PPP structure
8. Allocation of project risks
9. The Conventional Procurement Assessment Model
10. The NHSScotland Body
11. The Scottish Government Health Directorates
12. Other sources of income
13. Existing property and sites
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 participant with the background to the project. Sufficient detail should be provided to enable the participant 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. Finally, there should be a statement that the NHSScotland Body is not bound to accept any tender, that the NHS Board has the right to cancel the scheme at any stage and that the NHSScotland Body cannot be held responsible for any participant's costs of tendering.

The text below gives an example of an introduction:

In 1997, Anytown NHS Board 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 Board as a community hospital. The remaining site will no longer be required.

The NHS Board 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 Board and the participants;*
- *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 participants. It should give detail of:

- the non-clinical services which the private sector partner will be expected to provide;
- any further non-clinical services which the private sector partner may optionally provide;
- 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 Board intends to follow from prequalification onwards.

This section should set out the NHSScotland Body'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 participants with a clear indication of the expected timetable for the procurement. This will enable the participant 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 participants and the NHSScotland Body. It should also set out the present position of the procurement process including the date of approval of the Initial Agreement (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 NHSScotland Body of responses to the Memorandum of Information and the Prequalification Questionnaire;
- prequalification of participants by the NHSScotland Body;
- issue of the ITPD and dates responses will be due;
- outline dialogue with participants;
- evaluation of interim responses by the NHSScotland Body;
- development of the scheme and negotiations with participants;

- interim evaluation and selection of short-listed participants;
- development of the scheme and negotiations with participants;
- deadline for final 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 NHSScotland Body;
- monitoring and evaluation.

The indicative timetable can be taken from the NHSScotland Body's Outline Business Case.

6. Strategic context

The objective of this section is to provide the participants 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 NHSScotland Body, any reviews or strategies and any relevant national initiatives which impact on the project.

Other related projects (by the NHSScotland Body or other NHSScotland Bodies) 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 Scottish Government Health Directorates.

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

6.1 NHSScotland body acute services strategy

Example text is given below:

In 1997 the NHSScotland Body 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 Board envisaged the rationalisation of the existing NHSScotland Body services onto one main site with a community hospital setting at a second site.

6.2 The NHSScotland body

Example text is given below:

The NHSScotland Body approved the proposed project on []. The SGHD approved the proposed project on [].

7 The PPP Structure

This section should specify the PPP structure under which the facilities will be procured for example, NPD. It should clearly specify requirements which will be mandatory for the participant to adopt. For example, the appointment of an Independent and Stakeholder Director within an NPD project.

8 Allocation of project risks

This section should summarise the risks that the private sector will be expected to bear under the PPP contract. These should be consistent with the NHS Executive's position as set out in the guidance on PPP in the NHS.

This section should also indicate additional risks that the NHSScotland Body would be willing to transfer to the private sector such as residual value risk and a degree of volume or throughput risk.

9 The Conventional Procurement Assessment Model (CPAM)

This section should summarise details of the Conventional Procurement Assessment Model from the Outline Business Case. It should include the following points:

- the affordability ceiling within which the project must be developed;
- a brief summary of the key points of the output specifications for the buildings and services.

15. 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.

Information to be provided by the NHS body in both the ITPD and IFT

- 1 The ITPD and IFT should be constructed in such a way that it will:
 - enable participants to provide submissions;
 - enable the NHSScotland body to make a meaningful and consistent comparison both between competing private sector bids and between the preferred bid and the publicly funded option;
 - promote discussions with participants that should lead to an efficient, focused and cost effective procedure and eventual solution.
- 2 Although the documents 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 ITPD and IFT as follows:

Executive summary

- 3 The ITPD and IFT will consist of a number of documents, so it is essential to produce an executive summary with a contents sheet for quick reference.
- 4 In certain instances, the IFT may refer to previously available information rather than requiring a full set of tender documents to be prepared and reissued. When this approach is adopted there needs to be absolute clarity regarding the information requirements and the basis of the final tender.

Bidding process

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

Background information

- 6 The participants must be given comprehensive information on the structure, performance and culture of the NHS body and the scheme to the extent not already provided. The information should include:
 - the functional content for the scheme;
 - the NHS body's management structure, including NHSScotland body board membership and details of the composition of the project board;
 - activity and performance data;
 - information on the existence of contracts with incumbent service providers;
 - the NHSScotland body's strategic and business objectives;
 - the current configuration of the NHSScotland body's services;
 - the NHS body's forecast requirements based on the preferred option;
 - information on employees to be transferred under the contract;
 - the Board management structure;

- the NHSScotland body property strategy;
 - financial information (such as the NHSScotland body's three most recent accounts);
 - the NHSScotland body's strategic and business objectives;
 - current and future commissioning intentions;
 - confirmation of NHSScotland body support for the scheme.
- 7 Background information on the scheme should include:
- confirmation of relevant approvals received for scheme to date (such as Standard Business Case and Outline Business Case approval), it may be beneficial to make copies of Business Cases available to participants.
- 8 Background information should also address overall developments in health policy and the implications for the scheme.
- 9 The NHSScotland body should also set up a data/briefing room, where all the relevant information can be made available to participants. 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 & Input specifications

- 10 Detailed output and input specifications should set out the NHSScotland body's requirements to enable participants 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 body's requirements. Output specifications are discussed further in [Preparing for PPP Procurement](#).

Affordability

- 11 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

- 12 The ITPD should set out clearly which risks the NHSScotland body 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 **Appendix 1** of [Section 3](#) Technical & Commercial Issues. The allocation of risks should reflect the guidance set out in [Section 3](#) Technical & Commercial Issues and the [Standard Form Contract](#). The ITPD should also detail which systems the NHS body intends to use to secure value for money throughout the contract. The NHSScotland body's intentions as regards indexation, benchmarking or market testing and efficiency mechanisms should be set out.

NHS standard form contract

- 13 The SGHD has developed a [Standard Form Contract](#) which is obligatory for use in all PPP schemes.
- 14 The standard form covers all key commercial terms. These must not be varied or amended without the specific prior approval by the SGHD. The standard form comes with guidance notes indicating where local changes or input is required. All changes must be discussed and agreed by the NHS body's legal advisers and, if changes are contemplated outside the designated areas, these must be with the prior approval by the SGHD.
- 15 The Standard Form Contract can be downloaded from [Section 4](#).

Details of the contract terms

- 16 Use of the standard form contract will be vital in making participants aware of the NHS body's stance on a number of key issues and will facilitate accurate bids. The use of the standard form contract on larger schemes means a standardised contract summary can be used. NHSScotland bodies should contact the SGHD for copies.

Payment mechanism

- 17 The NHSScotland body should set out in detail the form of payment mechanism, performance regime and related calibration model on which bids are expected to be based. This will enable participants to work within this framework and prepare their bids accordingly. Payment mechanisms are detailed further in [Section 3](#) Technical & Commercial Issues.
- 18 The standard form contract includes a standard form payment mechanism which must be followed.

Timetable

- 19 The ITPD should set out the NHSScotland body'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.
- 20 NHSScotland bodies may find it helpful at this stage to set the timetable 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.
- 21 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 tenderers).

- 22 The ITPD and IFT should state the length of time for which participants will be expected to guarantee a fixed bid price. This should be consistent with the timetable which the NHS body is proposing for the scheme up to financial close, although it may include an allowance for slippage. Asking for fixed priced bids for too long a period may result in higher prices due to the participant 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 participant. Asking for too short a period may result in the NHS body being faced with a possible price rise at a late stage due to slippage in the timetable up to financial close.

Term of contract

- 23 In order to facilitate comparisons between bids, the NHS body should propose a length of term for the PPP contract and related financial and economic assumptions. Participants should make a compliant bid based on the NHS body's preferred contract term. However, this should not prevent participants making their own suggestions about the term in the form of a variant bid, which will take account of their proposed financing sources and/or structure for the scheme.

Implementation

- 24 The ITPD and IFT should set out the means by which the NHSScotland body 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.
- 25 NHSScotland bodies will also need to agree with participants 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 body requires to understand costs when the project company is undertaking benchmarking or market testing of individual services.

Change control

- 26 The ITPD and IFT should set out the NHSScotland body'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 [Section 3](#) Technical & Commercial Issues in relation to this point.

Bid format

- 27 It is easier for an NHSScotland body to compare bids when they are presented in a common format with serial numbering of items. Participants should be asked to present their bids accordingly.

Confidentiality and disclaimer

- 28 The ITPD and IFT documentation should include a clear statement of the NHS body's obligation to maintain a dialogue with external parties and staff within the NHS body, and of its approach to the release of information for these purposes. A clear statement should be made by the NHSScotland body to the effect that they disclaim liability for the accuracy of information provided. The disclaimers should also make clear that the NHSScotland body is not responsible for any costs incurred by participants during the bid process. The form of words used should be agreed with legal advisers.
- 29 The ITPD and IFT should also make clear which of the information provided by the NHS body should be treated as confidential by the participant. It is generally easier to instruct the participant to keep all information supplied in connection with the ITPD and IFT as confidential. Items which must be treated as confidential by all parties include transferring employees' terms and conditions.
- 30 The ITPD and IFT should also make participants aware that the Full Business Case and the standard form contract for the scheme will be published. This is explained further in **Chapter 9** of [Preparing for PPP Procurement](#)

Other relevant factors

- 31 Any external factors that might heavily influence the scheme will depend on the particular circumstances of the NHS body and should be identified in advance and incorporated into the process. For example, this may include planning constraints.
- 32 An example of the contents of the ITPD is detailed below:

VOLUME 1 - INSTRUCTIONS

1. INTRODUCTION
 - 1.1 Defined Terms
 - 1.2 Project Summary
 - 1.3 Competitive Dialogue Process
 - 1.4 Structure of the ITPD
 - 1.5 Project Management and Advisers
2. CONDITIONS OF ISSUE OF THE DOCUMENTS
 - 2.1 Confidentiality
 - 2.2 Competitive Dialogue Procedure
 - 2.3 Conditions of Participation in Dialogue
 - 2.4 Restrictions on Use of ITPD
 - 2.5 Changes to the Process and Exclusion of Bidders during the Dialogue Phase
 - 2.6 Commitment of Participants and Bidders
 - 2.7 Canvassing and Collusion
 - 2.8 Disclaimer
 - 2.9 Freedom of Information

3. BACKGROUND INFORMATION - THE PROJECT
 - 3.1 NHS Body's Aims and Objectives
 - 3.2 The Project Facilities
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4. FINANCIAL ISSUES
 - 4.1 Affordability and Value for Money
 - 4.2 Risk Transfer and Risk Management
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5. CONTRACTUAL ISSUES
 - 5.1 Draft Project Agreement and other Contract Documentation
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 - 5.3 Retained Services
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 - 5.5 Handback Requirements
 - 5.6 TUPE/Employment Issues
 - 5.7 Land/Planning Issues

6. TIMETABLE AND PROCEDURE
 - 6.1 Timetable
 - 6.2 Dialogue Phase – Consultation Process
 - 6.3 Requests for Clarification
 - 6.4 Communication Procedure
 - 6.5 Communications “Commercial in Confidence”
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 - 6.7 Site Visits

7. SUBMISSION REQUIREMENTS
 - 7.1 Introduction
 - 7.2 Submission Arrangements
 - 7.3 Format of Submission Responses
 - 7.4 Volume 1 – Financial Submission
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8. SUBMISSION EVALUATION
 - 8.1 Introduction
 - 8.2 Contract Award Criteria
 - 8.3 Financial Evaluation Criteria
 - 8.4 Technical Evaluation Criteria
 - 8.5 FM Services and Human Resources
 - 8.6 Legal Evaluation Criteria
 - 8.7 Evaluation Process
 - 8.8 Acceptance of Final Tenders
 - 8.9 Final Tender Validity
 - 8.10 Conflicts of Interest
 - 8.11 Changes to Composition of Bidder's Consortium Members

- 8.12 Key Stage Review
- 8.13 Selection of Preferred Bidder
- 8.14 Process and Final Award

APPENDICES

Appendix 1	Receipt of ITPD Documents Forms
Appendix 2	Confidentiality Agreement
Appendix 3	Certificate of Non-Collusion and Non-Canvassing
Appendix 4	Final Tender Statement
Appendix 5	Certificate of Eligibility
Appendix 6	Certificate for Racial Equality in Employment
Appendix 7	Certificate for Equal Opportunities in Employment
Appendix 8	Risk Allocation and Management Matrix
Appendix 9	Request for Information Pro Forma
Appendix 10	Financial Submission Requirements
Appendix 11	Cost Pro Forma
Appendix 12	Technical Submission Requirements
Appendix 13	Preferred Bidder Appointment Letter
Appendix 14	Final Tender Checklist
Appendix 15	Schedule of Data Room Information
Appendix 16	Specific Issues Commentary
Appendix 17	Acceptance of Project Documents
Appendix 18	Insurance Deliverables
Appendix 19	Indicative Meeting Schedule

VOLUME 2 – TECHNICAL SPEC

1. Document Structure
 - Document Structure
 - Glossary Of Terms
2. NHS Body's Objectives And Project Scope
3. Design Values
4. Site Specific Briefs
5. Technical/Construction Specification
6. Accommodation Schedules
7. Room Data Sheets
8. Equipment Schedules
9. Lifecycle And Services Specification

10. Services
11. Provision Of Services

VOLUME 3 – LEGAL

1. Draft Project Agreement
2. Draft Schedules
3. [Draft Articles Of Association]
4. [Draft Memorandum Of Association]

Appendix 5: Sample certificate for externally financed development agreements



..... **Health Board**
..... **PPP Project**

Certificate Issued in Terms of Section 1 of the National Health Service (Private Finance) Act 1997 as amended by the NHS Reform (Scotland) Act 2004

I, [], Director of Finance, Scottish Government Health Directorates, 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 as amended by section 11 and schedule 1 of the National Health Service Reform (Scotland) Act 2004 and, accordingly, Health Board is authorised to enter into each of them.

Scottish Government
Date

SCHEDULE

Note: Contents will be project-specific

