

33 COMMITMENT LETTERS

33.1 INTRODUCTION

33.1.1 Since the inception of the PFI, Authorities have frequently encountered protracted negotiations during the period between appointment of preferred bidder and financial close. Historically, one of the reasons for this was that Authorities refrained from producing draft contracts until late on in the procurement process (e.g. post appointment of preferred bidder). Over time, experience has shown that the production by the Authority of draft contracts as part of the ITN documentation represents best practice. Authorities (and their respective legal advisers) are now better equipped to include draft contracts as part of the ITN documentation due to the PFI market's acceptance of the standardisation of contractual terms.

33.1.2 Accordingly, except in very limited circumstances¹, there is no reason why a bidder and its lender(s) cannot commit to draft contractual terms at the time of its Best and Final Offer ("BAFO") submission or include in its BAFO submission an exhaustive list of suggested amendments to the draft contracts. To the extent that such a list is included as part of a BAFO submission, the Authority would then need to take account of the suggested amendments in its comparative analysis of the value for money of the BAFOs submitted.

33.2 ENSURING COMMITMENT

33.2.1 Notwithstanding the problems surrounding delay in publication of draft contracts, protracted negotiations have also occurred where draft contracts have been provided to bidders as part of the ITN documentation. The reasons for protracted negotiations in such circumstances can be many and varied, but the underlying principle must be that the Authority should be afforded the best possible opportunity to manage, control and deliver contract award following the appointment of the preferred bidder. Following the appointment of the preferred bidder, the Authority will be under pressure to commit to timetables for contract award that are expected (by the end user and/or the relevant Government department) to be delivered on time.

33.2.2 To address the above concerns, the Authority should seek to ensure that each BAFO submission provides sufficient information so that the Authority can evaluate the length of time that it is likely to take to achieve contract award following appointment of the preferred bidder. Accordingly, each bidder's BAFO submission should set out:

- any suggested amendments to the Contract (and any other draft contracts provided to the bidders) and the reasons why;
- representations as to how well developed the bidder's sub-contracts and finance documents are; and
- an estimate of the amount of time that the bidder (and its lender(s)) believe it will take to reach financial close following the appointment of the preferred bidder.

33.2.3 To help shorten the timescale between preferred bidder and financial close, it is now market practice for Authorities to require a commitment from all parties to the contract terms and in particular the payment mechanism. This is achieved by the Authority providing a letter to the

¹ In the context of novel and contentious projects, it may be unrealistic for Authorities to expect bidders (and their lenders) to commit to contractual terms at BAFO, but this is only likely to occur if the information provided and the time given to bidders (prior to BAFO) to conduct technical due diligence was insufficient to reasonably expect the bidders (and their lenders) to commit to contractual terms at BAFO.

preferred bidder, to be countersigned by the bidder, its lenders and subcontractors in which the parties confirm their acceptance of and commitment to the draft contracts contained in the ITN documentation. The letter will also set out any outstanding issues, which remain to be agreed between the parties.² Appointment of the preferred bidder will be conditional upon signature of the commitment letter.³

33.2.4 Whilst lenders are prepared to provide such letters, they typically vary in terms of commitment and often do not give the Authority the level of comfort that it is looking for. Accordingly, the Authority should include in the ITN documentation (or BAFO documentation if the ITN documentation did not include a form of commitment letter) the form of commitment letter that it will require the preferred bidder, its lenders and subcontractors to sign. Further guidance on how to apply the principles outlined above to funding competitions may be issued in the future and may supercede some of the above. Until such time as any such further guidance is issued, this section should be adhered to.

33.3 REQUIRED APPROACH

33.3.1 The form of commitment letter to be included in ITN documentation (or BAFO documentation if the ITN documentation did not include a form of commitment letter) to be countersigned by the preferred bidder, its lenders and subcontractors is set out below:

[ON LETTERHEAD OF AUTHORITY]

[Date]

[Name and Address of Bidder]

Dear [BIDDER CONTACT]

[PROJECT HEADING]

Following our letter to you of [] [and our subsequent conversations] I am writing to you to set out the position which has now been agreed between us.

Subject to receiving confirmation from you and [LENDER] on the points addressed in this letter, the decision has been taken by the Authority to appoint [BIDDER] as preferred bidder.

1. The unitary payments set out within your bid are fixed by reference to your design and services proposals (subject, of course, to any significant client changes) and on the assumption that financial close occurs on or before [●] (“ Expected Date of Financial Close”) . If financial close occurs after that date then your construction price will be increased only by movements in the [●] index from (but excluding) the Expected Date of Financial Close up to (but including) [●] and thereafter increased in accordance with your proposal included in [REFERENCE] of your Bid submission of [DATE]. The Authority will take the risk of any movement in [LIBOR][applicable interest rates] [relevant index] between [DATE OF BID SUBMISSION] and financial close. The benefit of any reduction in [LIBOR][applicable interest rates] [relevant index] (including the buffer) will be passed in full to the Authority.

² The list of outstanding issues will be based on the information provided in the preferred bidder’s BAFO submission. This will include any outstanding Senior Lender issues (e.g. areas of due diligence and credit committee approval).

³ The European Investment Bank may require the commitment letter to be in respect of the Project rather than the individual bidder.

