

Technical Note No. 3

How to Appoint and Manage Advisers to PFI Projects

1. Introduction

1.1 Status of Treasury Taskforce Technical Notes

1.1.1 This note is the third in a series of papers to be issued by the Treasury Taskforce providing practical guidance on key technical issues which arise from the implementation of the Private Finance Initiative (PFI). Each note focuses on a specific area of the procurement process where experience has shown that project managers value assistance.

1.1.2 This note is designed to assist public sector bodies to improve procurement of the right advisory support at the right time. It is advisory rather than mandatory, providing guidance on good practice. However, Accounting Officers may wish to take the guidance into account in accordance with their responsibilities on value for money.

1.1.3 It should be read in conjunction with the complementary HM Treasury Procurement Group publication "Appointment of Consultants and Contractors" (Procurement Guidance No.3), as well as any other relevant material such as sector specific or departmental guidance. It supersedes the Private Finance Panel's "5 Steps to the Appointment of Advisers to PFI Projects" (May 1996).

1.1.4 Based on this material, a training module on best practice in the procurement and management of PFI advisers is also available as part of the Treasury Taskforce's wide ranging programme of PFI training on offer to civil servants.

1.1.5 The text of this note is available at <http://hm-treasury.gov.uk> on the Internet, under "treasury-projects-taskforce.gov.uk/index.html" and "Guides to PFI". On the Treasury site, you can also find current EC procurement thresholds under the section "Guidance", subsection "Procurement Guidance".

1.2 Structure of the Note

1.2.1 Section 2 of this note explains how the Treasury Taskforce has responded to the recommendations of the Bates Review in this area. Section 3 covers the types and roles of advisers. Sections 4 and 5 set out the steps for selection and appointment, and Section 6 gives some tips on the use and management of advisers.

2. The Bates Review and Treasury Taskforce Response

2.1 Recommendations on improving the PFI process

2.1.1 In his review of PFI, published in June 1997, Sir Malcolm Bates observed that a large number of advisers had surfaced of varying ability. Despite the detailed procurement systems already in place to ensure top quality appointments, the quality of advisers on PFI projects was felt, by public sector project managers in particular, to be distinctly patchy. A number of PFI projects had been hampered by the engagement of advisers who were clearly "learning at the public sector's expense" and incapable of providing the timely advice to the quality required. This added to project costs and created unnecessary delays in the procurement process.

2.1.2 From the private sector's perspective, the public sector has been guilty sometimes of appointing the cheapest, but not necessarily the best, advisers available. In addition, there is evidence that the public sector has not always thought through the precise role it wanted the private sector to play. Private sector legal advisers have in some instances been asked to contribute well before actual Business Cases for projects have been properly developed and, on occasion, financial advisers have been asked to make policy decisions on behalf of procurers.

2.1.3 Recommendation 11 of the Bates review asked the Treasury Taskforce to develop quickly a means of improving the quality of advisers by, first, checking credentials and testing their knowledge, commitment and depth of resource and, secondly, clarifying the role of advisers so as to ensure consistency throughout PFI projects. Specifically, the Treasury Taskforce "should develop an accreditation facility to improve the quality and consistency of external advice".

2.2 Accreditation

2.2.1 Following the publication of the Bates review, the Taskforce undertook a wide public sector consultation process with major users of advisers to agree a way forward. After an extensive review, it became clear to the Taskforce that a detailed formal accreditation system would prove unwieldy and impose a bureaucratic burden on the public sector which would be disproportionate to the potential benefits.

2.2.2 One particular difficulty identified was that major variations in quality occur even within the same advisory firms. For an accreditation system to be of real use, it needed to go further than a company overview; it had to monitor the performance of individuals. This was considered impractical without the input of a tremendous amount of on-going effort and procedure.

2.2.3 There were also legal difficulties identified, particularly in respect of EC procurement rules on the selection of service providers to be invited to tender. For example, selection could not be limited simply to previously accredited service providers. All those responding to a contract notice would need to be considered on equal terms, regardless of accreditation or not.

2.2.4 In addition, there were also Data Protection issues relating to the sensitivity of potentially anecdotal and unchallenged information stored on individuals. Complying

with the Data Protection Act 1984 would add yet more bureaucracy to any accreditation system and still leave departments open to legal challenge if, for example, there were objections to adverse comments on individuals.

2.3 Underlying objectives on the use of advisers

2.3.1 The main objective behind Bates Recommendation 11 is for Government as a whole to become a more "intelligent purchaser" of advisory support. Public procurers need good quality commercial advice from firms with a good track record. The cheapest is not necessarily the best (although expense alone is no guarantee of quality either). Even "experienced" advisers may not have got it right before or they may have performed a different role.

2.3.2 With this in mind, and given the pitfalls of implementing a formal accreditation system as described above, the Taskforce identified a number of immediate actions which, if implemented, would be in line with the spirit of the underlying objective:

- # better appointment and management of advisers;
- # improved take-up of references;
- # improved monitoring and evaluation of advisers' performance; and
- # an assessment of the quality of external advice as part of the Taskforce's "signing off" criteria for assessing the commercial viability of "significant" PFI projects.

2.3.3 The Taskforce believes that the wide dissemination of best practice procurement guidance through this Note and other guidance material, combined with more focused public sector PFI training, should reduce the amount of external advice needed over the longer term (particularly on basic project management and PFI procurement procedures). and ensure that only the right quality of advice is bought.

2.3.4 This note highlights the particular importance of taking up references from relevant parties who have experience of using prospective advisers e.g. other government departments. To help procurers, Sections 4 and 5 outline a new Taskforce recommended process for organising and taking up references which, it is hoped, will quickly become established practice at departmental level.

2.3.5 Over the medium term, as external advisers continue to be engaged on PFI projects, the Taskforce will continue to evaluate their performance, keeping open the option of developing a more formal accreditation system should the quality of external advice remain a cause for concern.

3. The types and roles of Advisers

3.1 Why Appoint Advisers ?

3.1.1 Procurers should make use of appropriate professional advisers where their skills are likely to add value to the procurement exercise. In general, the circumstances in which the appointment of PFI/PPP advisers might be considered

by a procuring department are:

- €# when identifying or scoping the feasibility of a potential PFI project. Advice at this early stage may be strategic as well as operational, giving advisers the opportunity to propose alternative methods for achieving objectives. Importantly, however, the objectives themselves should remain the procuring department's responsibility (see the Treasury's "Green Book" - August 1997). At this pre-project stage, there should be no assumption that those appointed initially will automatically be appointed for subsequent PFI procurement work.
- €# when undertaking the procurement of a PFI project. To assist procuring departments in guiding potential projects through the PFI process (see the Taskforce's "Step by Step Guide to the PFI Procurement Process" - April 1998).

3.1.2 Procurers should consider and document at the outset all the skills inputs which will be required during the procurement. They should also consult their departmental PFUs, and possibly other organizations who have carried out similar projects, to satisfy themselves that all the inputs that they may need have been identified.

3.1.3 Advisers should be selected through competition (see Section 4.1 on EC Rules). The advice of in-house procurement and legal staff should be sought in relation to the need for, and the nature of, advertisements. Care should be taken to ensure that the ability of the procurer to award a contract by competition is not prejudiced by any earlier involvement of an adviser. The National Audit Office and the Public Accounts Committee have expressed concerns that failure to introduce proper competition for the appointment of advisers in such circumstances is contrary to good practice, unfair and imprudent.

3.1.4 The wider commercial perspective offered by external PFI advisers is unlikely to be available in-house. However, no procurer should rely exclusively on external advice. With all appointments, procurers should, first, bear in mind the in-house expertise available before considering the precise role to be played by external advisers. It is a waste of time and money to appoint external advisers who simply replicate what is already available, as it is to appoint an overqualified organisation for relatively routine functions.

3.1.5 There may also be opportunities for the transfer of skills so that in subsequent procurements there is less dependence on external advisers. For example, an assignment might be completed with the preparation of guidance notes and suitable training programmes for in-house staff where they take over responsibility for work previously undertaken by external specialist advisers. Departmental PFUs should be consulted routinely on the need and scope for external specialist advice.

3.1.6 At the earliest possible stage, accurate budgets should be prepared for advisers' costs. Good advisers will be stifled if they are badly managed, and costly if not managed at all (see Section 6).

3.2 Types of Advisers

3.2.1 Although there is a wide range of specialist advice available, PFI specialist advisers can be broadly divided into four types:

- €# financial;
- €# legal;
- €# technical; and
- €# project management.

3.3 Financial Advisers

3.3.1 In most major PFI procurements, the procurer will need suitably qualified and experienced external financial advisers. Currently, merchant and investment banks and the leading accountancy firms make up the bulk of what may be termed PFI 'financial advisers', although a number of multi-disciplinary professional firms, often from a 'technical' background, are also now beginning to compete in this field.

3.3.2 The key to the successful appointment of such firms is a thorough investigation of their financial skills and previous relevant experience. Departmental PFUs or the Treasury Taskforce may also be consulted about specific areas of expertise within individual firms. Some firms are stronger in certain areas of corporate finance, project finance or sectors of public activity than others.

3.3.3 A 'financial adviser' should have direct experience of project financing and should be able to explain the different risk and return appetites of different financial markets and instruments. It is, after all, private sector money that will be taking many of the risks.

3.3.4 Although not necessarily all will be required on any given project, a financial adviser should be capable of providing the following services:

- €# advice on scoping the potential PFI project;
- €# assistance with preparation of business case and/or investment appraisal;
- €# assistance in sounding out the market and raising the profile of the project (in conjunction with project managers);
- €# assistance in developing the reference project and the public sector comparator;
- €# advice on carrying out risk analysis, facility of risk workshops and the identification and quantification of risk (although this can often be under taken by procurers themselves in conjunction with technical advisers). Actuarial advisers may also be required to assess the value of final risk transfer or to advise on insurance issues;
- €# structuring and drafting the bid documentation to ensure good quality responses from the private sector (eg clarification of expected risk transfer);
- €# ensuring that the payment structures offer the optimum balance of risk and reward and checking that they are consistent with Taskforce model contract templates (due to be published later in 1998);
- €# providing detailed financial evaluation criteria (based on the procuring body's objectives);

- ≠ assistance with reviewing bids, including the deliverability of funding structures (reviewing and checking the accuracy of bidders' financial models, and assessing whether the bidders' assumptions are likely to be delivered on time without seeking further price variations);
- ≠ acting as PFI project managers (although procurers often choose to undertake this role themselves); and
- ≠ providing financial advice and support during negotiations with bidders to contract signing.

3.3.5 Crucially, the experience of the individuals put forward by the advisory firm in performing these tasks can often be more important than the reputation of the firm itself (See Section 5).

3.3.6 The procurer should obtain adequate confidentiality undertakings from financial advisers that information made available to them during the PFI process will not be used in the context of any other exercise (eg assistance to a potential bidder for the main contract in a subsequent competition). They should also ensure there is no existing or potential conflict of interest before appointing external advisers. Example of an Inappropriate Financial Advisory Role: A Central Government Department appointed a large accountancy firm as a financial adviser on a high profile PFI procurement. Among the tasks it was asked to perform, the adviser was requested to adjudicate between competing claims on Departmental resources ie a choice between expenditure on accommodation or additional programme delivery. The role of financial advisers should be confined to providing the commercial financial expertise that is not available to the procurer in-house. Procurers should resolve resource allocation issues themselves.

3.4 Legal Advisers

3.4.1 There are a number of specialists within the legal profession (on property, tax, corporate finance etc), who have built up considerable sector-specific expertise in PFI, and public-private partnerships. However, it pays to check that both the firm and individual have the expertise required, particularly commercial experience of negotiating project finance.

3.4.2 A number of objective legal reference guides to firms' capabilities and specialties exist, including PFI, and could play a useful role in the decision-making process. Internal legal teams must also be consulted closely on the appointment of external legal advisers. Again, consideration should be made of what skills and experience could be provided by in-house lawyers before considering the scope of external advice required.

3.4.3 Particular areas where, after exploring in-house options, external legal advice may be appropriate (without duplicating financial advice) include:

- ≠ structuring the transaction and advising on the procurement approach to be taken that best avoids the pitfalls of previous projects;
- ≠ advice on contractual issues on invitation to tender documentation, the project agreement, its terms and conditions, and any lease and other agreements;

- €# contract terms and conditions following appropriate published Taskforce model;
- €# how to approach negotiations with bidders, possibly undertaking certain aspects of negotiation on the procurer's behalf;
- €# drafting and settling of final contracts; and
- €# other more general advice, for example, on taxation, property, planning, environmental law, banking, competition law and intellectual property.

3.4.4 An important aspect of good legal advice is that the adviser should clearly explain to the procurer the implications of contract terms and other legal issues. As part of this work, the legal adviser should document for the procurer how the proposed PFI contract will achieve the allocation of risk and the commercial terms which the procurer has negotiated with their selected contractor.

Example of an Inappropriate Legal Advisory Role

A Local Authority appointed legal advisers on the basis of their extensive experience of local government and by virtue of their being the lowest price bid. When it came to detailed contract negotiations, however, the advisers lacked the necessary project finance expertise to negotiate effectively and realistically with bidders, their funders and the funders' legal advisers. In many aspects, the external advisers merely duplicated the Authority's own in-house knowledge of local authority law rather than complementing it with the necessary commercial experience.

3.5 Technical Advisers

3.5.1 A lot of technical expertise and PFI experience is also available to procurers from surveyors, engineers, architects, contractors, project managers, actuaries and many other technical professions. The size, experience and capability of these firms can vary. As discussed earlier, some of the larger firms are now looking to offer a broader PFI service beyond traditional "technical" boundaries.

3.5.2 Again, it is vital that the procurer is clear about precisely what technical advice is required, particularly over and above the skills that may exist in-house or be available under the auspices of the financial adviser. Specific technical advice may be of particular use, for example, in the following areas:

- €# Assisting the user to define an output specification for the physical asset, and services to be provided under the proposed agreement;
- €# technical assumptions to be used in business cases or investment appraisals, including public sector comparators;
- €# drafting technical aspects of Invitations to Tender/Negotiate;
- €# technical evaluation of proposals and bids, including capability of contractors;
- €# quality assurance during the construction phase together with arrangements for sampling contractor compliance,
- €# technical aspects of risk assessment, including the weighting and quantification of individual risks;
- €# valuing assets that may be sold or transferred as part of a PFI transaction;
- €# technical aspects of facilities management, including the development of appropriate payment mechanisms and the monitoring and measuring of

- service delivery and performance;
- €# actuarial issues, particularly where transfers of staff from the public sector to the private sector have pension implications; and
- €# IT and business process re-engineering.

Example of an Inappropriate Technical Advisory Role

A Government Agency recruited IT consultants to advise on a PFI project. The individuals were expert in the technical IT issues involved and provided extremely useful advice. However, following this success, they were asked to help with other work and went on to produce contract drafts and build models for financial evaluation. Much of what was produced on the legal and financial side had to be redone at considerable extra cost as the lack of specific expertise soon became apparent. The role of advisers should be contained within the scope of their brief. Expertise in one area is not confirmation of expertise elsewhere.

3.6 Project Management Advisers

3.6.1 It is vital that the procurer's named project manager can negotiate within a clear brief and mandate from the project sponsor, has a clear line of communication to management in the procuring organisation who have the appropriate level of authority, and is able to devote enough time to the project.

3.6.2 The time involved in managing a PFI project properly is often underestimated. PFI Project Management training is available for civil servants as part of the Treasury Taskforce's PFI training programme. However, where there are doubts about project delivery, where departments lack internal project management expertise or where the project manager has other additional time pressures, project management expertise may be brought in from outside. Although, in such cases, the procurer's project manager should still take overall responsibility for ensuring that the procurement is carried out in a satisfactory manner and in accordance with the required timetable.

3.6.3 External project management advisers should have a full and practical understanding of the 14-stage PFI procurement process (see the Taskforce's Step By Step Guide to the PFI Procurement Process, April 1998), including:

- €# key elements of the outline business case and the development of the reference project/public sector comparator;
- €# identifying and evaluating risks;
- €# standard OJEC notice, tendering procedures and shortlisting;
- €# ITN and negotiation with bidders; and
- €# drafting contracts and contract management.

3.6.4 There should be a clear distinction between the procuring client, who is responsible for delivering the user requirement, and the project manager, who manages the team and expedites the procurement process, including the co-ordination of all other external advice.

4. Preparation by Procuring Departments

4.1 EC Rules

4.1.1 It is important when considering the appointment of advisers that the impact of the EC public procurement rules is considered thoroughly from the outset (with advice being sought from procurement specialists and internal legal advisers as appropriate). In all cases, Treaty principles such as non-discrimination and freedom to provide services within the EU will apply. In certain cases the EC Services Directive (and implementing UK Regulations) may also apply.

4.1.2 The Services Directive applies to contracts where the value exceeds certain thresholds*. The Directive divides services into two categories, those to which the full rules apply (eg financial and technical advice and management consultancy) and those to which only limited provisions apply (eg legal services).

4.1.3 In cases where the full rules apply, they require that selection (of those to be invited to tender or negotiate) and award (evaluation of bids) are conducted as distinct stages. They place limitations on the information which may be considered at each stage. They also lay down, inter alia, strict requirements in respect of timescales for the award process, advertisement of the contract in the EC Official Journal and the number of persons to be invited to tender or negotiate (generally, at least three).

4.1.4 A common problem which arises when appointing advisers is that the full extent of the likely requirement is underestimated. As a result it is often assumed that the requirement is below threshold and the Directive is not applied when the adviser is first appointed, only for the authority to realise later that the rules do apply and that subsequent contracts with the adviser must be advertised. By that time the adviser is often considered to be the only person realistically capable of performing the assignment, but in order to comply with the law a competition must nonetheless be held before the appointment can be extended. Failure to have advertised the full requirement at the outset could be construed as a breach of the rules in these circumstances and lead to challenge in domestic or European courts. It is very important, in order to avoid such complications arising, that the full potential scope of the requirement is addressed from the outset and advertised in the OJEC if necessary (see Treasury Taskforce Technical Note No.2 "How to follow EC Procurement Procedure and Advertise in the OJEC" (June 1998)).

*The current thresholds can be obtained from the Treasury's Website: <http://www.hm-treasury.gov.uk>

4.2 Documentation Required

4.2.1 Following the advertising and prequalification stages, in inviting potential advisers to bid to provide PFI advisory services, procurers need to put together the following documents:

- # a full client brief for detailed definition of what is required of the advisers;
- # terms and conditions of contract with the advisers (including fees and payment terms);

- ## final evaluation criteria for award; and
- ## a request for a response to the first two bullet points above.

4.3 The Client Brief to Advisers (defining what is required)

4.3.1 It is critical when selecting advisers to give them as much information as is reasonable and to define roles and tasks as clearly as possible. This should cover the nature of the assistance sought in terms of advice, support, review, responsibility for the process etc. The clearer the brief, the easier it is for advisers to assess the experience and expertise required, and to price the advisory service accordingly.

4.3.2 A clear brief will also help the procurer to:

- ## specify the terms and conditions of appointment;
- ## achieve value for money from advisers;
- ## keep control of costs;
- ## produce a mechanism for managing advisers and the procurement process; and
- ## understand the internal project management arrangements (who performs what role with what responsibilities).

4.3.3 The Client Brief should first outline what is required to take the project forward. As a guide, it should at least include the following:

- ## the role of the procurer and any other stakeholder in the project;
- ## the background to the project, how it fits into the procurer's business strategy; and
- ## details of any existing service provision.

4.3.4 The Client Brief should then define the separate roles of lead PFI, financial, legal and technical advisers, as appropriate. A proven method of achieving this is to use a series of headings effectively tracking the procurement process. At Annex A, there is a useful checklist of what should be included.

4.4 Terms and Conditions of Contract

4.4.1 If there is doubt about whether a project is viable (for example it has yet to be defined, it is not clear that PFI is the most appropriate procurement route or interest from the market place is uncertain), initial advisory appointments should only cover the period up to the point when the procurer will have sufficient certainty and clarity to take a firm decision.

4.4.2 In these circumstances, payment may be on a fixed fee or hourly basis, or on an hourly basis with a price cap. It should be made clear, however, that if the project is to go further, the reappointment of advisers is not guaranteed and could, of course, be subject to a re-tendering exercise.

4.4.3 In the same way that under a PFI contract the service operator has its payments linked to quality of performance, so the same can be the case with advisers where they are able to influence or control the achievement of objectives. This can only be

done by identifying clear outputs against deadlines which are agreed by all interested parties.

4.4.4 Where appropriate, proposed advisers should be requested to put forward alternative fee structures in deciding fees for each area of work they are planning to undertake, for example:

- ## hourly rates for individuals;
- ## fixed fee alternative for the work required (making sure there is no overlap with other advisers' tasks);
- ## fixed fees for each defined stage (agreed in advance within an overall budget);
- ## what proportion of each of the above they are prepared to be paid on a success fee basis and to what extent this would, if at all, affect the payments;
- ## if a success fee element is a possibility, a clear definition of the "success" involved (eg project getting to financial close, awarded contract generating x% better value for money etc); and
- ## if appropriate, regressive fee rates e.g. as agreed levels of fees are earned the charge-out rates (i.e. hourly/daily) are reduced by a set sum or percentage. Both the agreed levels and reductions may be bid as part of the competition.

4.4.5 Procurers will also need to be clear about the premium they may have to pay in the case of opting for any element of a success fee arrangement, and measure this against the risks of not pursuing with the project (see section 5.4).

4.4.6 Procurers should ensure that they gain intellectual property rights to any output at feasibility stage, so that any future advisory appointments gain full access to work done at earlier stages. Procurers should also ensure they reach a clear understanding about expenses and disbursements, whether they are charged at cost or with profit, and what is to be reimbursed, e.g. travel, photocopying, couriers, out of hours secretarial support.

4.5 Evaluation criteria for award

4.5.1 As announced in February 1998, when the Treasury Taskforce considers the commercial viability of its defined "significant" projects, one of the key criteria used will be the quality of proposed advisers, based on their track record and on the procurer's assessment against pre-determined evaluation criteria.

4.5.2 As explained in paragraph 4.1.3 some procurement will be conducted in two distinct stages. Annex B provides two indicative examples (one is much more detailed than the other) of how Departments might attempt to evaluate competing advisory bids at the award stage. They are not intended to be absolute templates as, clearly, the level of detail required for a particular evaluation will be dependent upon the size and scope of the likely advisory role. With scoring systems, it is important not to be either too simplistic or too systematic. A balance should be struck between the use of scores obtained and other narrative/anecdotal information, whilst adhering to the selection criteria.

4.5.3 The bidder's understanding of relevant PFI or other types of public private partnership is clearly of paramount importance in demonstrating advisers' ability to

deliver the required service. What PFI/PPP projects are they working on or have signed either as advisers to the public or private sector or as principals? What was the precise advisory role undertaken? Many of the larger PFI projects involve a number of advisers in different roles, but not all of them central to the understanding and development of the project. Non-UK experience, if relevant, should not be discounted.

4.5.4 What actual PFI or equivalent experience have the relevant individuals themselves had? This should be explained in detail and in the context of the rest of the team that they are working with. This will also be a factor to address in any pre-qualification process. Procurers should make sure they follow any relevant legal rules on how to conduct the pre-qualification procedure.

4.5.5 What about similar project experience? PFI/PPP projects vary enormously; property, water and sewerage, roads, prisons, schools, hospitals etc. Experience of working on similar types of project is important, although any potential conflicts of interest will need to be identified and dealt with at an early stage.

4.5.6 What experience have individuals had in advising the public sector? What feedback is there on the advisers' previous standard of performance.

Example of Inappropriate Experience

A large local authority appointed advisers with appropriate experience for design and development of a wide ranging city centre economic regeneration project. As elements of the regeneration scheme developed, it became apparent that a potential PFI project could become an integral part of it. The role of the appointed advisers was simply extended to include advice on the PFI project, despite the lack of any previous PFI experience on the part of the individuals concerned. As a result, a wholly inappropriate PFI scheme was developed which met the design objectives of the city centre regeneration scheme, but failed totally PFI risk transfer and value for money tests.

4.5.6 The quality of references is clearly important. Whilst advisers may submit their own referees, particularly their most recent and relevant public sector clients, the Taskforce also encourages procurers to make their own enquiries. A better exchange of information between public sector procurers on their experience of advisers is one of the most effective mechanisms for raising and maintaining quality standards.

4.5.7 As part of an improvement in the on-going monitoring and evaluation of advisers' performance, procurers are encouraged to use the standard reference form included at Annex C to record information on the performance of advisers and make forms available upon request to other procurers who seek references in order to help choose a preferred bidder from the shortlist. It is best to complete the reference forms as soon as possible after the work has been carried out. Procurers should heed the information set out at the beginning of the form.

4.5.8 What is the perceived quality of resourcing? It is advisable to establish at the outset the named individuals in the advisory team. Be clear about the role of each of the advisers, including seniority and experience of the adviser required. There needs to be the right balance within the team.

4.5.9 Although it will not be cost effective to insist on senior advisers performing routine tasks, procurers cannot afford to have inexperienced advisers performing vital roles. Ensure that the individuals with greatest expertise are actually made available as and when required at key stages. Obtain a contractual commitment from a senior person representing the advisory firm that the right specialist resources will be available when needed and that procurers can draw on them directly.

4.5.10 Ensure that there is sufficient back-up within the firm to cover for key personnel if necessary. Beware of successful individual advisers being 'stretched' across a number of different projects for different clients. Your project may not always be the adviser's top priority.

4.5.11 Don't underestimate the skills required in negotiating a PFI project. Negotiations can be lengthy, complex, involve large teams and cover a variety of skills. The private sector project bidder will be well prepared and highly experienced in the variety of tactics and strategies. Procurers' advisers need to be robust enough to help deliver a good deal (and even, on occasion, disagree with the public sector client when it is wrong). The comments of other procurers who have used the advisers previously will be particularly useful.

4.5.12 Appoint on the basis of value for money (under the EC rules, the economically most advantageous tender or lowest price). However, beware of relying too much on low hourly rates. The cheapest option is not always best value for money. Mistakes from inappropriate or inexperienced advisers can be extremely costly in the long run, perhaps even threatening the success of the project itself. A good track record in delivery of the required service is essential.

4.5.13 What is the proposed timetable? An unrealistically short timetable may put pressure on advisers. They should be asked to comment on how realistic they see the timetable as well as whether it is likely to make a difference to their fees and appointment.

Example of an Uninformed Choice

A Central Government Department appointed legal advisers on the basis of the lowest hourly rates, even though its nearest competitor had a more extensive knowledge in the specialist field. Owing to the lack of experience of the appointed advisers, the transaction took much longer to complete and ended up costing the Department more in total fees than if the leading competitor had been appointed and done its normal quality job in less time.

Questions to Advisers

4.5.14 In the brief, advisers should be asked to respond in writing to a series of queries and to add any pertinent observations of their own on the project and its structure (although responses should be as short as possible). These queries should include the following:

- details and background of the firm, partnership, etc (to the extent that they are relevant);

- # details, including references, of the 3 most recent PFI/public-private partnerships projects in the sector, and/or up to 3 more projects from similar fields which demonstrate ability in the required areas of expertise;
- # similarly, details of relevant experience of active project team members (eg experience in structuring payment streams and evaluation of risk transfer and value for money), including full CVs of all team members;
- # terms and conditions of contract, especially fees;
- # how bidders see their role in relation to that of the procuring body;
- # resourcing proposals (how many people, what type, what level); and
- # details of any actual or potential conflicts of interest or investigation of any sort by the authority.

4.5.15 Procurers will need to ensure that if the EC public procurement rules apply then information is requested at the correct stage in the competition i.e. at the pre-qualification stage or at the tender stage. As previously stated, these two stages need to be kept separate.

5. The Appointment Process

5.1 Advertising

5.1.1 Advisers should be selected through competition, in line with public purchasing policy. In-house Procurement Groups or legal specialists can advise on how, when and where to advertise, and on whether an advertisement in the Official Journal of the European Communities is required or whether competition can be limited (see also Treasury Taskforce Technical Note No 2 - June 1998 and CUP Guidance Note No. 51).

5.2 Reviewing Replies, References and Interviews

5.2.1 Procurers should not normally need to interview more than three or four sets of each type of potential adviser. To make a choice, they should review the responses, take up references, follow up outstanding material issues and shortlist for interview in line with departmental procurement procedures. As indicated in paragraph 4.5.7 above, procurers are encouraged to complete the standard reference form at Annex C at the end of projects to record an appraisal of the quality of advice received on PFI work. Forms can then be made available to other procurers seeking to follow up references at award stage.

5.3 Interviewing and Selecting a Preferred Adviser

5.3.1 Procurers should prepare thoroughly. At interview, they should ensure the key contacts in the advisory firm are present. Procurers might ask advisers the following types of question in order to assess their perceived ability:

- # What do you see as the major issues to be addressed on this project?
- # What do you think makes you particularly well suited to advise? What is your experience in this sector or specialism?

- €# What resources do you intend to devote to the project? What other advisers do you think we need to appoint? Why? When? How will you work with them? How do you rate the feasibility of the proposed timescale for this project?
- €# What is the relevant PFI experience of the personnel you intend to use? What is their role in your team? How many other projects will they be supporting at the same time? Are there any conflicts of interest?
- €# What do you see as the key to achieving suitable risk transfer? How would you structure the transaction in terms of how you see the risk transfer working?
- €# How would you structure the Invitation to Negotiate so that it encourages innovation yet provides a basis for evaluation and comparison?
- €# What is your experience of developing price mechanisms? How would you handle variant bids?
- €# What are your views on the necessary documentation?
- €# What types of investors or lenders are likely to be interested in this type of transaction? How do you think they will perceive the different types of risks?
- €# How will the financing structure the private sector propose affect the structure of their advisory bid in terms of fee arrangement?
- €# What experience have you had in raising funding itself? In what types of markets? Are they the same as those which we will be approaching? What is your approach to market sounding?

5.3.2 After the interview process, procurers should be in a position to have one or more front runners as Preferred Bidder. Particularly if the transaction is sufficiently large or important, these may be taken to a second interview. Procurers are encouraged not to stand down all the other leading bidders until a Preferred Bidder has been selected and a contract agreement reached.

5.3.3 It may be useful to appoint a Reserve Bidder who, whilst not expected to commit any more resources to the bidding process at this stage, agrees to be ready and available to negotiate should difficulties with the Preferred Bidder arise.

5.3.4 Unsuccessful tenderers should be given full and honest feedback in order that they may improve their bids in future, and have a right to de-briefing under EC public procurement rules if they request it.

5.4 Concluding Terms with a Preferred Adviser

5.4.1 This should be undertaken by those in procuring organisations who have experience in negotiating contract, fee, and appointment arrangements, but must take account of relevant legal requirements with respect to post-tender negotiations, where applicable. Fee proposals should be competitive. With the exception of the feasibility study stage, this should mean procurers considering at least some success fee element.

5.4.2 Great care should be taken, however, not to distort the performance of the adviser towards obtaining a success fee at the expense of other considerations (eg the validity of the project). Procurers are encouraged to gather as much information as possible in the way of quotes in the ITT in order to negotiate the most advantageous fee structure.

Example of a success fee arrangement

Having secured approval from central government to proceed with a PFI procurement, a public sector body sought financial and legal advisers for the preparation of documentation and negotiation of the contract to award. Both packages of work were offered for competition and bidders were evaluated on the basis of written submissions, a shortlist was invited to make presentations. Legal advisers were engaged on the basis of hourly fees significantly below the market rate and capped for pre-agreed phases of work. Financial advisers were engaged on the basis of a modest monthly retainer fee payable each month that significant work was undertaken. In each case, a success fee became payable on successful closure of the contract. Whilst the monthly fees were paid by the public sector body, as the project proceeded the success fees were met by the successful bidder.

5.4.3 The advisory work involved at each stage of a project should be scoped, based on known assumptions. Monitoring systems for advisers can then control the work undertaken, testing the appropriateness of certain assumptions as the project progresses and revising original budget estimates as necessary in line with hourly rates.

6. Effective use and management of Advisers

6.1 Some tips

6.1.1 Don't underestimate the potential complexity and difficulties of a PFI negotiation and make sure the key individual advisers are present at all important meetings.

6.1.2 A visible public sector client as project sponsor/manager will generally carry more weight with the private sector during a negotiation than an adviser alone.

6.1.3 All advisers must be kept up to date with developments. A Steering Group is therefore useful to:

- # keep everyone up to date; and
- # drive progress, to check that everyone is doing what they should, by when they should, and identify any problems.

6.1.4 Steering Groups should meet as often as necessary. This will probably be more regularly in an active negotiation than in the early stages of the transaction. The size of Steering Groups or any other Working Groups should, however, be limited to the minimum number of people necessary. It keeps costs down and increases efficiency (although do ensure advisers are represented). Working Groups should only be set up to undertake specific tasks, by specific dates and be disbanded on completion of their remit.

6.1.5 Don't lose touch with advisers individually. Informal discussions, either socially or in the office can reveal a lot about how each thinks and things are going, giving invaluable insights into the team, the transaction, etc. A sign of a good quality adviser is his/her regular presence in the client's offices.

6.1.6 Departments should work closely with advisers and take every opportunity for as many people as possible within the procuring organisation to learn from them, in order that they may be able to apply expertise to future projects.

6.1.7 Be clear about the total approval process; within the procuring client organisation, the Spending Department and Treasury as appropriate. The approvals required must be taken into account when preparing the timetable.

6.1.8 Ensure that although a lot of the work may be being done by external advisers, the public sector client/sponsor must retain, and be seen to retain, overall control of the process.

6.1.9 Set out in a detailed brief the activities expected at each stage of the process. Make sure that advisers produce activity profiles which match budget estimates. In this way, increases in budgets can be properly verified.

6.1.10 Produce regular reports on all advisers and their activities, including work carried out and the costs of the work. Note variances against project timetables and earlier workplans and budgets, and obtain action plans for recovery when these occur.

6.1.11 Produce narrative explanations of how the project is progressing in relation to the Outline Business Case and expected outputs.

6.1.12 The project manager should manage advisers, not the other way round. Seek out and talk to people with experience of managing advisers.

6.1.13 CUP Guidance 61 gives guidance on contract management.

6.2 Summary of key messages

6.2.1 Identify the need. Establish a clear brief on the advice required, with arrangements for variables. Test bidders' knowledge, understanding and commitment. Check references. Ensure there is value for money in a preferred bid. Build a relationship with advisers and learn from them. Check outputs against specification. Pay for results.

6.2.2 If you structure and conclude a deal well, value for money should be improved. If you appoint the right team of advisers, they should achieve this for you and effectively be self-financing.

7. Further Information

7.1 Contacts

7.1.1 Additional copies of this Technical Note are available from the Public Enquiry Unit, HM Treasury, Parliament Street, London SW1P 3AG (Tel: 0171 270 4558/4860/4870).

7.1.2 Advice on PFI policy can be obtained from the Treasury Taskforce, Private Finance Policy Team, H M Treasury, Parliament Street, London SW1P 3AG (Tel: 0171 270 5527).

7.1.3 Advice on public procurement policy and on the EC rules can be obtained from the Procurement Policy Team, H M Treasury, Allington Towers, 19 Allington Street, London SW1V 5EB (Tel: 0171 270 1647).

ANNEXES

ANNEX A: A CHECKLIST OF WHAT SHOULD BE INCLUDED IN THE CLIENT BRIEF TO ADVISERS

Pre-competition

- 1 Defining, scoping and structuring the project to advertising in the OJEC;
 - 2 Assessing feasibility;
 - 3 Sounding out market interest;
- In procurement
- 4 Pre-qualification of interested bidders;
 - 5 Preparation of the output specification;
 - 6 Identification of payment mechanisms and criteria for service performance;
 - 7 Risk analysis (identification and quantification);
 - 8 Review of outline business case;
 - 9 Preparation of public sector comparator;
 - 10 Preparation of evaluation criteria;
 - 11 Preparation of invitation to negotiate/invitation to tender documentation;
 - 12 Preparation of the negotiating brief and negotiate to close;
 - 13 Financial credit assessment on the operator/operating consortium;
 - 14 Review and evaluation of bids;
 - 15 Building of financial models and undertaking investment appraisal;
 - 16 Review of full business case;
 - 17 Review of arrangements for transition and service monitoring (including establishment of milestones) for inclusion in the contract;
 - 18 Assessment (prior to contract signature and in the light of up-to-date knowledge of the market) of the extent to which the final terms obtained in negotiation represent an acceptable outcome for the public sector; and
 - 19 Other activities, which could include:
 - ## valuing assets or any future revenue stream;
 - ## reports on the bankability of proposals;
 - ## vetting proposed timetable;
 - ## documenting/auditing details of assets to be transferred; and
 - ## audit of contractor's proposed quality assurance during the construction of the asset.

ANNEX B: FIRST EXAMPLE OF TENDER EVALUATION CRITERIA AND SCORING SHEET FOR SELECTION OF PERFERRED BIDDER

This allows a breakdown of the qualities of the tender. A narrative description of the required criteria should be laid down separately and used in conjunction with the scoring sheet.

TENDER EVALUATION Tenderer:
Completed by: Date:

ABILITY SCORE WEIGHT TOTAL COMMENTS

1. Ability to advise on PFI, other public private partnership transactions, or project finance, generally (including experience where relevant to deliverability)
2. Expertise in international capital markets finance techniques and their impact on contract structure and negotiations
3. Knowledge of the process and quality of the indicative plan.
4. Identification of key financial/ legal/technical issues and approach to possible solutions
5. Capabilities and experience of the proposed individual advisers.

TOTAL SCORE

- 5 : Excellent
- 4 : Very Good
- 3 : Good
- 2 : Fair
- 1 : Poor

ANNEX B: SECOND EXAMPLE OF EVALUATION CRITERIA AND SCORING SHEET FOR PREFERRED BIDDER

This shows a breakdown of the qualities of the tender. A narrative description of the required criteria should be laid down separately and used in conjunction with the scoring sheet. PFI (or other public private partnership) experience to indicate deliverability Score/weighting

Company/Practice

Accommodation
Estate Rationalisation
Facilities Management
Desktop/Office IT

Individual

Accommodation
Estate Rationalisation
Facilities Management
Desktop/Office IT
Individual Roles

Public Sector Advisers

Similar Project Experience

Company/Practice

Property Development
Facilities Management
Outsourcing Services/IT

Individual

Property Development
Facilities Management
Outsourcing Services/IT

Company Practice

Organisation

Financial

Quality & Availability of Resources Availability

Innovation

Commitment

Competence

Team Working

Project Organisation & Execution

Adviser's Team

Authority Levels

Understanding of Brief

Stage 2 Plan

Stage 3 Plan

TOTAL SCORE/WEIGHTING

ANNEXE C: Advisers Reference Form
Appraisal of quality of advice received on PFI work.

Please note that this form is for PRINTOUT only

Where marks are requested:

5 = excellent

4 = more than satisfactory

3 = satisfactory

2 = problems were encountered which were resolve

1 = unsatisfactory

Advisers

Project Name

Estimated capital value of project

Short description of nature of project:

Type of Advice

Financial

Technical

Legal

Other

**Please give details of the appointment process.
Explain why the advisers were selected.**

**Please summarise the role objectives and
performance measures agreed with your
advisers**

How well the adviser integrated with the project team and others

Please elaborate as necessary:

A rectangular text box with a vertical scrollbar on the right side, currently empty.

Name:

Characteristic

Understanding of PFI
Commitment to the requirement
Technical expertise
How well the adviser integrated with the project team and others

Mark

Please elaborate as necessary:

A rectangular text box with a vertical scrollbar on the right side, currently empty.

Name:

Characteristic

Understanding of PFI
Commitment to the requirement
Technical expertise
How well the adviser integrated with the project team and others

Mark

Please elaborate as necessary:

A rectangular text box with a vertical scrollbar on the right side, currently empty.

Name:

Characteristic

Understanding of PFI
Commitment to the requirement
Technical expertise
How well the adviser integrated with the project team and others

Mark

Please elaborate as necessary:

Name:

Characteristic

Understanding of PFI
Commitment to the requirement
Technical expertise
How well the adviser integrated with the project team and others

Mark

Please elaborate as necessary:

From your experience of the advice on this project, please indicate a mark out of five for your judgement on the following characteristics of the company.

Characteristic

Managerial structure and competence
Availability of resources at the appropriate level
Overall performance (delivery requirement)
Value for money

Mark

Would you consider using this company again? (please elaborate as necessary)

Yes

No

Any other comments (eg. Particularly good advice; how specific problems were handled etc)

This question was completed by:

Name

Position

Department Agency

Address

Telephone

Fax

Signed:

Date: