

**LEISURE OPERATING CONTRACTS &
DESIGN, BUILD, OPERATE & MAINTAIN CONTRACTS**



A PROCUREMENT TOOLKIT

MAY 2013

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Foreword

“Sport England has long been an advocate of best practice and a source of advice and guidance in the sports and leisure sector, providing toolkits and guidance in areas such as strategic planning, design guidance, governance and asset transfer. During the last 12 months we have seen an increasing number of requests for assistance and guidance in the area of leisure contracts and their procurement.

In 2011 Sport England completed our own procurement process for the management and construction programmes at the National Sports Centres (Bisham Abbey, Lilleshall and Plas Y Brenin) which produced significant financial savings, strategically aligned outcome focused contracts over a 15 year period. Following the completion of this process we undertook to develop a toolkit and guidance on Leisure Contracts and Procurement.

The aim was to produce a suite of documents that would assist client bodies to adopt good practice, reduce cost and time in the process and to achieve contract partnerships which can deliver local outcomes.

The toolkit and contract documentation has been produced following wide consultation across legal and leisure consultants active in the sector, a range of Local Authorities, leisure operators, Sporta and BISL.

The objectives were to

- Promote best practice*
- Reduce costs and time for clients and contractors in the procurement process*
- Advise on fair contractual positions which can be adopted and avoid lengthy dialogue*
- Encourage partnerships which deliver increases in participation, enable the promotion of broader social and health outcomes and achieve financially sustainable leisure provision.*

We aimed to produce

- A Toolkit with guidance on procurement routes and process*
- Template contract documentation and guidance*
- Guidance on balancing quality, increasing participation, achieving broader outcomes in health and wellbeing, community engagement, commercial performance and cost.*

It is intended that the toolkit will assist the strategic decision making stage for clients and help to establish a sound basis for the procurement phase.

There is guidance on undertaking the procurement process and encouragement to focus on the key issues to reduce the procurement period. Where there is clear best practice or accepted market positions we have tried to highlight these, and where there are options we have tried to outline the benefits and implications of different routes.

The document will be web based and will be updated on a six monthly basis or when legislative changes occur.

The documents will not replace the need for quality specialist advice though it may enable clearer more focused briefs to be developed to ensure that consultants are deployed as effectively as possible in the process, enabling them to add value through focusing on key areas.

Sport England representatives in your local area can meet to discuss the documents and provide overview assistance if this would be helpful.

As I mentioned earlier we concluded the successful procurement of partners for the National Sports Centres in 2011 and our client team have been working with the two operators awarded the contracts to establish best practice partnership working, monitoring and reporting mechanisms. The contracts were let as Lilleshall and Bisham Abbey combined; Plas Y Brenin was let as a standalone contract. Our client team have hosted a number of visits to the National Centres from client organisations to discuss the overall philosophy, relationship management and implementation of contract monitoring. Should you wish to visit please contact the National Centres Team.

I hope you find the documents a useful tool in your thinking, decision making and implementation. It is a complex and continually evolving area and we will endeavour to update the documents on a regular basis, your feedback is important in helping us to improve the material.

Contact points for our local representatives, the national Sports Centre Team and an email address for general feedback is provided in the first section of the document.”

Charles Johnston

Director of Property

Sport England

Introduction & Overview

Introduction

- 1.1 Promoting good ideas, sharing best practice and ensuring everyone involved with sport has access to high quality tools, advice, support and information is essential if we are to succeed in creating a world-leading community sport system.
- 1.2 Sport England recognises the key role that local authorities play in delivering sport: local government spends approximately £1 billion per year on sport and leisure - more than 50% of the total resources available to sport every year. Within this, the provision of high quality facilities and services at a local level is of paramount importance.
- 1.3 This toolkit therefore provides information, resources and case studies that will be of use for local authorities contemplating procurement of services and / or facilities in their area. The most successful procurement projects are those that are collaborative efforts, resulting in effective partnerships being forged and developed over time between public bodies and the successful operator (commercial, in-house or trust).
- 1.4 The toolkit will also be useful for those authorities considering trust vehicles, particularly in relation to some of the template documentation that can be used to govern the contractual / service delivery relationship with the trust. When deciding whether to set-up a trust, careful consideration should be given to how value for money will be assessed and the need to demonstrate best value.
- 1.5 The core aims of developing a procurement toolkit are three-fold:
 - Reduce costs and time for the authority and contractor in the procurement of a leisure contract, thus ensuring that resources are spent on maximising the benefits to the local communities, rather than on procurement
 - Achieve fair contractual positions, which encourage market engagement, ensure a focus on service quality and provide a framework for innovation
 - Encourage partnerships which deliver increases in participation and financially sustainable leisure provision.
- 1.6 This toolkit therefore provides:
 - Toolkit information for authorities, with guidance on procurement routes and processes
 - Template contract documentation and guidance
 - Guidance on balancing quality, increasing participation, community engagement and cost.
- 1.7 This toolkit is not intended to be an ‘off the shelf’ set of complete documentation, as this could discourage local, project-specific thinking, which is key to ensuring the processes meet local needs. The toolkit and associated template documentation therefore provides a level of detail that explains the options, identifies the issues and provides industry best practice in relation to key principles. It does not provide

exhaustive general procurement information as this is contained elsewhere in Cabinet Office publications and other government guidance, which has not been replicated here but which authority procurement officers will be familiar with.

- 1.8 The documentation has been prepared with the aid of valuable feedback from a cross-section of the market, including local authorities, contractors and advisors, ensuring that best practice is recognised and that lessons are learnt from a wide range of procurements.

Overview of the toolkit

- 1.9 The toolkit seeks to: promote best practice and reduce costs and time for both authority and contractor in the procurement of leisure contracts; achieve fair contractual positions; and encourage partnerships which aim to deliver increases in participation and financially sustainable leisure provision.

- 1.10 The purpose of this document is to provide guidance to authorities seeking to maximise future service delivery in their area. It therefore covers the following topics:

- Procurement routes / options:
 - overview and key features of routes (open / restricted / negotiated / competitive dialogue / service concession)
 - both management contract & investment contracts (Design, Build, Operate and Maintain / Leisure Operating Contract)
- Project management
- Risk models
- Case studies
- Achieving desired outcomes and sporting objectives
- Evaluation models
- Template documents.

- 1.11 A key aspect is the need to provide a toolkit that is flexible for industry changes and encourages authorities to consider their own local issues within the framework of the toolkit.

- 1.12 The document is set out according to the phases of a project, covering:

- Pre-procurement (including development of documentation)
- Pre-qualification
- Tender stages
- Evaluation and selection
- Award & implementation.

1.13 Within each phase, the following topics are covered:

- Procurement issues / guidance / template documents
- Project management
- Key risks
- Checklist before progressing.

1.14 For those with a specific role in the project, for example, risk management or project management, it should be straight-forward to identify the key chapters for that particular role (although a review of the whole document is encouraged to provide a greater understanding of the inter-relationship between the roles and issues which inevitably over-lap and which, when considered together, will lead to a more successful outcome).

Links to other useful information

1.15 A number of other useful sources of information exist, which may assist authorities in developing their thinking, particularly in prioritising the outcomes expected from their procurement process. In particular, the work of LG Improvement & Development (formerly the IDeA) may be useful during the pre-procurement phase:

- <http://www.idea.gov.uk/idk/core/page.do?pageId=8722516> - LG Improvement & Development - Culture, Tourism & Sport
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf - DCLG - Localism Act
- <https://www.gov.uk/government/organisations/department-for-culture-media-sport> - DCMS
- <http://www.neweconomics.org/publications/guide-social-return-investment> - Cabinet Office - Guide to Social Return on Investment
- <http://responsibilitydeal.dh.gov.uk/> - DoH - Public Health Responsibility Deal.

1.16 This list is not exhaustive, but illustrates some useful sources of additional support.

1.17 In addition, Sport England has developed a number of advisory panels to support its work in relation to Strategic Planning for Sport, involvement with which will often precede any decision by an authority to follow a procurement process for leisure operations or new / refurbished facilities.

1.18 There are five panels:

- Strategic Planning - offering similar services to those undertaken for the Facilities Improvement Service
- Needs Assessment - the undertaking of needs assessments in accordance with the National Planning Policy Framework
- Playing Pitch Strategies - the preparation of playing pitch strategies in accordance with Sport England guidance

- Town Planning Support - including planning policy, planning negotiation and submission of planning applications
- Sport Specific Facility Strategies - the production or review of facility strategies for National Governing Bodies of sport.

1.19 These panels can provide valuable support to authorities in assessing their baseline position and future needs.

1.20 In addition to this, Sport England is developing affordable models for sports halls, swimming pools and leisure centres, which provide guidance and assistance for capital projects.

http://www.sportengland.org/facilities_planning/design_and_cost_guidance/swimming_pools/affordable_swimming_pools.aspx

http://www.sportengland.org/facilities_planning/design_and_cost_guidance/sports_halls/affordable_sports_halls.aspx

http://www.sportengland.org/facilities_planning/design_and_cost_guidance/sports_halls/developing_a_sports_hall.aspx

http://www.sportengland.org/facilities_planning/design_and_cost_guidance/artificial_sports_surfaces.aspx

Further information and assistance

1.21 This toolkit has been developed by Sport England with input and assistance from a range of experienced consultants and advisors in the sector. Consultation has also taken place with operators, Sporta and a number of local authorities.

1.22 FMG Consulting Ltd and Nabarro LLP have lead on the development of the toolkit on Sport England's behalf and a full list of consultants and advisors who have contributed during the consultation process is contained in the Acknowledgments at the end of this toolkit.

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1.23 Sport England's network of Facility & Planning Relationship Managers are best placed to provide regional support and their contact details are below.

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Pre-procurement phase

Introduction

- 2.1 Arguably, the most important part of a procurement process is the pre-procurement phase, during which the framework for the project is created, the procurement strategy agreed and key decisions taken. Prior to commencing any form of procurement process, the authority will need to have considered and resolved a number of key issues, including:
- What are the outcomes the project is seeking to achieve and how does the service fit within the wider landscape for the area (for example, in relation to physical activity or health & wellbeing)?
 - What facilities are / will be included in the contract? This will include core leisure assets but are there also wider opportunities, for instance, linked to libraries and cultural assets? Does the contract need to include flexibility for future asset rationalisation?
 - Which services are included? For example, is sports development included?
 - Are any new build or refurbishments required as part of the overall delivery? How will these be funded?
 - Have stakeholders and partners been given the opportunity to input into the business case and the project scope? Has political support been confirmed?
 - Have legislative implications been considered, including the impact of the Localism Act (2011) and the Public Services (Social Value) Act (2012)?
 - Has consideration been given to assessing equality to ensure that this is properly considered from the outset with a simple audit trail?
 - Has the affordability limit been confirmed and tested, in line with the intended risk profile? (this is key to ensuring a realistic project is offered to the market that is affordable and deliverable from a financial perspective)
 - Has the preferred procurement process been identified?
 - Have key commercial terms been identified / scoped (depending on procurement route) and risk allocations identified?
 - Where relevant, has soft market testing been used to test key issues and ensure sufficient market interest exists? (Wherever possible, market engagement should always form part of the pre-procurement process)
 - Has sufficient resource and budget been allocated to facilitate successful completion of the procurement process and do the skills exist in-house to deliver, or is external support required?

2.2 Many of these aspects may be covered in an outline business case that precedes the procurement. For further information on the development of an outline business case, please see HM Treasury guidance on public sector business cases using the five case model - http://www.hm-treasury.gov.uk/d/greenbook_toolkitguide170707.pdf

2.3 The remainder of this chapter therefore covers the following areas:

- Developing local outcomes and deriving specific local, measurable targets
- Procurement route selection & setting the timetable (the procurement strategy)
- Considering budgets and affordability (procurement and project)
- Setting up project management structures
- Developing key documentation
- Developing a data room.

Developing local outcomes

2.4 In order to maximise the benefits derived from the service and facilities, it is essential that a concise list of local outcomes are agreed, which can then be translated into specific, measurable targets. Much of the text set out below is taken from the LGA guidance on this subject.

2.5 Outcomes could be set in some or all of the following areas:

- Health & Wellbeing
- Community engagement
- Local economic benefits
- Education
- Social inclusion
- Participation
- Children & young people.

2.6 The LGA web resource for developing a local outcomes framework for culture and sport is a good starting point for authorities and their partners when considering how to create a local outcomes framework for culture and sport. The guidance explains how to measure and evidence the difference a service makes and its contribution to local priorities. It also explains how to make the case for continued investment of public money. The framework, once developed, can then be integrated into the Services Specification and Payment and Performance Monitoring System (see later comments on such documents) and thus be embedded in future service provision.

2.7 A summary of the approach can be found at:

http://www.local.gov.uk/c/document_library/get_file?uuid=d520c121-7a5e-4494-b356-6911619ec99c&groupId=10171

Guidelines for developing outcome focused contracts

2.8 In line with the focus on developing local outcomes and priorities, there has been a shift towards the delivery of outcome based contracts in public procurement. This represents a

significant movement away from traditional specifications and requires the development of a new form of documentation and contractual relationship.

- 2.9 As with any new approach, there remain a number of challenges around implementation. The following paragraphs provide over-arching guidance for authorities considering such an approach. The required outcomes need to be clearly defined at the outset of the process so that performance against/ contribution towards each outcome can be measured.
- 2.10 The first point to bear in mind is that the procurement documentation should be developed around the key outcomes for the project and an outcome focused approach should be emphasised throughout. The outcomes framework noted earlier should form the basis of the 'performance' aspects of the Services Specification, alongside baseline facility management / service delivery requirements.
- 2.11 The development of a clearly defined Services Specification is key, structured to emphasise the distinction between facility outputs and service outcomes. The Services Specification sets out the required outcomes and the principles around how success should be measured and should be clearly linked to a defined payment structure.
- 2.12 Innovation from contractors, both up-front and throughout the contract period, is encouraged. The contractor should be able to achieve the desired outcomes using their own preferred methods and to adapt these as the contract develops in order to achieve the best results. They will, however, still need to work in partnership with the authority in order to validate the methods being used and developed and to ensure efforts are dovetailed with other aspects of development in a particular area.
- 2.13 An outcome against which performance is measured and a price paid must be clearly defined, measurable, understood and agreed upon by all parties. Authorities therefore need to be clear on what is defined as an outcome and what the key components are for this to be achieved (pre-procurement market engagement can assist with this process).
- 2.14 Both parties need to be clear on how success is represented and over what timeframe. There are numerous models for measuring success against outcomes and the Key Performance Indicators derived as part of the outcomes framework will serve as a base for measuring 'success'.
- 2.15 It is recommended that both parties use the model of working from a baseline so that targets can be set based on agreed increments from the baseline. If, for example, an outcome relates to increased levels of participation by a specific group, the contractor will be assessed against the achievement of target levels of increased participation within an agreed timeframe. It will often be necessary to use data from year one of a contract as the baseline, on which future targets are set.
- 2.16 There are a range of options available to make payments for results. The most straightforward model is a system of fixed payments per positive outcome. This is regardless of external factors and is based on a demonstrable contribution towards outcomes. Alternatively payments could rise in line with an increase in the number of outcomes achieved up to a defined ceiling.
- 2.17 "Payment by results contracts" should also consider interim payments for outputs that each contribute to the overall outcome. If for example, the required outcome relates to health and wellbeing and a contribution to reducing obesity, a series of target objectives may be agreed covering delivery of weight management classes or measured increases in participation levels. Similarly, an outcome could be a contribution towards reducing local

unemployment levels, for which a series of target objectives could include employing a certain number of local residents or running a certain number of apprenticeships with an agreed percentage of apprentices being offered full time employment. Achievement against each individual target objective can then be measured and assessed.

- 2.18 The development of a clear performance monitoring and payment system is considered key. The underlying principle is that payment is only made for the delivery of the required services and outcomes. The system should be agreed during the procurement process as part of the contractual documentation so that all parties agree the specific levels to be achieved and/ or sums to be deducted if such levels are not achieved. Consideration will need to be given to how the mechanism is calibrated on contracts where there is a payment from the contractor to the authority (a 'surplus' scheme), and this is discussed later in this chapter.
- 2.19 Likewise, performance 'bonuses' can be used to either reward over-achievement in key areas, or to offset deductions incurred in other areas, thus providing an incentive for the contractor to focus on the key requirements of the authority.
- 2.20 Template documents are provided as part of this procurement toolkit, which outline one example of an approach to outcome focused delivery / reporting and payment for services delivered and targets achieved. However, other models are available and authorities are encouraged to consider the approach best suited to their circumstances.

Procurement route selection

- 2.21 The different procurement routes available to an authority include the adoption of formal EU compliant procedures, triggered by an advertisement in the Official Journal of the European Union (OJEU). This permits the contracting authority to utilise one of the following procedures; open, restricted, competitive dialogue or negotiated. In the case of below threshold public contracts a contracting authority may use a non-OJEU route. This is currently permitted for public services concessions and/or below threshold value contracts. The current EU procedures are set out in the Public Contracts Regulations 2006, as amended (the "Regulations").
- 2.22 One of the first issues to consider is how the contract will be categorised, particularly where both Works and Services are included in a single contract (for example, under a Design, Build, Operate, Maintain approach). The key factor is to assess the primary purpose of the contract, which then forms the basis for deciding on correct categorisation. The authority's legal advisors should be used to ensure correct categorisation up-front, otherwise there is considerable risk of procurement challenge and practical risks associated with not receiving sufficient market interest.
- 2.23 It is important to note that even where full OJEU procedures are not required for public contracts, the EC Treaty principles of non-discrimination, transparency and equality of treatment will apply and the authority must also consider whether there is likely to be cross-border interest in any public contract opportunity. A local authority / public body will also need to comply with its own internal contracting standing orders and standing financial instructions.

- 2.24 The current EU threshold for local authority services contracts is £173,934¹. If the authority were simply letting a service concession such contracts currently fall outside of the scope of the Regulations (see further detail later in this chapter). However, to comply with the EC Treaty principles and particularly if the contract may have a cross border interest, it may still be advisable to advertise the opportunity.
- 2.25 The scope of services for leisure management contracts is likely to fall under the Regulations in the category of Part B services (there is a category for recreational, cultural and sporting services). This means that there is no requirement for such procurement to follow one of the procurement processes set out in the Regulations. However, to comply with the EC principle of transparency many public bodies advertise Part B services in the OJEU and state whether they will comply with the Regulations in full or in part.
- 2.26 Further to this, the planned changes in procurement regulations may affect the level of regulation applicable to leisure management contracts².

Procurement contract approach

- 2.27 Alongside consideration of the appropriate procurement route, it is important to consider the preferred contract approach, particularly where new / refurbished facilities are included. Options include:
- Leisure Operating Contract
 - DBOM Contract (Design, Build, Operate and Maintain Contract)
 - Separation of operating contract and construction elements, including:
 - Traditional Building Contract
 - Design and Build Contract (1 Stage)
 - Design and Build Contract (2 Stage)
 - Operating Contract containing provisions for investment / minor refurbishment works.
- 2.28 It is worth noting that where capital works are included, separate consideration will need to be given to how such works are funded, albeit they will be delivered by the appointed consortium / contractor. All of the options noted above can be flexed to cover either private sector funding or provision of capital via the authority, and this will impact on the risk allocations and payment regimes in particular.

¹ Correct at the date of publication - May 2013

² The proposals to revise the existing public procurement rules are being negotiated through the EU Competitiveness Council. The revised directives could be adopted in early 2013, but this is dependent on various factors including discussions with the European Parliament. Transposition of the revised directives will then follow; the current proposal would require member states to implement the new rules within 18 months of the new directive being published in the Official Journal of the EU.

Leisure Operating Contract

- 2.29 Where the focus is on operation of facilities and provision of services, the Leisure Operating Contract is the most appropriate route.
- 2.30 The Contract would focus on the provision of services to meet the authority's service specification and this toolkit includes a template contract for leisure operations only.

Design, Build, Operate and Maintain (DBOM) Contract

- 2.31 Where major capital works are to be included in a contract (for instance the building of a new facility) along with operational requirements, the suggested approach involves the authority procuring a consortium (building contractor and operator) that will take the lead and take on the risk in the design, construction and the operation of the new facility. A template DBOM Contract has been prepared as part of this toolkit.
- 2.32 It is a so called 'one stop shop' where the authority issues an output specification covering the 'facilities requirements' and 'technical requirements' - standards of construction, the requirements for the facilities (pool, gym etc.) - and services specification (e.g. opening hours, programming, cleaning, quality accreditation etc.).
- 2.33 Consortia bid for the contract, which is normally a long term contract of 15 plus years, and between them, deliver an optimum solution (in terms of design, construction and operation) balancing capital costs and revenue costs.

Traditional Build Contract

- 2.34 In the traditional design then build construction project, the authority enters into contracts with a design professional (typically an architect) to design the facility. The architect may employ other "sub-consultants" such as engineers to assist in the development of the design stages. When the design is complete and approved by the authority, tender documentation is prepared by the design professional and bids are solicited from building contractors. The authority then enters into a separate contract with a building contractor for a fixed price to construct the facility. This process therefore requires two EU compliant procurements - firstly for the design team and secondly for the construction team.
- 2.35 In this approach, there may be practical risks around the build-ability of the design and the authority will need to input a high level of resources into the design process. There may also be issues that the design is not the most efficient to construct. This can be mitigated by engaging a building contractor early to provide input into the design before it is "completed" by the relevant design consultants. However, this requires early selection of a building contractor before a fixed price for the construction works can be agreed.
- 2.36 Under this process the authority retains responsibility for any delay in providing design information from its professional consultants to the building contractor.
- 2.37 Even where designs are "complete" before the engagement of a building contractor, there is usually the need for continued detailing of design and approval of elements (particularly mechanical and electrical installations) from specialist contractors. There is a risk that this could allow 'cost creep' as the designs are finalised.
- 2.38 Using this approach allows the authority to develop its own design. However, the disadvantages include the costs / resource implications of three procurements (design

team, building contractor and operator), timescales, impact on the VAT recovery on the authority's special exemption de-minimus limit and the authority retaining design risk.

- 2.39 There is also the risk relating to the interface arrangements between the building contractor and leisure operator. Under a DBOM contract the main contractor is responsible for all of the consortia whereas under this approach the local authority may be left 'in between' a building contractor and leisure operator in disagreement.
- 2.40 Under this type of procurement, a separate exercise is usually still required to procure a leisure operator, although it does offer flexibility in relation to operation being delivered by an existing delivery vehicle such as a local trust.

Design and Build Contracts

- 2.41 In a design and build contract, the authority enters into a single contract with a building contractor who takes ultimate responsibility for both the design and construction of the facility.
- 2.42 In the first instance, the authority will employ a professional team to develop the design and Employer Requirements to a specific design stage and then tender for a building contractor to undertake the works. Under this method of procurement, there is the opportunity to use a one or two stage tender process.
- 2.43 A one stage process is where the building contractor provides a price based upon the Employers Requirements (normally RIBA Stage E) which is based upon the cost of construction, profit and preliminary costs.
- 2.44 The two stage process firstly selects bidders to provide their preliminary costs and profit (based upon RIBA Stage C/D) and the best priced bids are taken to a second stage where the bidders are asked to price for the construction based upon a further developed design (Stage E) which has their input on build-ability etc. The latter option provides more cost certainty.
- 2.45 Following the appointment of the building contractor, the professional team may be novated across to the building contractor from the authority. The building contractor may also employ architects or engineers.
- 2.46 Design and build contracts provide a single-point of responsibility for the authority for the building works. However, there will still be the interface risks with the leisure operator as described above.
- 2.47 The design-build process increases the likelihood that the facility will be constructed within the authority's budget. The building contractor is able to conduct value engineering and 'constructability' analysis from the moment they are engaged in the process which can reduce the cost of the project.
- 2.48 Design and build projects are often completed sooner than traditional build only projects. A building contractor can start construction before the final design is completed. The building contractor can provide early project scheduling, and can order long-lead time items before the design is completed. In the traditional build only contracts, the design generally must be completed before construction tenders are let.

- 2.49 In a design-build contract, the authority cannot rely on the architect to act as his or her representative during the construction process (following novation) and will need to retain the services of a construction project manager.
- 2.50 Under this type of procurement, a separate exercise is usually still required to procure a leisure operator, although it does offer flexibility in relation to operation being delivered by an existing delivery vehicle. Where a new facility is being provided that is not simply a replacement centre, consideration should always be given to the most appropriate delivery vehicle going forward, which may require a tendering exercise.

Operator Contract with minor works provisions

- 2.51 In the scenario where the planned works or investment is relatively minor, it may be more appropriate to simply include these additional aspects in the procurement of a leisure operator, with associated wording in the Leisure Management Contract to cover provisions for capital investment and minor works, such as refurbishments.
- 2.52 Similar to the DBOM structure, the operator will bring forward their own professional team to deliver the works.

Procurement route options

- 2.53 Authorities have a number of potential routes for contracts of this nature. Each has its own procedures and timescales. The authority will need to consider the appropriate route based on the level of complexity of the contract terms, whether it needs to be able to negotiate any key terms with contractors, the number of likely bidders and the resources available to it to manage the procurement. It should also strongly consider soft market testing on the scope of the opportunity and key issues with likely bidders to inform the subsequent procurement process.

Competitive dialogue

- 2.54 This procedure should only be used for complex contracts where the authority does not have defined service requirements or is not able to clearly identify its legal and/or financial requirements. It is particularly useful where innovative solutions are being sought from bidders, for example in relation to new facilities being developed or changes to the scope of the services. This procedure is most commonly used for high value and innovative contracts.
- 2.55 The key feature of the competitive dialogue process is that it allows an authority to enter into dialogue with bidders to develop solutions to meet its needs. Dialogue usually consists of meetings with each bidder to focus on the different aspects of the procurement which relate to the price and risk of the bidder's solution. It can be resource demanding and drawn out if not managed effectively and requires bidders' understanding of the Regulations.
- 2.56 Appropriate project management can overcome concerns with competitive dialogue and encourage innovative solutions to complex problems, such as where there is significant stock rationalisation or a new build / refurbishment.
- 2.57 Where competitive dialogue is the most appropriate route, the opportunity to streamline the process should be seriously considered, for example in relation to having less dialogue stages or restricting dialogue to key issues only. The use of the templates in this toolkit should facilitate a focus on key project-specific issues and avoid unnecessary dialogue on

areas where a standard market position exists. A suggested list of key areas to discuss during a stream-lined dialogue is included within the Appendices to this toolkit.

Negotiated procedure

- 2.58 The negotiated procedure should only be used in exceptional circumstances (the conditions for use are specifically set out within the Regulations). Under current procurement regulations, the competitive dialogue route is seen as the default position for procurements which require an element of dialogue, but potential changes in EU procurement regulations, possibly from 2014, may change this position and increase the opportunity for use of a form of competitive negotiated procedure.

Open procedure

- 2.59 The open procedure is suitable where the contract is straight forward with limited requirement for specific skills / technical capacity and where there are a limited number of potential contractors. It allows for a combined pre-qualification and tender assessment and can be a quicker procurement route than the restricted procedure. The authority will send its invitation to tender, including its contract documents, to all respondents expressing an interest. Therefore if there is likely to be a high number of respondents this route may be inappropriate. Tenders can be clarified following receipt by the authority but changes to the tender and any negotiation with the bidder are not permitted.
- 2.60 ‘Clarification’ in this context would be if the authority, upon reading part of a bid submission, was not clear on what the contractor was proposing. In that case the authority could clarify their position. They would not however be able to negotiate a different or more favourable position under the bid submission. Clarification essentially stems from reading something and not understanding the intent of the party.

Restricted procedure

- 2.61 Interested parties can submit an expression of interest in response to the OJEU contract notice. The authority will then carry out a shortlisting exercise using a pre-qualification questionnaire (the mandatory evaluation criteria including the bidders legal capacity, economic and financial standing and technical capability. Those bidders most closely meeting the authority’s selection criteria will be invited to tender.
- 2.62 Negotiation with bidders is not permitted; therefore, this process should only be used where the authority is able to specify its requirements, particularly as the procedure requires that the contract documents are issued with the invitation to tender. In relation to the market, this would mean being able to specify areas such as scope of services, risk sharing, payment terms, monitoring requirements etc.
- 2.63 Where a small number of alternative options exist, there is an opportunity to use ‘variant bids’ to compare the merits of different options, for example in relation to rationalisation options, different approaches to maintenance risk or contract lengths. Variant bids must however meet the contracting authority's minimum requirements as set out in the tender documentation (for example, in the Services Specification). If they do not, they must be disregarded. From a practical perspective, variant bids should not be used as a substitute for up-front analysis as part of a comprehensive business case.

Public Service Concession

- 2.64 The letting of a service concession contract is currently outside the scope of the Regulations and therefore is not required to follow one of the procurement routes noted above - it is however within the scope of general EU Treaty principles, so some form of competition should be initiated to ensure fair, open and transparent treatment within the relevant market. The essence of a services concession is that the contractor is being offered the opportunity to exploit the rights associated with the concession - i.e. the opportunity associated with management of the leisure facilities, and that the risks associated with this are also being transferred to the contractor.
- 2.65 The opportunity to procure outside of the Regulations provides greater flexibility to the authority, but nevertheless the principles of non-discrimination, transparency and equality of treatment should be adhered to in any procurement process. Also, there is a significant risk of a contract being seen as procurement of a services contract, rather than a concession, particularly if the authority absorbs an element of risk in relation to project delivery and/or wishes to link payments to outcomes and delivery of particular services.
- 2.66 Figure 2.1 set out later in this chapter identifies some of the key questions to be considered in selecting the preferred procurement route and contract approach. In considering this, authorities also need to take into account guidance issued by central Government in relation to local authority procurement, which suggests a presumption against using competitive dialogue and reinforces the opportunities offered via soft market testing prior to engaging in a procurement process - for example, using soft market testing to examine market positions that can then inform the contractual position of the authority.

Timescales for procurement

- 2.67 Table 2.1 identifies general timescales for each of the procurement options, based on successful schemes delivered in the past few years. There are a number of factors that can impact directly on a timetable and should be considered when identifying key deadlines, including:
- Requirement for Cabinet / full Council reporting and timescales associated with report deadlines
 - Level of resource availability to undertake evaluation / provide feedback on documentation
 - Requirement for stakeholder engagement / feedback
 - Holiday periods, particularly Christmas and summer holidays, where resource for both the authority and bidder may be limited
 - External sign-offs required - for example, if dual use facilities are included, is formal approval required from school governors
 - Planning process - if planning permission is likely to be required, has sufficient time been allowed for application and determination and has pre-application advice been sought to inform the project and its deliverability.
- 2.68 Also, the timing of any advert will be important in relation to maximising interest and competition - it is useful to test this with the market as part of the pre-procurement work,

to avoid clashes with other major projects which may reduce the ability of the market to respond.

Table 2.1. Timescales associated with procurement routes*

	Operating Contract	DBOM Contract	Traditional Design then Build	Design & Build Contract
Restricted procedure	9-12 months	N/A - very difficult to deliver a DBOM via restricted process	12-14 months (can be quicker, particularly where there is market engagement pre-procurement and standard contracts are ready)	9-12 months
Competitive Dialogue	12-15 months	18 months, plus planning application / submission time periods	N/A	N/A
Non-OJEU competitive tender	9-12 months, assuming a PQQ stage is included	N/A	N/A	N/A

* Note: it is recommended that an additional 6-8 weeks be included up-front in any timeline to provide an opportunity for soft market testing on key issues and commercial terms.

- 2.69 In setting a realistic timetable, it is therefore recommended that authorities allow at least 12 months for the procurement phase, plus time in preparation and time for any market testing. Planning is often a critical aspect that is overlooked and can add considerable delay to a project, particularly where a development is contentious or contrary to planning policy. Early engagement with planners should be a key aspect of pre-procurement work, to minimise uncertainty and identify key issues for resolution.
- 2.70 Should insufficient time be allocated, there are clear risks in relation to achievement of project objectives, loss of bidders due to insufficient time to respond and potential compromising of value for money.
- 2.71 Should an updated facility strategy or management options appraisal study be required to underpin the decision making pre-procurement, then an additional 3-6 months should be added to the timeline.

Framework agreements

- 2.72 An alternative approach to a project-specific procurement via an OJEU advert is to procure some elements via existing framework agreements. Whilst this is generally not relevant

from an operating perspective (there are only a small number of examples where certain authorities have set up operator frameworks in their area), it is potentially helpful from a construction perspective. The next few paragraphs are therefore drafted in the context of a design & build approach, possibly run in parallel with a separate leisure operator procurement.

Design & Consultant team appointment

- 2.73 Sport England encourages authorities to use the Government Procurement Service (GPS) 'Project Management and Full Design Team Services Framework' <http://gps.cabinetoffice.gov.uk/>. This framework

"brings together project management, design and a number of ancillary technical services. It is open to any public sector organisation and enables the procurement of construction and property related consultancy services on any project, of any value."

It has already been tendered through the Official Journal of the European Union (OJEU) process, thereby significantly reducing the time required to select and appoint the consultant team. However, it is critical to ensure that the framework partners have the requisite skills and experience to deliver the intended project.

- 2.74 In addition, some authorities may have their own consultant frameworks in place, which provide an alternative to the GPS route, and a number of regional frameworks also exist (see below for details).
- 2.75 If the authority is not satisfied that a framework has teams with the required experience on it, then consideration will need to be given to running a bespoke OJEU tender process, probably via a Restricted Procedure.
- 2.76 In using the GPS framework, there are two options available - to select a preferred supplier directly on the basis of them best meeting the project requirements or to run a mini-competition for all suppliers on that particular framework (there is no option to have a mini-competition for only certain suppliers on the framework). Given that there are usually a number of potentially qualified parties on the framework, a mini-competition is normally recommended for selecting a design consultant team - there is a clear process for this dictated by the GPS.

Construction appointment

- 2.77 Recent guidance from Sport England in relation to procurement of facility projects recommends a single stage design and build process, with the design developed to RIBA stage D, at which point the works are tendered. This approach fits with the analysis of design & build vs traditional procurement noted earlier in this chapter and fits with the use of the GPS framework for early appointment of the design and consultant team.
- 2.78 In relation to appointing the constructor, again there are options available either via an existing framework or via an OJEU tender process. A significant number of construction frameworks exist, some of which are national and some regional, including:
- ProCure21+ - an NHS framework open to any NHS organisation or any non-NHS organisation collaborating with an NHS organisation for the provision of a facility that has a health component. This framework is suitable for major works schemes

- SCAPE - this is a national construction framework with a single framework provider on it
- Regional frameworks, such as:
 - Construction Framework SW
 - West Midlands Contractor Framework
 - Constructing West Midlands Framework
 - YorBuild - Yorkshire, Humberside and NE Lincs
 - NW Construction Hub
 - Smarte East Alliance
 - IESE - SE plus London
 - SCAPE - East Midlands
 - NE Improvement and Efficiency Partnership
 - East London Solutions Procurement Group.

2.79 As noted earlier, it will be important to check that the companies on the framework have the required skills and experience to deliver the intended project before confirming use of a framework.

2.80 Figures 2.1 - 2.3 overleaf identify a number of considerations in relation to selecting the preferred procurement route. Figure 2.1 deals with leisure operator only contracts, figure 2.2 construction only, whilst 2.3 is for a combined operation and construction project.

2.81 In all cases where significant refurbishments or new build facilities are included, it is essential that early input is gained from specialist operators (in-house, trust or commercial), which will help to facilitate the most operationally efficient solution and ensure the facility mix maximises future sustainability. This is straight-forward where an incumbent operator can input to this process, but where the facility development is being twin-tracked with appointment of a new operator, consideration should be given to staggering the processes such that the preferred operator is selected whilst the facility development is still at an early stage and the operator has an opportunity to input to the detailed design and facility mix. Alternatively, the DBOM approach allows an operator to come forward with their preferred construction team.

Figure 2.1. Procurement route selection - leisure operator procurement

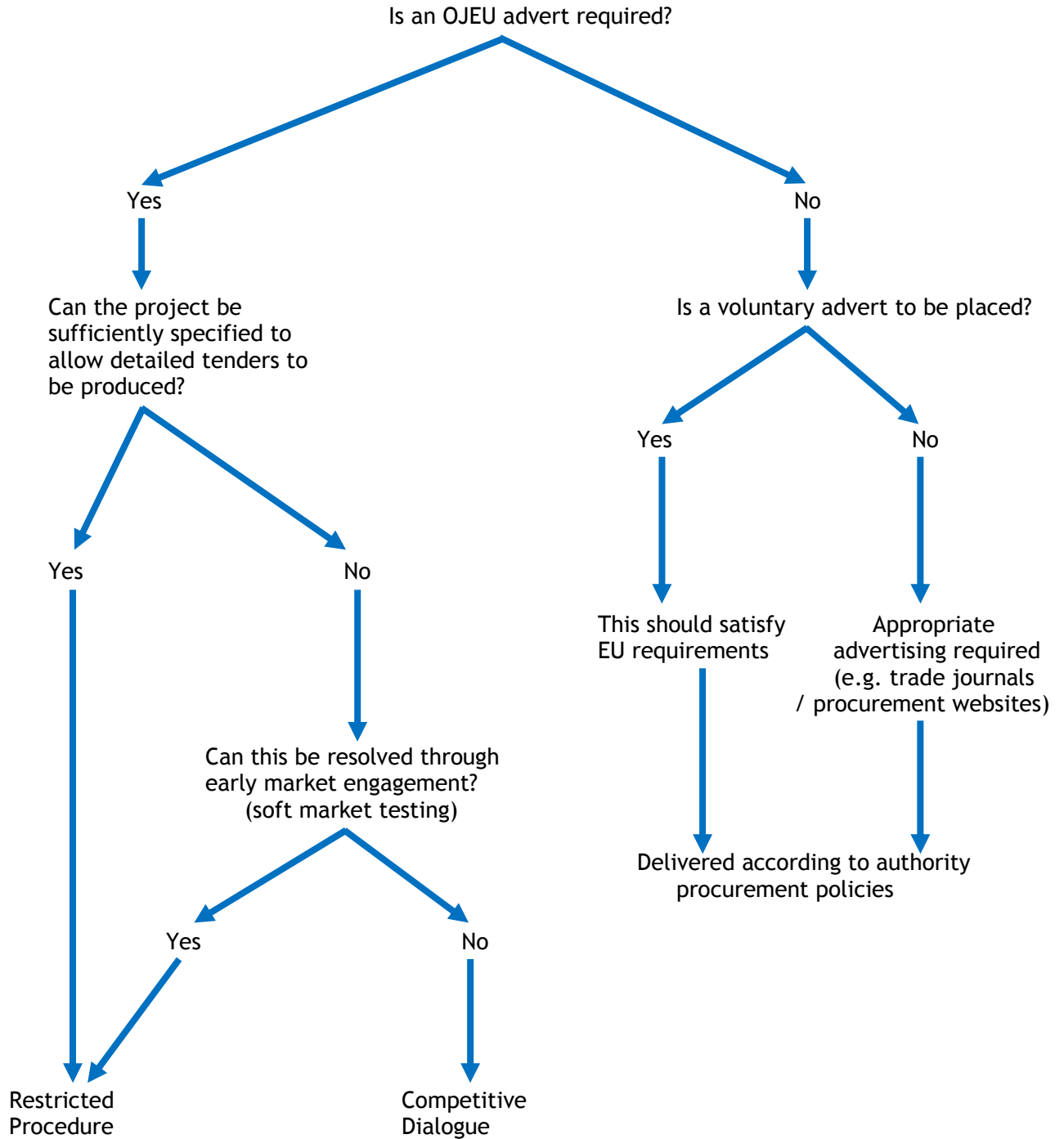


Figure 2.2. Procurement route selection - construction procurement

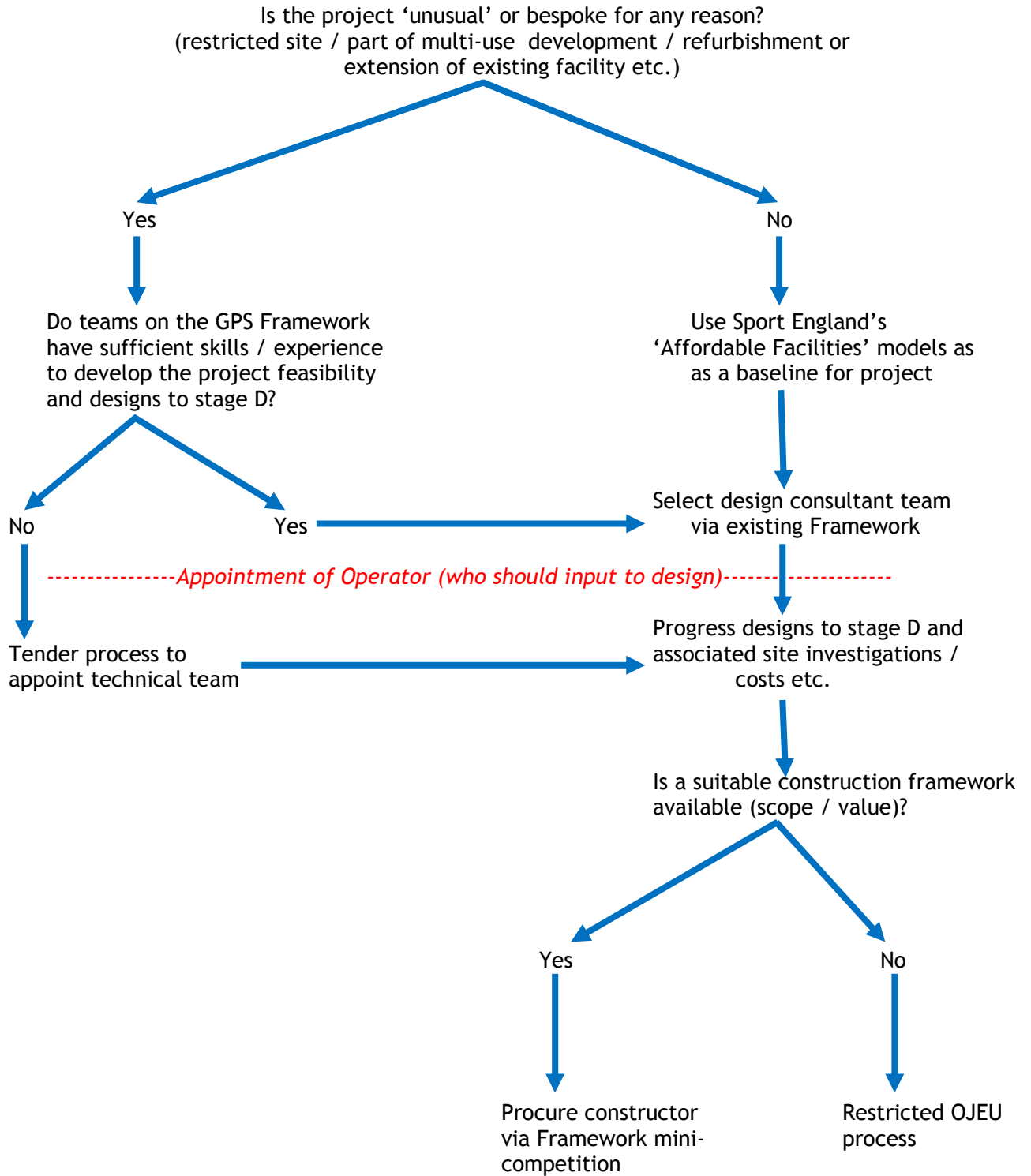
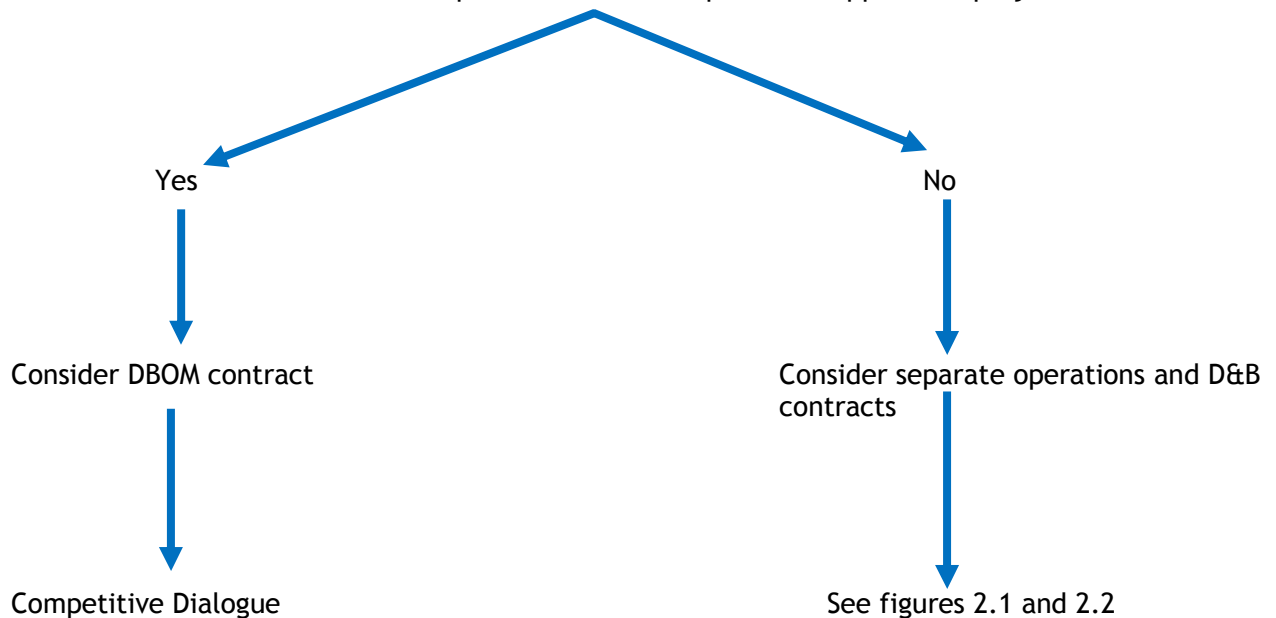


Figure 2.3. Procurement route selection - leisure operator & construction procurement

Does the project meet one of the following criteria:

- Market innovation required in relation to facility mix / site selection;
- Whole-life costing approach critical in terms of minimising running costs (utilities / repairs & maintenance / staffing) via innovation in construction and design approach;
- Full risk transfer in relation to future lifecycle and defects is required;
- A single contract solution is required, avoiding the issues associated with interface between operator and constructor;
- Commercial capital investment required to support the project.



Considering budgets & affordability

For the procurement process

- 2.82 There are a number of roles to be fulfilled in delivering a successful procurement, including:
- Project management and reporting
 - Leisure advice
 - Technical advice (architect / cost consultant / other technical disciplines)
 - Financial advice
 - Legal advice.
- 2.83 The advisor roles will include input to documentation, input to bidder clarifications / dialogue and evaluation of submissions.
- 2.84 In addition, specialist areas in which additional advice may be required include insurance and pensions.
- 2.85 Each authority will need to consider the availability of in-house resources and whether appropriate expertise is available, or whether external support should be considered to ensure the project is delivered in line with best practice. It is imperative that a dedicated project manager (internal or external) is available to lead the project. If external support is required, it is recommended that specific task lists are developed against which quotations can be sought, in order to minimise expenditure on external advisor fees and ensure all aspects of the process are covered.
- 2.86 The project manager should ideally have an understanding of both the procurement process and the specific market issues for leisure, which can then be supplemented by more detailed expertise from in-house personnel (for example procurement specialists) or external advisors.
- 2.87 As a broad guide, the project management role for a leisure contract will require in the region of 2-3 days per week of dedicated resource, whilst for a DBOM project this is likely to be 4-5 days per week given the additional technical roles and input to be managed.
- 2.88 Input from other authority personnel will be focused around key points in the procurement process and table 2.2 identifies key stages where input will be required from different departments. This is in addition to on-going project management and support from external advisors. In general terms, there is up-front input to develop the documentation and populate the data room, followed by specific input during dialogue / clarification and evaluation of tenders.
- 2.89 In some instances, the level of in-house resource and expertise is limited, so consideration will need to be given to additional external support requirements.
- 2.90 Table 2.2 does not cover the Project Board and Project Team, which will be directly involved in all aspects of the project.

Table 2.2. Overview of authority input required

	Pre-procurement	PQQ Stage	Tender Stage & Evaluation	Preferred Bidder / Contract Award
Councillors	Approval of process and key outcomes required. Input to Services Specification.	Delegated authority is usually agreed for shortlisting during the tender stages, although there may be Councillor representation on the Project Board and regular progress reporting to Cabinet.		Approval of recommendation for preferred bidder. Approval of contract award.
Leisure / Sports Development	Provision of information for data room. Drafting of Services Specification and Payment and Performance Monitoring System (PMS). Input to facility requirements and design brief. Input to PQQ drafting.	Review of PQQ responses, particularly service delivery aspects.	Input to dialogue / clarification process and evaluation process, covering leisure-specific areas, e.g. service delivery proposals, sports development plans and authority outcomes.	Finalisation of service method statements and reporting frameworks (KPIs and outcome scorecard in particular).
Technical -QS / Architect and Property	Provision of information for data room. Input to Services Specification, particularly maintenance aspects and facility performance standards. Development of technical requirements and design brief (if relevant).	Review of PQQ responses, particularly technical aspects.	Input to dialogue / clarification process and evaluation process, covering property-specific areas, e.g. design and construction proposals, capital costs and maintenance plans.	Finalisation of technical requirements, maintenance plans and input to lease details.

Finance	<p>Provision of information for data room.</p> <p>Approval of capital / revenue affordability positions.</p> <p>Input to PMS drafting.</p>	Review of PQQ responses, particularly financial aspects.	Input to dialogue / clarification process and evaluation process, covering finance-specific areas, e.g. future revenue affordability.	Finalisation of base financial model and payment framework. On-going review of project affordability.
Legal / procurement	<p>Drafting of OJEU advert.</p> <p>Compliance review of documentation and approval of process.</p> <p>Development of contract and schedules.</p>	Review of PQQ responses.	Input to dialogue / clarification process and evaluation process, covering legal-specific areas, e.g. contract mark-up.	Finalisation of contract and schedules. Confirmation of leases / licences.
Personnel / HR	<p>Provision of information for data room.</p> <p>Approval of approach to TUPE and Pensions.</p>		Input to evaluation process, covering personnel-specific areas, e.g. approach to TUPE and pensions.	Ad-hoc input during handover process (if relevant).
Insurance	Agreement of preferred insurance structures / requirements.		Evaluation of insurance proposals.	Agreement of detailed insurance requirements and schedules.
Health & Safety	Input to development of Services Specification and relevant PQQ aspects.		Evaluation of health & safety method statement.	
Sustainability (environmental / energy)	Input to development of Specification and relevant PQQ aspects.		Evaluation of sustainability proposals / method statements.	

Budgets & affordability for the project

- 2.91 As part of the tender documentation, it is often useful to specify a realistic affordability limit against which bids will be considered /evaluated. This provides interested parties with a clear understanding of the financial parameters within which their solutions should be developed and allows all parties to be clear on any potential balancing between affordability and service delivery. The competitive pressures of the process should still ensure bidders maximise the financial position in their tenders.
- 2.92 The business case for the project should include the financial model that has been used to test the affordability limit, but if there is no business case then consideration should be given to developing a summary model that identifies the future budgets for the project and compares them to the resources required to deliver the anticipated services - in this regard, any obvious mis-match between affordability and deliverability can be identified prior to commencing procurement, to ensure a viable project is offered to the market.
- 2.93 In relation to capital investment, consideration will need to be given to which party is best placed to provide the required investment. Public sector capital is often, but not always, more cost effective and provides greater flexibility (without the need to align contract periods with debt repayment periods), but there are advantages to private sector investment or at least use of the buying powers / commercial approaches to development that private partners can bring.
- 2.94 Testing the financial viability of a project and thus setting a realistic affordability framework (both revenue and capital) is critical to overall deliverability and market interest.

Setting up project management structures

- 2.95 Timely decision-making is a critical part of the process and early consideration needs to be given to a number of practical questions, including:
- What level of delegated authority has been approved in relation to the shortlisting of bidders
 - What stage(s) require a report to Cabinet / full Council and what is the process for gaining approval to enter into the contract
 - Who is responsible for approving changes to the project
 - Who is responsible for project management and liaison with any external advisors
 - Who should be on the project board / project team
 - Who else in the authority will need to be involved - for example, in relation to provision of data room information and input into evaluation processes (examples include finance / HR / property colleagues).
- 2.96 As a minimum, a Senior Responsible Owner (SRO) should be appointed for all projects, who has overall responsibility and accountability for successful delivery of the project and achievement of the outcomes.
- 2.97 From a project management perspective, there are a number of project management methodologies available and each authority will have its own preference. However, of critical importance in all cases is an appropriate audit trail of decisions and a risk register that is regularly updated.
- 2.98 If an authority is following a Prince 2 approach, the Project Initiation Document (PID) will be particularly useful as a base on which to start the project. A comprehensive PID will cover:
- What is the project aiming to achieve? (setting out desired outcomes, project deliverables, scope, constraints)
 - Why it is important to achieve it? (a summary of the Business Case for the project)
 - Who will be involved and what are their responsibilities? (project structure and identification of key personnel)
 - How and when will it happen? (project plan, communication plan, quality plan).
- 2.99 The communication plan may include community engagement, for example in relation to providing updates on the procurement and pertinent issues such as future programming and pricing. Certain processes have also included community feedback on facility designs or facility mixes, however, this will require careful management if confidentiality of bidder proposals is to be maintained and may therefore be better undertaken as part of developing the business case for the project, rather than during the procurement process.
- 2.100 In addition, many authorities will require an Equality Impact Assessment to be completed, assessing the likely effects of the project on people in relation to disability, gender and racial equality.

- 2.101 Effective project management will significantly increase the chances of successful delivery on time, and it is recommended that at least 1-2 days per week are allocated to a project manager function - this can be either in-house or an external resource.

Developing key documentation

- 2.102 Part of the preparation phase will need to include development of the key documents for the project, including:
- OJEU Notice / tender advert
 - Information Memorandum
 - Services Specification / Facilities Requirements and Technical Specification & KPIs
 - Payment and Performance Monitoring System
 - Pre-qualification questionnaire and evaluation criteria (see chapter 3)
 - Contract risk matrix (see chapter 4)
 - Tender documents (format will depend on the procurement route being adopted) (see chapter 4)
 - Evaluation criteria and weightings (see chapter 4)
 - Legal contract and associated schedules (see chapter 4).
- 2.103 The latter five elements of the list are discussed in more detail in separate chapters of this document.

OJEU Notice / tender advert

- 2.104 Careful consideration should be given to drafting of the OJEU advert / tender advert, in particular to ensure that the scope of the advert is sufficient to cover all possible aspects of the project. If competitive dialogue is being used, it is recommended that a workshop is used to identify possible solutions, which can then be used to ensure the scope of the advert is drafted accordingly. Legal advice will be required as part of this process, as an inaccurate advert can present a significant risk of procurement challenge or require a procurement process to be re-started.

Information Memorandum

- 2.105 The Information Memorandum should cover the following topics:
- Overview of the project and key objectives
 - Background to the authority
 - Outline of existing provision
 - Scope of the procurement
 - Outline of the procurement process
 - Timetable for the process
 - Overview of the project team and management structures

- Bidders open day information
- Legal compliance information.

Services Specification & KPIs

- 2.106 As part of this toolkit, example Services Specifications are provided which can be used as a base for developing project-specific documentation. There are other formats available in the market and Sport England does not wish to be prescriptive in relation to format. However, a comprehensive services specification will contain the following key aspects as a minimum:
- Authority outcomes / objectives required, and specific targets against which performance of the contractor can be measured (this will ideally be linked to the authority's Culture & Sport Outcomes Framework and the Performance Indicators contained within it)
 - Service delivery requirements - for example, relating to sports development / health & wellbeing plans / customer care / reporting / pricing / programming / opening hours
 - Facility management requirements - for example, cleaning / maintenance / lighting / heating / staffing / equipment.
- 2.107 Of critical importance is that the Services Specification contains specific and measurable targets for all elements, which will facilitate effective monitoring and allow deductions to be made for poor performance or bonuses to be achieved for over-performance. The targets should be reasonable and achievable, for example in relation to building performance the temperatures or lighting lux levels set out in the Services Specification should be achievable in the facilities and prior testing will facilitate accuracy of the documentation.
- 2.108 It is recommended that a set of KPIs are agreed which can be reported on regularly by the contractor and provide the authority with a clear indication of progress against targets. Examples are provided as part of this toolkit from Sport England's own National Sports Centres contract - whilst these are clearly specific to the unique circumstances of the National Sports Centres, the format and approach may be useful as a template in terms of developing a scorecard and KPIs that reflect an authority's own contract requirements.
- 2.109 Where dual use facilities are covered by the contract, early consideration will need to be given to the split of responsibilities on the particular site, which should then be detailed in the Services Specification. Examples of key areas to be considered include utilities costs / provision, maintenance, cleaning, programming and opening hours.
- 2.110 Further research is on-going in relation to measuring social outcomes / social return on investment and health outcomes. The template documents will be updated on a regular basis to take into account emerging measures in these areas, but in the meantime authorities are encouraged to work with their local health provider, for example, to develop local targets where possible.

Facilities Requirements and Technical Specification

- 2.111 In the event that new or substantially refurbished facilities are part of the contract, a detailed set of Facilities Requirements and Technical Specification will need to be compiled, setting out the facilities to be provided and the technical requirements for the new build / refurbishment and covering the following key aspects:

- Overarching requirements:
 - Schedule of Accommodation
 - Adaptability & Flexibility
 - Sustainability & Environmental
 - Design Life
 - Durability & Maintenance
- Architectural requirements
- Mechanical & Electrical Engineering requirements
- IT & Communications requirements
- Civil & Structural Engineering requirements
- External works requirements
- Construction site management.

2.112 Drafting of the Facilities Requirements and Technical Specification will require technical input from advisors with specialist knowledge of sports facility development, unless the authority has sufficient expertise in-house. A template set of Facilities Requirements and Technical Specification are provided in an Appendix to this toolkit. In all cases, the technical specification should as a minimum meet Sport England Design Guidance Notes.

2.113 A particular issue is the approach to be taken in relation to planning. Wherever possible, it is preferable for the authority to obtain at least outline planning permission in advance of the procurement process, for the following reasons:

- It provides confidence over deliverability to potential bidders
- It reduces the timescale for the process and can facilitate a better risk transfer in the contract
- It provides a framework within which bidders can develop their solutions, which allows the authority to evaluate bids on a more like-for-like basis.

Payment and Performance Monitoring System (PMS)

2.114 Example payment and performance monitoring systems are provided, which are linked to the template Services Specifications and legal contracts, such that the suites of documents ‘work together’ in ensuring high quality service delivery by the contractor.

2.115 Again, there are alternative mechanisms available, but, whatever format is used, it is important that the payment and performance monitoring system links to the Services Specification and provides clear incentives for the contractor to perform and remedies if there are any performance failures.

2.116 A good payment and performance monitoring system will cover:

- A clear process for changes in the base price - for example, inflationary increases (utility benchmarking is dealt with separately via a specific schedule)
 - A clear system for financial deductions resulting from poor performance - the example provided uses 'performance deduction points', which are weighted according to the seriousness of the performance failure
 - An incentive mechanism to allow the contractor to benefit from enhanced performance against the key outcomes / objectives for the contract
 - Clearly defined 'excusing causes' which provide the contractor with relief from deductions in specific circumstances that the contractor cannot reasonably control (linked to achieving a 'fair' risk profile and encouraging value for money solutions).
- 2.117 The aim of the documentation is to create a contract that encourages partnership working and a cooperative approach to improving service and customer focus. The performance monitoring process should not be seen as a mechanism for generating income as any approach like this would be counterproductive to overall service quality, but the mechanisms need to be sufficiently robust and specific so that they are effective where genuine underperformance occurs and there is no or little evidence of commitment by the contractor to resolve problems and improve service provision.
- 2.118 In relation to the value of deductions, a balance must be achieved between deductions which are representative of the seriousness of the performance failure but which do not unnecessarily jeopardise the financial robustness of the contractor - often, putting the contractors profit margin plus a small amount of central costs at risk will be a sufficient incentive without impacting on business sustainability.
- 2.119 The payment and performance monitoring system will need to be aligned to ensure that any amounts set out for deductions in relation to poor performance are calculated in the context of being a reasonable and ascertainable loss incurred by the authority, otherwise the mechanism may be open to challenge. Nevertheless, the opportunity to link performance failure points to termination triggers should be retained.
- 2.120 Suggested contents lists for the remaining documents are discussed in later chapters of this toolkit according to the relevant stage in the procurement process. Template legal documents for both a Leisure Operating Contract and DBOM Contract are included in Appendices to this toolkit, as are schedules for surplus sharing and benchmarking.
- 2.121 The template benchmarking arrangements include both utilities benchmarking and net income benchmarking, however, the net income benchmarking is unlikely to be relevant in all circumstances and will rarely be required for operating contracts up to 10 years in duration.

Developing a data room

- 2.122 Providing sufficient information for bidders is essential in facilitating accurate bids and achieving a value for money solution. To the extent that an authority is not able / willing to provide relevant information, bidders will usually need to obtain such information themselves, typically increasing the overall costs for the project. Therefore, it is critical that time is spent developing a comprehensive data room of information that bidders can access as the project progresses.

2.123 Listed below are typical sorts of information that should be contained in a data room, but each project will have its own unique circumstances, so an early project team discussion will be beneficial to identify possible information for collating.

- Financial information for the past three years by site and by facility type (for example, swimming, fitness, sports hall)
- Throughput / user information by site/facility type
- Membership information - numbers per site/type
- Pricing policies per site
- Programmes of activities per site
- Information on regular hirers / block bookings
- Information on any specific contractual arrangements with private trainers (often mainly gym based)
- TUPE information
- Pensions information, including (if known) the size of any bond required for admitted body status
- Utility consumption information (ideally past three years)
- Any existing leases / contracts, for example maintenance agreements or dual use agreements
- Insurance claims history
- Property information - site ownership plans / facility layouts / Gross Internal Floor Areas / any planning restrictions (e.g. closing times)
- Equipment inventories (ideally with commentary on equipment condition)
- Condition surveys of buildings
- Maintenance records / inspections / testing
- Programme of future block bookings already made
- Information on current IT systems
- Any external assessment results e.g. Quest
- Authority's Service Plans / Strategies for Sport & Leisure
- Previous related reports - e.g. feasibility reports commissioned etc.
- Authority's Corporate Plan
- Any development plans / strategies for the facilities
- Past user survey results
- Authority policies.

2.124 If a new build / major refurbishment is part of the project, additional information will be required, covering:

- Design brief
- Planning brief / planning conditions / planning permission details (if planning permission has already been sought)
- Site information - site history / site plans
- Title information
- Sustainability requirements
- Further surveys / information, including:
 - Archaeology
 - Arboriculture and ecology surveys
 - Tree preservation orders
 - Noise surveys
 - Rights of way
 - Site surveys (topography)
 - Building condition surveys
 - Geotechnical surveys (Desk Study Report) including local abstraction (mineral & water) rights
 - Soil/borehole surveys
 - Ground contamination reports
 - Water table reports
 - River Authority reports and requirements
 - Mining surveys
 - Existing drainage layouts and drainage capacities
 - Existing utilities surveys to include private services e.g. cable company fibre optics
 - Utility capacity/availability
 - Transport Impact Assessment/Surveys
 - If any adjoining buildings - rights of light, party wall issues and rights of access
 - Asbestos survey (type3) of any existing buildings
 - Munitions surveys
 - Underground structures e.g. Bunkers, Air Raid Shelters, Tunnels etc.

2.125 Not all of these surveys will be required for every project, therefore the authority will need to consider at an early stage what information will be provided to enable bidders to

develop proposals without the need for significant caveats to be included. It should also be noted that in certain areas the suppliers (e.g. utilities) will only provide information to the authority, rather than responding to various requests from bidders.

- 2.126 If possible, the data room should be electronic, allowing remote access by bidders and members of the project team. There are numerous systems available to provide online data rooms and in many cases external legal advisors will have their own system that the authority can utilise.

Incumbent contractors

- 2.127 In some instances, the authority may be re-letting a contract that has previously been outsourced to a trust or private sector provider. In this scenario, it will be important to understand early in the process what level of information is required from the incumbent contractor and to confirm their willingness to supply the required information and any contractual rights the authority has to insist on the provision of information pursuant to the incumbent contractor's contract. If the incumbent contractor is bidding, the authority will need to ensure a level playing field as far as possible, as the incumbent may have a potential advantage.

- 2.128 As a minimum, the following information should be obtained:

- Income breakdown - it is entirely reasonable to require a breakdown of income per site, as this is specific to the local position and demand so will be critical for any bidder
- Cost / expenditure breakdown - bidders will need to understand overall costs per site, staffing costs (which will be provided via the TUPE information) and utilities consumption
- TUPE information for all staff that would be involved in any transfer, including directly employed staff and any sub-contract staff (for example maintenance providers / cleaners etc.)
- Pensions information for the above staff
- insurance claims history and any outstanding claims
- any leasing/ sub-contract/ rental arrangements that continue past the end of the current contract
- usage information, including throughputs and membership numbers
- equipment inventory and confirmation of ownership
- Programmes of use, particularly committed block bookings / events
- Building condition surveys / maintenance schedules
- Annual testing certificates - electrical / gas / lifts / health & safety audits etc.
- Quest assessment reports
- User surveys results.

- 2.129 Consideration should also be given to asking the incumbent operator to agree to sign a bulk transfer for Direct Debit members, as failure to achieve this can have a significant impact on year one revenues for the incoming operator.

- 2.130 Many older contracts do not include provision of information requirements in relation to contract handover, so early discussion with the incumbent contractor will often be necessary to confirm willingness to supply the information and timescales for receipt.
- 2.131 Further to this, any new contract should include clear handover provisions to ensure similar information is available at the end of the contract to facilitate any re-tendering exercise required.
- 2.132 The next chapter of this document sets out the first stage of procurement - pre-qualification.

Key risks to consider

- Scope of OJEU advert insufficient to cover all project aspects
- Lack of market interest due to scope / affordability of the contract
- Lack of political / partner / stakeholder buy-in (linked to communications plans)
- Inability to agree information provision with incumbent contractor
- Insufficient resources / skills available to develop the approach and documentation.

Project management notes

- Development of the Project Initiation Document, including Project Plan
- Identification of Project Management Structures and Senior Responsible Owner
- Appointment of external advisors / identification of internal resources as required
- Set-up of project management documents - risk log / issues log / quality log / lessons learnt log
- Set-up of data room and appropriate access permissions.

Checklist before continuing

- Have all required approvals been sought to commence the process?
- Has the authority set out its outcomes framework and is this clearly linked to the targets specified in the Services Specification?
- Has the project management structure been approved and all required resources allocated?
- Has the procurement route and contract approach been confirmed?
- Has legal sign-off for key documentation been received?
- Have relevant site surveys and condition surveys been commissioned (if necessary)?
- Has the data room been set up and sources of information identified / been made available?
- Where relevant, has the approach to achieving planning permission been confirmed, and ideally outline planning permission sought?
- Where an incumbent contractor is in place, has relevant data been requested and an approach agreed in terms of detail to be provided and frequency of updates?
- Where specialist external advice is required, has this been requested (for example, actuarial valuation in relation to pensions provision)?

Pre-Qualification phase

Introduction

- 3.1 Having confirmed the appropriate procurement route and developed the project management arrangements, the pre-qualification phase is an important stage in ensuring a good level of market interest and allowing the authority to select an appropriate range of bidders for the tender stages.
- 3.2 The pre-qualification phase normally consists of the following elements:
- Advertising the project either via OJEU or other means
 - Release of pre-qualification questionnaire & information memorandum
 - Bidders open day (can take place prior to OJEU advert, for example via advertising in a Prior Information Notice)
 - Evaluation of pre-qualification submissions & selection of bidders to be invited to tender.
- 3.3 The remainder of this chapter looks at each element in turn.

Advertising the project

- 3.4 Depending on the procurement route chosen, the authority will need to either place an OJEU advert or place suitable tender adverts in the trade press and on procurement websites. In certain instances, a PIN (Prior Information Notice) may also be placed, which is submitted with the intention of giving the market early notice of the authority's intention to potentially award a contract.
- 3.5 The placement of a PIN is not required under the legislation, but can be used to speed up the actual procurement process by reducing the timescales associated with the procurement regulations.
- 3.6 Early market engagement can also help raise market awareness generally. As part of the market engagement process, the contracting authority will have established whether there are a sufficient number of interested parties to secure a genuine competition and will have given potential bidders the opportunity to liaise with the contracting authority and formulate a bespoke solution.
- 3.7 There is a prescribed format for an OJEU advert, which the authority's procurement team will no doubt be familiar with. However, further guidance can be found at http://simap.europa.eu/index_en.htm including template documentation for completion.
- 3.8 As noted in chapter 2, the wording of the OJEU advert is critical, in particular to ensure that the scope of the advert is sufficient to cover the full scope of the proposed procurement exercise. Specifically the authority should consider whether it will need any change or variation to the scope of works or services in future service delivery. It is recommended that (with the exception of simple procurements where the requirements

are clearly defined) a workshop is used to brain storm both possible solutions and the corresponding scope of required services. This can then be used to ensure the scope of the advertisement for the project is drafted accordingly. Legal advice will be required as part of this process, as an inaccurate advertisement can present a significant risk of procurement challenge or require a procurement process to be re-started.

- 3.9 Alternatively, the Regulations do not currently require the placement of an OJEU notice for Part B services, meaning that alternative forms of advertisement can be used - for example via trade journals or via procurement websites. However, the principles of equality of treatment, non-discrimination and transparency all apply, meaning that authorities need to consider any likely cross-border interest in the contract and ensure that it is opened up to an appropriate degree of advertising/competition. In this scenario, a voluntary OJEU advert will meet these requirements and will need to include wording that identifies the advert as a voluntary notice and as such does not bind the authority to following one of the formal procurement routes outlined in chapter 2.
- 3.10 However, it is recommended that in all cases a form of procurement process is followed and the Regulations adhered to accordingly, as this provides a clear basis and understanding for interested parties in terms of how they can expect the process to proceed. This should be supported by clear instructions within both the OJEU notice and tender documentation. Further to this, the potential changes to the Regulations from 2014 (possibly earlier) indicate the removal of the current Part B exemptions, with leisure services falling under a new Annex XV of services, subject to a new regime with new thresholds and rules.

Pre-Qualification Questionnaire & Information Memorandum

- 3.11 Bidders expressing an interest in a project advertised in the OJEU or via tender websites / trade journals are normally issued with a Pre-Qualification Questionnaire ("PQQ") and Information Memorandum (also referred to as a Descriptive Document) that provides details of the project, procurement route, key dates, background data and other relevant information.
- 3.12 The contents of a comprehensive Information Memorandum are outlined in Chapter 2 and should provide interested parties with a clear overview of the project that enables them to make an informed decision on whether to complete the PQQ.
- 3.13 The PQQ allows the authority to establish whether potential contractors have the technical capacity and ability, economic and financial standing and legal status to deliver the project. The PQQ is used to shortlist bidders to invite to tender by applying the selection criteria.
- 3.14 It is worth noting that the PQQ should not be seen as an opportunity for a 'mini' tender and there are clearly prescribed areas on which a PQQ should focus, as set out in the paragraph above.
- 3.15 The Regulations provide an exhaustive list of the selection criteria which can be used to exclude a bidder (the Exclusion Criteria - Regulation 23 of the Public Contract Regulations). One of the Exclusion Criteria relates to criminal offences, for example, and this could include breach of environmental law. Where none of the Exclusion Criteria apply, the bidder may still be rejected at this stage if the specified standards for economic and financial standing, and technical capacity and professional ability, are not achieved. At this stage of the procurement process, the bidder's track record in similar contracts is usually also considered under the criteria of technical capability.

- 3.16 The Cabinet Office has issued useful guidance that can form the basis of a PQQ, including a template of ‘core’ questions to be asked and a recent Procurement Policy Note - ‘Taking account of bidders past performance’, which authorities can refer to when preparing their own documentation.
- 3.17 A standard PQQ is likely to request full company contact details, evidence of previous work and require answers based on the following topics:
- Social / Environment
 - Finance
 - Health and Safety
 - Status & legitimacy
 - Technical Ability
 - Legislative Standards.
- 3.18 Most authorities have their own form of PQQ, however it is important to ensure that the document is correctly focused on the type of project being procured. Some common issues to take into account include:
- Ensuring the financial criteria are relevant to the type of project - for example, operating contracts will have different financial thresholds to construction contracts - and the criteria should not unnecessarily disadvantage different types or sizes of operator (for example, charitable trusts or smaller commercial operators)
 - Ensuring the technical capacity questions are tailored to the project - for example, do you have an operational focus or are skills required in design and construction as well?
 - Are there any ‘pass / fail’ criteria that might be problematic - some authorities have pass / fail criteria linked to financial sustainability and it is important that the criteria are able to take into account specific leisure market aspects, such as trust vehicles which often appear ‘unprofitable’ due to their status and reinvestment of any profits
 - Has the document taken into account the types of contracting structures often used in leisure projects, for example where an SPV or wholly owned subsidiary is to be the delivery company, but with a suitable bond or parent company guarantee in place?
- 3.19 The drafting and evaluation of the PQQ will often require input from authority personnel in a number of areas, including:
- Finance
 - HR / personnel
 - Environmental
 - Health & safety
 - Operational.
- 3.20 Authority departments will need to be engaged early in the process and resources allocated at appropriate times to support this work.
- 3.21 It is advised that the selection criteria, scoring methodology and any weightings are published as part of the PQQ documentation (as well as the OJEU notice), ensuring full transparency of information.

- 3.22 According to EU Legislation, at least five parties should be shortlisted under a restricted procedure (assuming there are five suitable bidders), and at least three under a competitive dialogue or negotiated route. The OJEU notice can be used to state a maximum number of bidders to be shortlisted, thus allowing the authority to limit the number of bidders in the next stage. However, if the authority does not receive the minimum number of bids as stipulated then it can still proceed with less bidders.

Bidders Open Day

- 3.23 In addition to the Information Memorandum, OJEU notice and PQQ, it is recommended that the authority considers hosting a bidders open day, with the aim of providing further information on the project, background to the authority and allowing bidders to visit the facilities / development site(s). The bidders open day can provide a valuable opportunity for the authority to demonstrate that they are serious about the project and that bidders can confidently invest time and resource in their submissions.
- 3.24 Open days are not regulated under the procurement rules but essentially would be governed by the general principles of equality, non-discrimination and equal treatment. Authorities should therefore bear those principles in mind when holding their open days. They are an opportunity to provide the necessary background to the project or the services which a contracting authority wishes to procure. The same principles would apply to individual meetings offered as part of the open day i.e. if specific information is disclosed during that meeting then the same information should be disclosed to the remaining bidders, whether through their individual meetings or subsequently by email or post. The intention is to provide as much information as possible to all bidders so as to facilitate the production of informed bids whilst ensuring that no one bidder is put at an advantage or disadvantage. The key to this is a properly structured and regulated process with no opportunity for bidders to pursue individuals for information.
- 3.25 Practical arrangements will form part of the project manager's tasks, and consideration will need to be given to the following issues as a minimum:
- Has a timetable for the day been confirmed, taking into account travel times for interested parties
 - Has the venue been booked and arrangements confirmed in relation to catering, AV equipment, seating etc.
 - Have presentations been prepared / background material printed
 - Have key speakers / project personnel confirmed availability
 - Have bidders been asked to confirm attendance and provide any special requirements
 - Have bidders been informed of any limitation on the number of attendees
 - If site visits are included, has transport been booked
 - Are arrangements in place to keep an appropriate audit trail.
- 3.26 The bidders open day is an important opportunity for the project team to maximise interest and ensure the best possible level of competition, so time should be invested in planning this accordingly.

Key risks to consider

- PQQ criteria incorrectly calibrated resulting in de-selection of a large number of bidders
- Project inappropriately advertised, resulting in a lack of interest and impacting adversely on the competitiveness of the process
- Poorly managed bidders open day resulting in lack of market interest and impacting adversely on competitiveness of process.

Project management notes

- Key documents drafted and tested to ensure they are reflective of the legislative framework and market circumstances (e.g. financial thresholds)
- Internal and external input to documents obtained at appropriate times and resources allocated for evaluation of PQQ responses
- Practical arrangements for bidders open day in place - venue hire, refreshments, AV equipment, key personnel available, transport for site visits (if required)
- Appropriate sign off structures in place for ratification of shortlists.

Checklist before continuing

- Has required authorisation been provided to ratify the shortlist of suppliers?
- Have all bidders been informed of the outcome of the PQQ assessment?

Tender phases

Introduction

- 4.1 Following short-listing of those parties considered to have most closely met the selection criteria, the next stages of the process are considerably more project specific and dependant on the selected procurement process. This chapter outlines the tender stages under the two most commonly used procurement options, namely restricted procedure and competitive dialogue:
- Restricted Procedure
 - Invitation to Tender Stage
 - Competitive Dialogue
 - Invitation to Submit Outline Solutions (ISOS)
 - Invitation to Submit Detailed Solutions (ISDS)
 - Invitation to Submit Final Tender (ITSFT).
- 4.2 It is worth noting that under the competitive dialogue process, there is no requirement to retain all of the stages mentioned above - indeed, in many circumstances serious consideration should be given to having no more than two stages, otherwise costs and time are increased for both the procuring authority and bidders.
- 4.3 Continued recognition should be given of the bid costs incurred by the bidders, and where possible, early de-selection should be used to minimise bid costs for unsuccessful bidders and to avoid bidders loading costs on successful bids.
- 4.4 However, before focusing on the specific aspects of the two procurement routes, a common consideration that will underpin the tender documents in all cases will be the authority's approach to risk and risk sharing. Therefore, it is useful to identify at this stage a clear risk matrix for the project and where those risks are intended to lie. Figure 4.1 provides an indicative risk matrix with a suggestion of the appropriate party to accept the risks noted.
- 4.5 Figure 4.1 notes a number of risks that are recommended to stay with the authority, rather than being transferred to the contractor - the approach taken has been to allocate risk according to the party best placed to manage it, thus maximising value for money, however some authorities may wish to take a different approach depending on their circumstances.

Figure 4.1. Indicative risk matrix

Risk Category	Proposed Risk Allocation			Notes
	Authority	Shared	Contractor	
<p>Planning Risk (assuming the contract/project imposes construction obligations on the contractor)</p> <p>Outline</p> <p>Detailed</p>	✓		✓	In order to maximise bidder interest, provide comfort over deliverability of the project and provide a framework within which submissions can be evaluated, it is recommended that the authority seeks outline planning approval as a minimum. This process can be twin tracked with the initial stages of the procurement process (PQQ stage and ISOS stage) so that the timetable is not adversely affected.
<p>Design Risk (assuming the contract/project imposes construction obligations on the contractor)</p>			✓	
<p>Site Risk (assuming the contract/project imposes construction obligations on the contractor)</p> <p>Site availability - sites made available by the authority</p> <p>Site Condition (assuming the contract/project imposes construction obligations on the contractor)</p> <ul style="list-style-type: none"> • Ground conditions (to the extent they can be investigated pre-commencement of construction) • Ground conditions that cannot be investigated pre-commencement of construction 	✓		✓	<p>Additional time may be required if English Heritage or other similar body needs to be involved.</p> <p>An example would be ground under an existing centre that requires demolition before the ground can be accurately assessed.</p>
<p>Commission and Construction Risks</p>			✓	
<p>Operation and Service Risks</p> <p>Regulation / by-laws / licensing procedures / applications and approvals, including procedure</p>			✓	

Risk Category	Proposed Risk Allocation			Notes
	Authority	Shared	Contractor	
change				
Specific Change in Law	✓			
General Changes in law involving capital expenditure during service period not reasonably foreseen at contract signature	✓			This follows the positions promoted by the Government in PF2.
Compliance with external grant conditions (if applicable)		✓		For example, any Sport England grants received. Whilst compliance with such grant conditions will usually be a contractor risk, there may be some conditions that only the authority can comply with. Bidders will need to review the conditions to ensure that they can be complied with and whether or not there are any cost implications.
<u>Latent Defects</u>				
• Existing facilities	✓			
• New Build			✓	
• Refurbishment			✓	Those elements refurbished/constructed by the contractor only
Functionality changes required by the authority	✓			
Health and Safety			✓	
Catering			✓	
Performance and availability			✓	In line with the standards set out in the Services Specification
Staff absence / recruitment			✓	
Estimating errors			✓	
Theft			✓	
Energy requirements / conservation			✓	

Risk Category	Proposed Risk Allocation			Notes
	Authority	Shared	Contractor	
Maintenance of facilities				<p>Maintenance obligations are often contract and sometimes site-specific. The approach to lifecycle risk is discussed in more detail later in this chapter.</p> <p>Benchmarking arrangements may facilitate some level of shared risk around demand, attendance levels and third party use / income.</p> <p>A more detailed overview of the issues associated with lifecycle costs is noted later in this chapter.</p> <p>Typically a Relief Event.</p> <p>A utilities benchmarking mechanism is often included in the legal schedules to provide a framework within which a contractor can price for utilities. The standard position is that the contractor takes responsibility for consumption risk, with the authority taking risk associated with fluctuations in tariff.</p>
• Reactive & PPM			✓	
• Lifecycle		✓		
Materials (including chemicals)			✓	
Service Failure			✓	
Force Majeure / Relief Events		✓		
Demand Risk			✓	
Attendance Levels			✓	
Third Party Use and Income			✓	
<u>Refresh of facilities (lifecycle)</u>				
• New Build			✓	
• Existing	✓			
Local and national disputes		✓		
Utilities costs (for service provider)		✓		
Climate Change Levy			✓	
Change in rate of VAT on the management fee borne by the authority	✓			
Change in rate of VAT on costs borne by the contractor			✓	
Change in scope of VAT*		✓		

Risk Category	Proposed Risk Allocation			Notes
	Authority	Shared	Contractor	
Change in eligibility for business rate relief		✓		Typically the contractor will take the risk of its structure gaining a particular relief (and it properly applying for such relief), but the authority will take the risk of the amount of relief changing due to changes in law/its discretionary rate relief policy.
Insurance Premium Increases <ul style="list-style-type: none"> • Buildings • Other 	✓		✓	<p>In many cases, it is better value for money for the authority to insure the buildings rather than the contractor. This can be tested during procurement. This proposed risk sharing relates to a project where the authority maintains buildings insurance.</p> <p>In a DBOM if a project insurance structure is adopted then the physical damages policy in relation to the buildings and the BII cover would be subject to the standard insurance benchmarking arrangements, in which case it would be a shared risk.</p>
Asset Value Risk <ul style="list-style-type: none"> • Residual value of equipment • Residual value of Facilities 	✓		✓	
Equipment and Obsolescence Risks Upgrades required by the authority	✓			
Financing Risks Achieving income and profit levels identified in bid submission			✓	

* Where trust type structure is included in SPV

Risk Category	Proposed Risk Allocation			Notes
	Authority	Shared	Contractor	
Benefit of super - profit level		✓		A surplus share mechanism should be included to allow sharing of any additional surpluses between the authority and the contractor. Assuming private sector funding. This will be different if funding is being provided by the authority.
Inflation (capital cost outturn to tender)			✓	
Interest rate variability			✓	
Availability of capital allowances / tax exemptions			✓	
Pensions				The contractor is likely to be responsible for contribution rates either at a set level or within a pre-agreed band.
• LGPS Deficit at Transfer Date	✓			
• LGPS Deficit on Exit	✓			
• Future increase in Contribution Rates		✓		
• Future decrease in Contribution Rates		✓		

4.6 Whilst the matrix noted in figure 4.1 is not exhaustive, it should provide a useful starting point for agreeing a sensible risk allocation, particularly for a contract being procured under a restricted procedure where dialogue is not permitted.

4.7 The next part of this chapter provides a more specific overview of the tender documents associated with the two main procurement routes.

Restricted procedure - Invitation to Tender

4.8 The Invitation to Tender document is normally split into two parts:

- Volume I: Information Memorandum
 - Overview of the project and key objectives
 - Background to the authority
 - Outline of existing provision
 - Scope of the procurement

- Outline of the procurement process
 - Timetable for the process
 - Volume II: Invitation to Tender
 - Intentions of the ITT
 - Legal notices
 - ITT Submission requirements
 - Process for responses and enquires
 - Evaluation and evaluation criteria.
- 4.9 Volume I is an updated Information Memorandum to ensure bidders are reminded of the project and key objectives, whilst Volume II sets out the detail of the tender process and bid requirements.
- 4.10 Appendices to the ITT should include, as a minimum:
- Services Specification
 - Payment and Performance Monitoring System
 - Leisure Operating Contract (including any surplus share arrangements).
- 4.11 Templates for all of these documents are included in Appendices to this toolkit and further information on the Leisure Operating Contract is provided later in this chapter.
- 4.12 Focusing on Volume II and using the headings noted above, the following key information should be included:
- Intentions of the ITT
 - To provide detailed information on the requirements and arrangements for the submission of ITT responses
 - Legal notices
 - Ensuring the authority's legal position is set out and any risks mitigated, for example in relation to the right to amend the ITT; clarifying that costs and expenses will not be reimbursed; reminding bidders of the position in relation to Freedom of Information; placing the onus on bidders to satisfy themselves as to the sufficiency of information; general conditions covering confidentiality, canvassing, collusion and information disclosure; disclaimers
 - ITT submission requirements
 - Overview of the submission requirements, including any mandatory variant bid submissions required (optional variant bids are not permitted under this route)
 - Information to be submitted in relation to Quality
 - Information to be submitted in relation to Price / Financials

- Information to be submitted in relation to legal structure (for example, any sub-contract arrangements intended)
 - Warranty requirements
 - Requirements in relation to updating previously submitted information, usually in relation to the PQQ submission
 - Process for responses & enquiries
 - Procedure and times for submission of ITT responses, for example hard copy tenders or via a procurement website / number of copies / postage instructions
 - Contact details for any enquiries / questions
 - Evaluation framework and criteria
 - Basis of award should be set out - for example most economically advantageous tender
 - Headline percentages should be identified between Quality and Price / Financial aspects (see later in this chapter for further detail on this aspect)
 - Detailed evaluation criteria and weightings
 - Evaluation scoring scale
 - Glossary of terms - it is useful to include a glossary of key terms to assist in bidder understanding of the project and requirements.
- 4.13 The document will normally also contain proformas for bidders to submit their tender price on and certificates for bidders to sign in relation to the offer being submitted and confirming no canvassing and no collusion in the preparation of their submission.
- 4.14 In order to facilitate evaluation, consideration should be given to providing bidders with templates for submission of key information, such as their operational projections or any capital costs, as this will aid evaluation and identification of any gaps in submissions. The use of proformas is discussed in more detail later in this chapter. A suggested list of information in relation to service delivery and capital developments is noted later in this chapter under the 'ISDS' stage of the competitive dialogue text - this level of detail should be appropriate for a restricted procedure where there may still be up to 5 or 6 bidders, however, authorities will need to balance bidder requirements with the likelihood of success otherwise bidders may withdraw due to overly onerous submission requirements.
- 4.15 Where mandatory variant bids are being considered, the documentation will need to be explicit in relation to how such bids will be evaluated and how a preferred bidder will be selected.
- 4.16 Following evaluation of the bids and selection of a preferred bidder, chapter 6 outlines the key stages and issues to consider in awarding and implementing the contract.

Competitive Dialogue

Invitation to Submit Outline Solutions (ISOS)

- 4.17 A possible first stage, following shortlisting of bidders, is the Outline Solutions, where bidders are asked to provide their high level responses across a range of key issues for the authority. The scope of contents which may be included in an ISOS document are noted below, following which a number of potential topics are identified which could form the basis for the ISOS evaluation questions. As with the documentation for the restricted procedure, the document is usually split into two volumes:

Volume I: Information Memorandum

- Overview of the project and key objectives
- Background to the authority
- Outline of existing provision
- Scope of the procurement
- Outline of the procurement process
- Timetable for the process

Volume II: Invitation to Submit Outline Solutions

- Intentions of the ISOS
- Legal notices
- ISOS Submission requirements
- Process for responses and enquires
- Evaluation and evaluation criteria.

- 4.18 Focusing on volume II, the contents should include:

- Intentions of the ISOS
 - To provide detailed information on the requirements and arrangements for the submission of ISOS responses
- Legal notices
 - Ensuring the authority's legal position is set out and any risks mitigated, for example in relation to the right to amend the ISOS; clarifying that costs and expenses will not be reimbursed; reminding bidders of the position in relation to Freedom of Information; placing the onus on bidders to satisfy themselves as to the sufficiency of information; general conditions covering confidentiality, canvassing, collusion and information disclosure; disclaimers
- ISOS submission requirements
 - Overview of the submission requirements
 - ISOS questions to which bidders are asked to respond (normally with page limits for responses)
 - Requirements in relation to updating previously submitted information, usually in relation to the PQQ submission

- Process for responses & enquiries
 - Procedure and times for submission of ISOS responses, for example hard copy tenders or via a procurement website / number of copies / postage instructions
 - Procedure and booking arrangements for dialogue meetings - dates / times / locations / agendas etc.
 - Contact details for any enquiries / questions
- Evaluation framework and criteria
 - Basis of award should be set out - ‘most economically advantageous tender’ is the only option for competitive dialogue
 - Headline percentages should be identified between Quality and Price / Financial aspects (see later in this chapter for further detail on this aspect) for the whole of the process including any Detailed Solutions stage and Final Tender stage
 - Detailed evaluation criteria and weightings for the ISOS questions
 - Evaluation scoring scale for the ISOS questions
- Glossary of terms - it is useful to include a glossary of key terms to assist in bidder understanding of the project and requirements.

4.19 In relation to the basis of award, ‘most economically advantageous tender’ is usually determined or defined on a project by project basis, depending on what the authority's priorities or goals are. Therefore it could mean that the contracting authority will accept the most economically advantageous tender based on price, quality of submission, expertise of the team, social or environmental considerations etc. Each of those limbs would thereafter be given a percentage scoring depending on their importance to the contracting authority e.g. 60/20/20%. Therefore essentially it is a breakdown of what the contracting authority wants to achieve from their procurement.

4.20 In relation to the evaluation criteria and weightings, it is not necessary at this stage to provide detailed weightings for subsequent stages of dialogue / Final Tenders. However, bidders should be provided with ranges for each of the main criteria such that they can be clear on the authority's priorities as the process progresses.

4.21 The actual questions to be asked at ISOS stage will depend on the authority's key requirements and the nature of the project, however, the overall aim is to understand bidders' high level proposals and approach to key aspects. Some example topics for ISOS questions may therefore include:

- Commercial issues
 - Approach to key contractual aspects / risks (e.g. lifecycle responsibilities / repairs & maintenance / TUPE and pensions etc.)
 - Approach to maximising commercial returns / minimising subsidy requirements from the site(s)

- Any capital development schemes envisaged, with the aim of meeting the authority's stated outcomes or maximising commercial returns / minimising subsidy requirements
- Approach to ensuring delivery of the facilities within the stated timescales (e.g. identification of key milestones in relation to construction, operation and phasing and provision of an indicative Gantt chart).
- Service issues
 - Approach to key aspects of service delivery (e.g. sports development / reporting / maximising participation)
 - Approach to setting programmes and pricing policies
 - Approach to partnership working
 - Key methods for achieving the authority's outcomes (as stated in the Services Specification)
 - Approach to working on dual-use sites in order to maximise community use whilst meeting the needs of the school.

4.22 The ISOS document should also set out what areas an appropriate response would cover, so that bidders are clear on the level of detail and any particular aspects to focus on. Scoring of the ISOS questions will need to be focused on the rationale for the suggested approach / solution and justifications presented, as there may be more than one appropriate solution / approach, so bidders should not be disadvantaged for alternative approaches that are suitably justified and explained.

4.23 At ISOS stage, bidders should be offered at least one dialogue session during which they can explore their proposals with the authority's team to assist them in responding to the ISOS document. Depending on the complexity of the ISOS and range of topics being assessed, there may be merit in two dialogue meetings with a different focus - for example, a separate session on technical aspects.

4.24 There is a risk that (where relevant) the commercial, legal, financial and technical teams each dialogue with their counterparts in silos. The authority's teams should meet at the end of each dialogue session in order to ensure that the authority's decisions are internally consistent.

4.25 Following evaluation of ISOS submissions, normally no more than 3 or 4 bidders should be invited to submit detailed solutions. Ideally, only three bidders will be invited to submit detailed solutions, given the level of work required by both bidders and the authority, which has to be balanced against the likelihood of each bidder's success.

Invitation to Submit Detailed Solutions (ISDS)

4.26 The purpose of the ISDS stage of the competitive dialogue process is to test bidders detailed proposals.

4.27 The ISDS stage requires bidders to make a detailed and fully priced response including (where applicable) their design and build proposals and operational method statements and to mark-up or respond to the Leisure Operating Contract and associated schedules issued,

to include (where relevant) the Facilities Requirements and Technical Specification, Services Specification, Payment and Performance Monitoring System, Surplus Share and Benchmarking.

- 4.28 As an alternative to providing a mark-up of the key contractual documents, one approach which can assist with streamlining the procurement/dialogue process is to use a "Legal and Contractual Issues List" which limits the areas of the draft contractual documents which may be dialogued upon and which requires bidders to respond/bid-back on certain key areas of the contract (but not to provide a full mark up of the contractual documents). A template legal and contractual issues list is indicated as an Appendix to this toolkit.
- 4.29 It is important to note that the ISDS stage is a completely new phase of the procurement process and as such none of the evaluation scores should be carried over from the ISOS. However, the principles agreed to at ISOS stage should be adhered to.
- 4.30 The ISDS documentation should follow a similar format to that for ISOS stage, with two volumes and a Volume I that is simply an updated Information Memorandum. Volume II can follow a similar format to ISOS, which aids understanding through consistency of format, but key issues to focus on at ISDS stage include:
- Evaluation criteria and weightings - detailed criteria and weightings need to be published, including associated scoring scales
 - Submission requirements - levels of detail expected, format for mark-ups, templates to be completed
 - Dialogue arrangements - further dialogue will be needed to allow bidders to refine their proposals and submit detailed solutions which meet the authority's requirements. Therefore, a clear programme of dialogue and topics should be set out in the ISDS documentation
 - Affordability - given that ISDS submissions require a fully priced response, it is important that clear affordability positions are set out in the documentation, which will assist bidders in understanding the authority's position and the balance between cost and service.
- 4.31 With regard to submission requirements at ISDS stage, a fully priced response will be required and service delivery proposals should be accompanied by detailed method statements for all key aspects of service delivery. The authority may wish to consider limiting the number of pages or words for each response or method statement. Mark-ups or responses to key documents (Leisure Operating Contract and associated schedules issued, to include the Facilities Requirements and Technical Specification, Services Specification, Payment and Performance Monitoring System, Surplus Share and Benchmarking) will allow a detailed assessment of the legal and commercial position being adopted, which can then be scored accordingly. Service method statements required could include some or all of the following:
- Proposed pricing structures
 - Proposed activity programmes
 - Proposed opening hours
 - Health and safety policy
 - Child protection policy
 - Security policy
 - Staffing structures and qualifications

- Staff training
- Catering proposals
- Cleaning
- Environmental and energy management
- Customer service including customer complaints and customer satisfaction measurement
- Sports development plan
- Health & Wellbeing development plan
- Marketing plan (including communications strategy)
- Reporting and IT systems
- Programmed and reactive maintenance, including statutory inspections and equipment maintenance
- Quality management
- Equality and diversity
- Contribution towards authority outcomes
- Event management
- Licenses and legislation
- Business continuity
- Proposed handover methodology.

4.32 Careful consideration needs to be given to requirements associated with capital developments, given the direct costs associated with developing designs / capital costs / M&E solutions etc. If capital developments are included, it is therefore recommended that, at ISDS stage, requirements are restricted to: (this may differ for refurbishment solutions, and will require consideration by the project technical advisors)

- 1:100 architectural layout drawings including floor plans and elevations, plus a location plan and a 1:500 site plan of the capital development proposals including building(s) footprint, designated areas for future development, security, landscaping, disabled provisions, signposting, parking areas, infrastructure improvements, off-site improvements, access and transport routes etc.
- Design philosophy statement including how the requirements of DDA provision etc will be met
- Total calculations on gross area, net area and zone allocation
- Evidence of compliance with Sport England Design Guidance Notes and deviation therefrom
- Method statement for design and construction
- Procurement strategy for proposed projects identifying procurement route and supply chain management
- A detailed Gantt chart programme for all the project's design, construction and commissioning phases, indicating critical paths

- A statement setting out the proposed design process to be followed and approach to planning, including a planning statement on the likelihood of securing planning permission
 - Sustainable construction proposals, a statement on the environmental impact of the components and materials used in the construction of the new or refurbished facilities and proposals on minimisation of the environmental impact
 - Proposals for compliance with Building Regulations Codes of Practice
 - Energy efficiency statements both in respect of design and subsequent operation and maintenance
 - A report on consultation with statutory authorities and undertakers on design proposals as necessary including any assumptions and associated risks as a result of information outstanding at the time of bid submission
 - Elemental capital cost build up for the capital developments following BCIS format or similar
 - Clear costings for fees, contingency sums, planning, risks, assumptions, inflation and other on-costs
 - Detailed lifecycle and maintenance costs
 - A methodology for satisfying the requirements of Construction Design Management Regulations
 - A full mark-up of the relevant Facilities Requirements and Technical Specification.
- 4.33 This remains a considerable amount of information to support any capital developments, which reinforces the need to carefully consider the number of bidders shortlisted from ISOS.
- 4.34 Following evaluation of ISDS submissions, ideally two bidders will be invited to progress to the next stage of the procurement process.

Invitation to Submit Final Tenders (ISFT)

- 4.35 Having shortlisted at ISDS stage to two bidders, a period of further dialogue may be required to refine bidders solutions and ensure that all issues pertaining to price and risk have been explored and acceptable positions adopted. Once this position is reached, the authority can close dialogue and invite final tenders. Dialogue must be formally closed before final tenders are invited.
- 4.36 The Invitation to Submit Final Tenders should be similar to the Volume II ISDS document, setting out updated information and confirming in particular the submission requirements and evaluation criteria.
- 4.37 With regard to submission requirements, these are likely to be similar to those at ISDS stage, although greater technical detail may be requested to inform evaluation of capital development proposals, such as mechanical and electrical drawings or engineers drawings.

- 4.38 To aid both parties it is recommended that the ITSFT clearly sets out the approach to be taken in terms of the level of detail to be re-submitted. Where there has been no change to a service delivery method statement for example, the bidder should provide confirmation that the ISDS version is to be evaluated. Any updated method statements should be provided that clearly identify any changes from the previous ISDS submission.
- 4.39 Further detail on the evaluation process is provided later in this chapter, whilst chapter 6 focuses on the implementation stage.

Enabling comparison of bids - Use of template response forms

- 4.40 As has been referenced a number of times in this chapter, the use of template response forms can be a useful tool in aiding evaluation of bid submissions, particularly in relation to financial information. Examples include:
- Tender price schedule
 - Operational projections template
 - Capital cost template.
- 4.41 By providing bidders with templates on which to submit their responses, it becomes more transparent to the authority what costs are included / excluded, how price changes over the 10-15 years of a contract and what assumptions have been made in relation to detailed operational business planning. It can also facilitate benchmark analysis of bid submissions, for example in relation to calculating income per visit, staff costs as a percentage of income, members per fitness station, visits per sq.m. and so on.
- 4.42 The exact format of the templates will depend on the nature of the project, but ideally should be developed in a way that allows the submissions from the ultimate preferred bidder to form part of the final contract schedules in terms of the base financial model and the basis on which future indexation is calculated and performance monitored.

Approach to evaluation and selection

- 4.43 Each of the procurement routes requires evaluation of bid submissions and selection of shortlisted parties to progress to the next stage or selection of a preferred bidder. It is therefore important to consider the various aspects associated with evaluation and selection, including:
- Development of evaluation criteria
 - Bid evaluation team selection
 - Clarification questions and clarification meetings
 - Scoring table
 - Score moderation meeting
 - Evaluation report
 - Providing feedback to bidders.

- 4.44 A detailed and clear evaluation is critical to the overall success of the project, therefore sufficient time should always be set aside for this, taking into account the need for clarification meetings, moderation meetings and reporting.
- 4.45 It is recommended that the evaluation criteria are developed and tested to ensure that the evaluation model is weighted towards the achievement of key outcomes as opposed to simply facility management.
- 4.46 Subject to the procurement route being followed, dialogue can then be focused around the required outcomes and how the contractor intends to contribute to their achievement.

Evaluation criteria and weightings

- 4.47 The evaluation criteria should reflect the priorities of the project and will need to be tested to ensure that the outcome of the evaluation will accurately reflect these priorities within the context of the weightings applied to each area.
- 4.48 There are normally two or three overarching categories as illustrated in table 4.1 - the categories will depend on whether technical / construction requirements are included in the project. The table shows an overview for a competitive dialogue process, with the associated stages. However, for a restricted process there would clearly only be one column of percentage weightings and no technical/ design element.

Table 4.1. Overarching evaluation criteria

Evaluation Criteria	ISOS Weighting	ISDS Weighting	Final Tender Weighting
Operational / Services	30%	Between 25% and 40%	Between 25% and 40%
Technical / Design (<i>only where Works are included in the contract</i>)	30%	Between 20% and 30%	Between 20% and 30%
Commercial / Price	40%	Between 35% and 50%	Between 35% and 50%
Total	100%	100%	100%

- 4.49 Of note in table 4.1 is that ranges have been provided for the later stages of the process, which allows the authority to retain some flexibility to tailor the evaluation as the scope / focus of the project becomes clearer. However, please note that specific weightings should always be published in advance of each stage.
- 4.50 Sometimes an additional overarching category is added - ‘Added Value’ - which can be useful in assessing the bid submissions against specific local criteria which do not easily form part of either core services delivery or commercial criteria.
- 4.51 Below each headline evaluation area, there will be a series of more specific evaluation criteria, which should also be disclosed as part of the procurement documentation. An

example set of criteria for operational / services aspects is noted in table 4.2. Please note that if too many criteria are included, then the overall importance of each one will be diluted.

Table 4.2. Operational / services evaluation criteria examples

Main Criteria (Level 1)	Sub Criteria(Level 2)	Weighting
	Pricing Structures	
	Opening Hours	
	Programming	
	Health and Safety Management & Security	
	Equipment	
	Staffing /TUPE arrangements	
	Catering and Vending	
	Cleaning	
	Environmental and Energy Management	
	Maintenance	
	Quality Management	
	Reporting	
	Customer Care & marketing	
	Sports Development / Health & Wellbeing plans	
	Achievement of authority outcomes	

4.52 The detail of how each of the sub-criteria will be evaluated should then be set out, for example:

Pricing Structures	<p>Does the proposed pricing structure reflect the demographic profile of users?</p> <p>Does the Bidder demonstrate innovation in its pricing? Has the Bidder identified their approach to Concessionary Pricing and the benefits of this approach to the authority?</p>
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4.53 This allows bidders to be clear on the key aspects in each area and to focus their bid submission accordingly.

4.54 Examples from a technical / construction perspective are identified in table 4.3.

Table 4.3. Technical / construction evaluation criteria examples

Main Criteria (Level 1)	Sub Criteria(Level 2)	Weighting
Technical (25%)	Design Layout	
	Design Quality	
	Design Quality of Services	
	Plans & Drawings	
	Design & Construction	
	Programming & Management	
	Planning Requirements	
	Facilities Management - Hard FM	

4.55 As noted above, each sub-criteria will need explanation to identify key aspects against which a bid submission will be evaluated.

4.56 In relation to commercial criteria, including price, table 4.4 identifies a range of potential criteria that could be evaluated against this aspect.

Table 4.4. Commercial evaluation criteria examples

Main Criteria (Level 1)	Sub Criteria(Level 2)	Weighting
Commercial (50%)	Revenue Affordability (Price)	
	Capital cost Affordability	
	Deliverability	
	Payment and Performance Monitoring System and Utilities benchmarking	
	Contractual Agreement/Legal issues	

4.57 In the example shown in table 4.4, the actual tender price is one of a small number of commercial criteria, rather than being assessed separately. There is still a clear opportunity to weight price according to its overall importance, but this approach offers flexibility to balance this with ensuring the overall submission is considered deliverable and that the legal positions adopted are reasonable.

4.58 In a restricted process, where the legal contract / risk position is set out in the documentation with no opportunity for dialogue, then these types of evaluation criteria for the commercial aspects of the bid will not be required, providing a greater focus on the tender price which is likely to represent the whole of the commercial/ price element of the evaluation.

4.59 In relation to assessing price, there are generally two options available:

- Set a specific affordability limit and then score bidders according to a published scale against this limit - for example, if the affordability limit is £250,000 pa, then a bidder

may score 5 out of 10 for achieving this position. For every additional saving of £50,000 pa offered below this level, then they could score an additional point, such that a submission with £0 management fee / subsidy would score a maximum 10 out of 10 for price

- Score the lowest price (or highest surplus) maximum marks and then reduce the score given to other bidders according to their price compared to the lowest price (or highest surplus):
 - The lowest priced bid consistent with the most economically advantageous offer which best meets the authority's requirements is awarded 100% of the evaluation score for price / affordability. All other tenders are scored a lesser amount on their financial offer on the principle of deducting a percentage point from the maximum value for each unit of value their tender is in excess of the lowest achievable bid

The units of value to be used could equate to one percentage point deduction for a specified amount that the bid is in excess of the lowest accepted bid (e.g. 1% for every £5,000)

- The Price evaluation is based upon the "standard differential" method. This assumes that the lowest acceptable bid (excluding abnormally low bids) will attract full marks. The other bids will then be ranked comparatively to that lowest acceptable bid. Bidders will be awarded all of the available marks less the percentage by which their submission is more expensive than the lowest (e.g. if the lowest acceptable bid is £100,000 and the next lowest bid £110,000 that bid would score 90% of the available marks).

- 4.60 One potential difficulty with both alternatives in option 2 is that a particularly low price may mean all other bidders score very poorly on price, which cannot then be addressed via improved service quality - there are examples where the 'winning' bid under this type of approach has actually provided a poorer level of service, but the price scoring has unduly favoured a cheaper model despite the authority's intentions to have a 60:40 or 50:50 price:quality balance.
- 4.61 However, in scenarios where the contractor may be paying the authority (a 'surplus' generating contract), then option 2 may provide a more accurate means of recognising the maximum surplus being offered.
- 4.62 If the second option for scoring price is being considered, the authority should also consider setting minimum score thresholds in relation to key service criteria, so that they are not forced to accept a submission that actually results in very poor service quality.
- 4.63 When developing the evaluation matrix it is highly recommended that a scenario testing workshop is undertaken to 'test' the outcome that the matrix would deliver when different types of hypothetical submission are scored - in this way, the authority can be confident that the results from the matrix will accurately reflect its priorities for the project.

Bid evaluation team selection

- 4.64 The period of bid evaluation requires intensive resource from both the authority and its advisors in order to review, clarify, score, moderate and select a shortlist / preferred bidder. Early in the process, consideration will need to be given to who will form the

evaluation team and what their role will be. Time then needs to be allocated in diaries to ensure sufficient resource is available at the critical times.

4.65 Clearly, the evaluation team will need to include specialist expertise in the key areas associated with service delivery, commercial aspects and, depending on the project, technical issues. As a minimum therefore, the following authority departments are likely to be involved in some or all of the evaluation:

- Leisure
- Finance
- HR
- Legal
- Property
- Planning (only for competitive dialogue)
- Procurement.

4.66 In addition, there may be specialists within the authority who are responsible for areas such as insurance, pensions, health & safety and IT, who can all contribute to specific aspects of the evaluation.

4.67 Prior to commencing any evaluation, it is recommended that the evaluation team is briefed, particularly in relation to the scoring matrix and key project issues. Also, all evaluators should seek to undertake a general review of the bid submission as well as focusing on their key areas, in order that they understand the context of the submission and how their specific element fits into the wider picture.

4.68 Authorities will need to ensure that their evaluation processes follow the evaluation methodology as set out in the tender documentation. From a practical perspective, this may mean that at least two people should score each question to ensure the evaluation is robust, reduces the potential for error / omission and enables each score to be moderated.

4.69 The normal process for the evaluation team would be:

- Initial review of bids and drafting of clarification questions
- Clarification meetings (if necessary) and review of clarification responses
- Scoring and justification by individual evaluators
- Moderation of scores and agreement of score for each criteria.

Clarification questions & meetings

4.70 As part of the initial review of the submissions, evaluators should seek to identify clarification questions relating to any areas of the bids that are not clear. These written questions can then be submitted to the bidders and form the basis of clarification meetings, where bidders are given the opportunity to respond and clarify their submissions

to the evaluation panel. Clarification meetings may not be required in all instances, depending on the nature of the questions.

- 4.71 In all cases, written responses to clarifications should also be requested, as this forms an important part of the audit trail for the evaluation process.
- 4.72 It is worth noting that the clarification process is aimed at ensuring the evaluation panel has a clear understanding of the bid submissions - it is not an opportunity for further dialogue with the bidders, albeit the clarification process can identify topics for subsequent stages of dialogue (if following the competitive dialogue route).

Scoring table

- 4.73 Each evaluation criterion should be scored against an agreed scoring table, which clearly sets out the basis for the marks awarded. An example is provided below for a 5 point scoring matrix. Depending on the authority's preference / procurement regulations, some authorities prefer a 10 point range, which provides greater opportunity to differentiate between bidders.

Table 4.5. Example 5-point scoring table

Score	Description of information received
0	No comments or information provided; complete rejection of fundamental principles of the project; meets none of the authority's basic expectations, complete misunderstanding of project brief; no innovation and no comment on the draft contract(s).
1	Unsatisfactory submission, no comments given or rejection of some fundamental principles; meets few of the authority's basic expectations; poor understanding of project brief and significant omissions from the bid; very little or no evidence of innovation; position on the draft contract(s) and financial position is unacceptable.
2	Poor submission with identifiable shortcomings - the comments made show areas of weakness and/or limited information has been provided; meets the authority's basic expectations; vague understanding of project brief; limited examples of innovation but are inappropriate; seeks significant amendment and major negotiation required on the draft contract(s).
3	Adequate/satisfactory submission - comments or information submitted is acceptable for this stage in project; meets the authority's basic expectations without offering any great advantages, adequate understanding of project brief, satisfactory evidence of innovation but is not particularly beneficial to the authority; complaint with draft contract(s) subject to minor drafting.
4	Good submission - comments made demonstrate a sound and complete approach which have the potential to fully accord with the authority's strategic objectives and requirements and/or wholly meets expectations at this stage; good understanding of project brief; some innovative solutions that will be acceptable to the authority; compliant with draft contract(s) and any project specific comments cause no appreciable

Score	Description of information received
	concerns.
5	Excellent submission - comments made demonstrate a sound and complete approach which will have the potential to meet the authority's strategic objectives and requirements in all respects; and/or exceeds expectations at this stage; thorough understanding of project brief and requirements; excellent innovative solutions which offer potential for increased capacity; efficiency and VFM; compliant with draft contract(s) and any project specific comments are advantageous

4.74 Each evaluator can then score their individual criteria against the agreed scoring table and provide narrative justification to support their scores.

4.75 It is important that the evaluators are clear that their scoring and narrative is a comparison of the bid submission to the authority's requirements - bids should not be scored on how they compare to other bids, as the aim is to appoint the bidder who best meets the authority's requirements.

4.76 A simple spreadsheet can then be used to weight the scores according to the weighting of each evaluation criteria, which will provide an overall score for the bid.

The moderation meeting

4.77 In order to agree a single score for each criterion, the authority and its advisors should hold a moderation meeting at which each evaluation criterion is discussed and a score with associated justification agreed.

4.78 A well-managed moderation meeting should result in scores against which all evaluators are confident and which have robust justification and rationale that can form the basis of the evaluation report.

Evaluation reporting

4.79 A detailed evaluation report, setting out the process that has been followed, the criteria used, the scores awarded and the narrative justification, should be prepared. This is a critical part of the audit trail for the project and should allow, for example, Members and Senior Executive colleagues, to read and understand the basis on which the preferred bidder has been selected.

4.80 The detail within the report should also be specific enough to provide the basis for feedback to the bidders.

Providing feedback to bidders

4.81 Following evaluation of final bids the authority will issue letters confirming whether each bidder has or has not been successful in the bidding process. Such correspondence should give feedback to bidders on the relative advantages and disadvantages of their bid against the successful bidder's bid.

- 4.82 Having invested a great deal of time and resource in their bid preparations, it is appropriate to provide bidders with detailed feedback on their submission if requested by the unsuccessful bidders and identify areas where their bid submissions can be improved.
- 4.83 Authorities should also consider offering bidders the opportunity for a debrief meeting at which further feedback on their submission can be provided, which will no doubt be helpful to bidders in future submissions.
- 4.84 The authority's legal advisors will be able to provide template letters for the intention to award and then subsequent contract award notifications.

*Leisure Management Contracts*³

- 4.85 As noted earlier in this chapter, the leisure management contract is clearly a critical document in the process and therefore two templates are provided as part of this toolkit:
- Template management agreement for a Leisure Operating Contract
 - Template agreement for a DBOM Contract (design, build, operate and maintain).
- 4.86 The DBOM is designed for situations where an authority wants to fund the building of new facilities which will then be operated and maintained by a leisure operator, and/or situations where there will be significant refurbishment works to existing facilities, which will then be operated and maintained by a leisure operator.
- 4.87 The operating contract is intended for use by authorities who have existing facilities which they would like to be operated and maintained (including minor refurbishment works).
- 4.88 Separate key template schedules to the contracts are included as appendices to this toolkit: the Services Specification, Payment and Performance Monitoring System, Surplus Share and Benchmarking schedules. There is a different form of each schedule depending on whether it is for use with the DBOM or Leisure Operating Contract. There is also an additional schedule for the DBOM contract containing the Facilities Requirements and Technical Specification for the building works being undertaken.
- 4.89 The key areas covered by each of the contracts are described below, along with a commentary on the issues where authorities may wish to consider taking different approaches.
- 4.90 It is always worth checking that the contract and schedules appropriately dove-tail (in terms of defined terms and legal concepts, for instance) and that they do not conflict in any areas, given that they are often developed by different personnel within the project team.
- 4.91 Both contracts are drafted on the basis of a main contractor who will then sub-contract relevant obligations (for instance works obligations to a building contractor or FM obligations to a FM contractor). The preferred bidder may use a different structure to this and so the relevant contract will need to be updated to reflect the structure of the preferred bidder, if necessary.
- 4.92 The contracts themselves are relatively detailed but reflect market and industry accepted positions that have been discussed and challenged through consultation. Therefore there should not be a need to consider and discuss all the provisions in detail during a procurement process (indeed, depending on the procurement process such discussion may not be permissible in any event). It is suggested that authorities and bidders instead focus

³ Within this section of the toolkit various clauses are discussed. These are given in italics. The initial clause reference is for the Leisure Operating Contract and the second clause reference is for the DBOM. If only one clause reference is given, this means that it is the same clause reference for both contracts, unless stated otherwise.

on key project / bidder specific issues for discussion, for instance in a similar manner to that set out in the suggested legal and contractual issues list.

Length of contract

- 4.93 The draft contracts at *Clause 3 (Commencement and Duration)* contain provisions to include a fixed length of contract, along with a possible extension.
- DBOM - Typically will last 15 years or longer
 - Leisure Operating Contract - Typically up to 10 years in length (plus a possible 5 year extension).
- 4.94 Authorities will need to consider their preferred length of contract (whilst also considering what term might be attractive to bidders) and also whether they would like the opportunity for a contract extension (and if so, for how long).

Protections and security

- 4.95 At *Clause 4 (Collateral Warranties [and Surveys] [and Guarantees])*, provision is included for the authority to be provided with a collateral warranty from each of the parties within the contractor's consortium. The clause may need to be amended to reflect the successful contractor's structure, but it is recommended that collateral warranties are obtained from each relevant party.
- 4.96 Drafting has also been included to require the contractor to provide a parent company guarantee (and a guarantee from its building contractor's parent company, in the case of the DBOM) or a bond if appropriate. Again it is recommended that the authority asks for such protections from bidders at the outset of the procurement so that they can be fully priced for as part of the bid process (if bidders are concerned that, for instance, the provision of a PCG from their building contractor may increase the price of the works so as to make them unaffordable, bidders can also be asked to price for such protections separately so that authorities can make a value for money assessment as to whether they would like such protections).
- 4.97 There are scenarios where a PCG may be inappropriate or unavailable (for instance, because the bidder does not have a parent company), and therefore consideration should also be given to asking for a performance bond as an alternative.
- 4.98 *Clause 49;58 (Authority Step-In)* allows the authority to step-in to the contract (both the DBOM and Leisure Operating Contract) and provide the Services itself if there is a serious health and safety risk, to discharge a statutory duty or because an emergency has arisen.
- 4.99 At *Clause 51;60 (Indemnities, Guarantees and Contractual Claims)*, the contractor indemnifies the authority against the standard areas of death or personal injury, damage to property and third party claims arising from the contractor's design, construction (DBOM only), operation and maintenance (DBOM and Leisure Operating Contract) of the facilities. A cap on liability for breach of statutory duty claims made against the authority has been included to reflect the positions used in other sectors. Bidders could be asked to bid back their proposals for such a cap as part of the procurement process.
- 4.100 At *Clause 59;67 (Assignment and Sub-Contracting)*, there are restrictions on the contractor's ability to assign or sub-contract the contracts without the authority's prior consent and only provided certain obligations are fulfilled. This gives the authority comfort

that it can be confident about the identity of the party it will be contracting with through the life of the contract. *Clause 60;68 (Change in Ownership)* adds a further level of comfort so that changes in the ownership of the contractor can only be made to suitable third parties.

- 4.101 At *Clauses 68;76 (Public Relations and Publicity)* and *69;77 (Advertisements)*, there are restrictions placed on the contractor about when they can communicate with the media, take photographs of the facilities and / or put up advertisements at the facilities. Generally the authority will need to give consent for any such matters. The authority may agree with the contractor to set out protocols for use in such circumstances allowing limited use of media communications etc without needing to repeatedly ask for consent.

Title

- 4.102 Both the DBOM and Leisure Operating Contract contain an authority title warranty in the format developed in schools projects (*see Clause 6.4 (Authority Title Warranty) and Schedule 13 (Title Matters)*).
- 4.103 This means that the authority (and / or its legal advisors) will need to carry out title investigations at an early state in the procurement process and disclose the results of this to bidders so that bidders can rely on them. Whilst this may create an additional expense for the authority at an early stage of the procurement, it is considered the most cost effective approach overall as it means that bidders will all be given the same information which they will need to take account of in their tender proposals and will avoid the risk of bidders not undertaking adequate title due diligence and potentially proposing unworkable solutions.
- 4.104 The authority will need to factor in the time/costs of undertaking title investigations/providing a title warranty.

Property Structure

- 4.105 In both forms of contract, a lease is ultimately used (*see Clause 8 (Nature of Land Interests)*) (though a licence is granted to the contractor during the works period of the DBOM contract). The granting of a lease means the contractor will be "in occupation" of the facilities which may allow them to claim NNDR Relief. Provisions have been included to allow contracting out of the security of tenure provisions of the Landlord and Tenant Act 1954.
- 4.106 A suggested form of "bare bones" lease for use with the DBOM and Leisure Operating Contract has been included. The lease does not contain any substantive provisions (for instance in relation to repairs/maintenance/ insurance etc). These provisions are dealt with in the main contract and the lease refers back to the main contract on such issues so as to avoid conflict between the documents.
- 4.107 Depending on the successful bidder's structure, underleases and sub-underleases may also need to be used.
- 4.108 Authorities should investigate title of their sites at an early stage to determine whether they are able to grant leases (for instance, if an authority holds a site on a leasehold interest, they may need consent to grant an underlease to a contractor or may not be able to grant a lease at all). If it is not possible for an authority to grant leases of the sites then a licence should be used.

Initial Services

- 4.109 Both the DBOM and Leisure Operating Contract allow for the authority requiring "Initial Services" before full services commence (see *Clause 9 (Initial Services)*). This could be useful where, for instance, initial services are to be provided at a facility before it is refurbished, and then full services will be provided after the refurbishment works.
- 4.110 The authority will need to consider whether initial services are needed for the nature of its project and if so, what level of services will be necessary and what the consequences will be of the contractor not providing such services to the required standard. This may require additional drafting in the Services Specification and Payment and Performance Monitoring System to reflect the initial services requirements.

Works Obligations

- 4.111 *Clauses 10 (the Works) - 17 (CDM Regulations) of the DBOM* contain industry standard provisions relating to construction obligations. They essentially set out that the contractor will be responsible for the design and construction of the works, and for making sure that the works are completed on time.
- 4.112 *Clause 19 (Monitoring and Inspection) of the DBOM* allows the authority various rights to monitor and inspect the works and *Clause 20 (Notification of Services Availability) of the DBOM* deals with the suggested process of an Independent Certifier (appointed by both parties) signing off when the works (or parts of the works) are complete.
- 4.113 If the works are delayed beyond the "Planned Services Availability Date" (i.e. the date that the contractor commits to completing the works by), then, in certain circumstances, the authority may be entitled to claim liquidated damages from the contractor. Such liquidated damages should be a genuine pre-estimate of the authority's loss in such circumstances, and could include items such as administrative costs and costs of providing alternative leisure facilities. Liquidated damages are dealt with at *Clause 21 (Delay and Supervening Unavailability) of the DBOM*. The authority will need to consider whether it would seek liquidated damages (and if so, at what level) in the event of a delay to the works.
- 4.114 If any minor works are required under a Leisure Operating Contract (for instance, limited refurbishment works) then it is suggested that these are included as an additional schedule to the Leisure Operating Contract.

Site Conditions

- 4.115 *Clause 13.2;18.2 (Site Matters)* deals with conditions of the sites and provides that the contractor is responsible for having investigated them to the extent necessary to perform its obligations under the contract. The DBOM contains more onerous provisions as a contractor carrying out works obligations should carry out more thorough and detailed investigations relating to a site than a contractor that is merely providing services.

Contamination

- 4.116 Under the DBOM, as the contractor is undertaking works obligations, it is also responsible for dealing with any contamination at the sites (on the basis that it should have investigated whether there was any contamination present as part of its site investigations) (see *Clause 18.2.2 (Site Matters) of the DBOM*).

- 4.117 However, the authority is responsible for any contamination under existing buildings which has not (and could not) have been identified in any surveys (*Clause 18.2.3 (Site Matters) of the DBOM*).
- 4.118 If any contamination arises from an off-site source, then the contractor is responsible for dealing with it given it is the party in occupation of the site and so will have a right of action to claim its costs back from an adjoining landowner or could bring an action in the authority's name (*Clause 18.2.5 (Site Matters) of the DBOM*).
- 4.119 In relation to the Leisure Operating Contract, as the contractor is not undertaking works obligations it is unlikely to be undertaking detailed investigation of the sites and it would be unreasonable to ask the contractor to take the risk of contamination at the sites (unless it is caused by the contractor). The risk therefore stays with the authority (see *Clause 13.2 (Site Matters) of the Leisure Operating Contract*).
- 4.120 However, the position remains as set out above in relation to contamination arising from an off-site source as the contractor is still the party in occupation of the site and so will have a right of action to claim its costs back from an adjoining landowner or could bring an action in the authority's name (*Clause 13.2.5 (Site Matters) of the Leisure Operating Contract*).
- 4.121 When considering risk of contamination should sit, parties should take note of the recent guidance issued by the government in their PF2 document: where it is not possible for a contractor to adequately assess contamination risk (for instance by obtaining surveys) it may be better value for money for the authority to bear or share the risk.

Consents and Planning Approvals

- 4.122 *Clauses 13.3;18.3 (Consents and Planning Approval)* make the contractor responsible for obtaining and complying with any consents and approvals necessary for the works and/or services. However, there is an acknowledgement that there may be some consents/approvals that only the authority can obtain/discharge, in which case, it is reasonable for the authority to agree to an obligation to obtain/discharge such matters.
- 4.123 At *Clause 18.3B of the DBOM* drafting has been included to deal with the situation where there is a judicial review of a planning application for the works.

Defects and Asbestos

- 4.124 This is dealt with under *Clause 13.7;18.7 (Defects and Asbestos)* of the contracts. If there are any existing facilities, because the contractor was not responsible for building them, then it is considered appropriate for the authority to take the risk of any defects or asbestos present in such existing facilities.
- 4.125 This position is, however, subject to a few caveats:
- The contractor is responsible for any defects it causes
 - If there are any condition surveys/asbestos surveys available, the contractor may be expected to take the risk of (i.e. and to price for dealing with) any defects/asbestos shown in the surveys
 - If there are any such surveys available and if the surveyor will provide a collateral warranty to the contractor, then the contractor can also be expected to take the risk

of any defects/asbestos not shown in the surveys (but which should have been shown had the survey been properly carried out). This is on the basis that the contractor should be able to pursue the negligent surveyor for costs it incurs in relation to such defects/asbestos under the collateral warranty it receives. This final limb is unlikely to be appropriate in the Leisure Operating Contract situation where the contractor should take into account any surveys in planning its lifecycle and maintenance responsibilities, but would not necessarily be expected to pursue a negligent surveyor for any deficiencies in the surveys

- In the DBOM, the contractor is responsible for any defects/asbestos in the new facilities it constructs.

4.126 The authority will need to consider the range and nature of any existing facilities and whether it already has (or will obtain) condition and/or asbestos surveys in relation to them (and also whether warranties from such surveyors will be available for the successful bidder). Authorities will need to factor in the time and costs involved in obtaining any such surveys.

Services Obligations

4.127 *Clauses 14;22 (Principal Obligations) to 20;28 (Use of the Facilities and Surplus Share) and Clauses 24;32 (Operating Manual) to 27;35 (Service Delivery Proposals)* set out industry standard provisions relating to the provision of services by the contractor. Essentially the contractor is responsible for providing the services in order to meet the services specification and comply with other relevant standards (for instance good industry practice, guidance and legislation) (see *Clause 14;22 (Principal Obligations)*).

4.128 These clauses also set out the maintenance and lifecycle responsibilities of the contractor and the rights that the authority has if the facilities are not being repaired/maintained as agreed. For further details on the lifecycle provisions, please see below.

4.129 *Clauses 18;26 (Performance Monitoring)* makes the contractor responsible for monitoring the provision of the services and also gives the authority monitoring rights as well.

4.130 *Clause 20.5;28.5 and Schedule 19 (Surplus Share)* allow for the potential sharing of any surpluses (between the authority and the contractor) generated in the project. The authority should consider whether it wishes to invite bidders to put forward proposals for sharing of surpluses and a template Surplus Share mechanism is provided in the suite of documents associated with this toolkit.

Lifecycle

4.131 Different positions on lifecycle are contained in the DBOM and Leisure Operating Contract.

4.132 *Clause 23 (Condition of the [Facility/Facilities]) of the DBOM* contains the DBOM provisions relating to lifecycle.

4.133 The DBOM provisions require to the contractor to provide an annual plan for lifecycle replacement which the contractor will then submit to the authority as part of the schedule of programmed maintenance.

4.134 The contractor then has to carry out lifecycle replacement in accordance with the lifecycle schedule but has the opportunity to suggest changes to the lifecycle schedule.

- 4.135 The authority has the right to see detailed records relating to lifecycle replacement.
- 4.136 The risk of lifecycle replacement (of all items) is therefore passed to the contractor. This means that the contractor is responsible for funding all lifecycle replacements as and when due (even if they have not budgeted to do so). Equally, if lifecycle spend comes in under budget, the contractor can keep the lifecycle "surplus".
- 4.137 This approach brings benefits to contractors as they have flexibility to manage their own lifecycle funds and is less of an administrative burden for the authority than alternative options (see separate appendix with alternative options), but the down-side is that if the contractor became insolvent the lifecycle fund would remain with its assets (which is less likely to be the case with a joint lifecycle/separate lifecycle account (see below).
- 4.138 However, there are many different lifecycle approaches that an authority may wish to take, depending on the nature of the facilities and their condition. A separate appendix to the toolkit discusses the different options.
- 4.139 In the Leisure Operating Contract the lifecycle provisions are included at *Clause 15 Condition of the [Facility/Facilities]*.
- 4.140 For this contract, consultation feedback has indicated that the most likely scenario is that it is unlikely to be appropriate and/or value for money for lifecycle risk to be passed to the successful bidder given the bidder would not have been responsible for building the facilities.
- 4.141 The suggested approach is therefore for the contractor to have responsibility for profiling when lifecycle items should be replaced, but then to alert the authority to items which the authority was responsible for as and when they were due (whether according to the lifecycle schedule or applying good industry practice). It is then for the authority to determine whether to confirm that the contractor should proceed and replace such item (at the authority's cost - such cost to be the cost set out in the lifecycle schedule if the item was planned for replacement at that time, or the cost assessed using the 'Change Protocol' (see below) if the item's renewal has been determined by the contractor applying good industry practice.)
- 4.142 If the authority does not want the item to be replaced, the authority would instruct an 'Authority Change' to deal with it.
- 4.143 All maintenance responsibility is still with the contractor. The contractor has to provide the authority with evidence that it has maintained an item that the authority is responsible for funding the replacement of before the authority is obliged to fund its replacement.
- 4.144 In both contracts there is no sharing of lifecycle surpluses, however, in light of the government's PF2 guidance, authorities may wish to include provisions allowing for such sharing. Suggested drafting to provide for this is included in an appendix to this toolkit.

Employment and Pensions provisions

- 4.145 The drafting in *Clauses 21;29 (TUPE and Employees) - 23;31 (Employees - General)* is based on the Local Partnerships drafting in these areas, as updated to allow for legislative changes and to include market standard pensions risk sharing provisions.
- 4.146 The drafting in these clauses may need to be amended to deal with the factual circumstances of the transferring staff (if any) and authorities should consider the

provisions with their advisors and HR teams in order to make sure that they are appropriate for the relevant workforce.

- 4.147 In order for bidders to be able to price accurately and for the authority's advisors to be able to update these clauses as necessary, the authority should establish at an early stage the nature and details of any transferring staff - for instance, how many are likely to transfer, where are they transferring from (authority or third party contractor), are they entitled to membership of the LGPS?
- 4.148 The pensions clauses give the contractor the option in relation to staff that are entitled to Local Government Pension Scheme ('LGPS') membership to either become an admitted body and allow the staff to join the LGPS or to provide a 'broadly comparable scheme'.
- 4.149 A key consideration in relation to pension arrangements is the allocation of funding risk when transferring employees are entitled to benefits in the LGPS. *Clauses 22;30 (Pensions)* and in particular *Clauses 22.2;30.2* represent a starting point and standard drafting to address the risk allocation between the authority and the contractor/sub-contractor if the latter is to provide LGPS benefits for employees by becoming an "Admitted Body" in the LGPS.
- 4.150 Under statute, the basic position is that the contractor is solely liable to meet all funding costs in relation to providing LGPS benefits to any employees where this is required. However, given the cost of providing such benefits, the standard market position is that contractors will attempt to limit their exposure to such costs via a number of mechanisms.
- 4.151 In light of this commercial position, *Clauses 22.2;30.2* reflect the general position that most authorities tend to reach with contractors on pensions risk allocation. Each mechanism is explained below, along with comments about the options available.

Clauses 22.2.2; 30.2.2 - The Notional Fund

- 4.152 It is likely that the contractor will ask for a "notional fund" to be created within the LGPS from the date the employees transfer to its employment. This is a mechanism to deal with past service pension benefits (i.e. relating to pensionable service before the transfer date). The mechanism notionally allocates the contractor a fund within the LGPS and ensures that as at the transfer date, the notional fund is fully funded so it is neither in surplus nor deficit. Therefore the contractor will not inherit any funding deficit or benefit from any surplus and will commence the term of the agreement on a neutral funding basis.

Clauses 22.2.3; 30.2.3 - Cap on Initial Contribution Rate

- 4.153 *Clauses 22.2.3; 30.2.3* put a cap on the contributions that the contractor has to pay from time to time to the LGPS which is usually expressed to be a percentage of payroll. This will mean that any contributions that have to be made in excess of the "Initial Contribution Rate" (defined in *Clause 22.2.3; 30.2.3* as the "Excess Amount") are then deemed to be the authority's responsibility. The Initial Contribution Rate is a percentage of payroll and is to be agreed commercially between the contractor and the authority (based on actuarial input).

Clauses 22.2.5;30.2.5 - Deficit on termination

- 4.154 It is likely that contractors will want to transfer liability for any funding deficit payment which might arise on termination of the Admission Agreement to the authority. This will mean that if there is a funding deficit in relation to the benefits of the relevant employees

when the Admission Agreement terminates, the contractor or sub-contractor will be liable to pay the amount (defined in *Clauses 22.2.5;30.2.5* as the "Exit Contribution") but will be reimbursed by the authority.

- 4.155 The effect of the "contribution cap" and "deficit reallocation" mechanisms is essentially to remove all unspecified pensions risk for the contractor and reallocate it to the authority. An authority will need to decide whether it is willing to accept this reallocation of liability in principle.
- 4.156 The current market position is that many authorities do accept this sort of risk reallocation subject to certain measures which are discussed below. Contractors usually use the argument that they should not be required to accept liability for fluctuating contributions or the risk of the contributions being insufficient to ensure that the assets in the Notional Fund meet the accrued pension liabilities at the end of the contract as they are not in control of investment or funding policy in the LGPS.
- 4.157 However, a counter argument that authorities may use is that contractors should be building contingencies for these costs into their financial models rather than seeking to reallocate the risk (though such contingencies would then be likely to be reflected in an increased management fee).
- 4.158 If the authority is prepared to accept the risks as outlined above in principle, then it may take the following measures to ensure that the risk reallocation is more reasonable, as reflected in the following clauses:

Clauses 22.2.6;30.2.6 - Costs within the contractor's control

- 4.159 It is typical for an authority to take the view that the contractor should be required to cover all costs to the extent that those costs are within the contractor's control. For example, enhancement of benefits on redundancy and early retirement or increased contributions due to pay rises above those estimated in the LGPS valuation should be covered by the contractor.

Clauses 22.2.4;30.2.4 - Impose a "collar" on the Initial Contribution Rate

- 4.160 An authority could impose a "collar" mechanism, whereby if the contribution rate reduces below a specified level (e.g. the Initial Contribution Rate), then the contractor must pay the difference (defined in *Clauses 22.2.4; 30.2.4* as the "Shortfall Amount") to the authority.
- 4.161 This will ensure that the contractor will not benefit from any reduction in contribution rates and will balance out the risk allocation as the authority has to meet any "Excess Amount" required over and above the Initial Contribution Rate.

Payment Provisions

- 4.162 The payment provisions are set out at *Clauses 36 (Payment during the Works Period) (DBOM only) and 28;37 (Payment/Payment During the Services Period)*.
- 4.163 It is anticipated that payments for the works under the DBOM will be made against the achievement of 'Milestones' (such Milestones having been certified by an Independent Certifier) and payment for the services will be made monthly in arrears.

Supervening Events

- 4.164 Various industry standard provisions are included dealing with events which might occur during the period of the contract which might impact on the provision of the works and/or services. These are set out in *Clauses 11; 16.5 (Compensation Events), 33; 42 (Termination on Force Majeure) and 46;55 (Relief Events)*.
- 4.165 Typically Performance Deductions would continue to be levied during a Relief Event and a Force Majeure Event on the basis that the authority would not be receiving a service that it was paying for.
- 4.166 However, where the project is either zero subsidy or a surplus scheme, Performance Deductions or penalty payments may not necessarily be appropriate. This is because the authority would still be receiving the surplus/not having to pay a management fee and the contractor would suffer a loss of revenue.

Change in Law

- 4.167 Standard risk sharing provisions have been included in relation to specific changes in law. The authority takes the risk in relation to 'General Changes in Law' which incur capital expenditure to follow the recommended risk sharing position under PF2.

Termination scenarios

- 4.168 *Clauses 30;39 - 44;53* contain provisions dealing with when the contracts can be terminated and the consequences of such early termination.
- 4.169 The usual termination scenarios have been included: authority voluntary termination, authority default termination, contractor default termination, termination on corrupt gifts and fraud, force majeure termination.
- 4.170 In order for the parties to have certainty over what compensation will be payable in each termination scenario, what is recoverable in each instance has been detailed, and, if retendering is appropriate, a suggested retendering process has been included.
- 4.171 Again, in order to give the parties certainty, the concept of the "Profit Payment" has been included which will be used to compensate the contractor (and sub-contractors if necessary) for a pre-agreed level of profit should the contract be terminated due to authority voluntary or authority default termination. Bidders should be asked to put forward their proposals over the level of profit they would seek to recover as part of their tender submission so that it can be assessed and evaluated.
- 4.172 There is also allowance for possible recovery by the contractor of capital sums invested in the facilities to the extent they have not been paid for or recouped during the contract up to the point of termination. Authorities will need to assess on a case by case basis whether this limb of compensation is appropriate for their project.

Changes in work/services/Authority Policies

- 4.173 At *Clauses 48; 57 (Authority and Contractor Changes) and Schedule 24 (Change Protocol)* a standard change protocol has been included to allow authorities flexibility during the term of the contract to change or vary their requirements. The change protocol also includes the option for it to be used to allow partial termination of the contract.

- 4.174 At *Clauses 29; 38 (Continuous Improvement)*, the authority also has the opportunity to propose changes (which will be processed via the Change Protocol) in light of the annual services report that the contractor prepares.

Insurance

- 4.175 The provisions in the DBOM at *Clause 61 (Insurance) and Schedule 14 (Insurances)* are drafted on the basis of the contractor maintaining all the necessary insurances for the project. Authorities will need to take insurance advice on the most appropriate insurance structure for their project.
- 4.176 The provisions in the Leisure Operating Contract at *Clause 52 (Contractor Insurances) and 53 (Authority Insurances)* are drafted on the basis that the authority retains the physical damages (buildings) insurance as experience indicates that this may be the more likely approach in leisure operating contracts.
- 4.177 If the authority decides to retain the buildings insurance, then consequential amendments may need to be considered in light of the insurances that the contractor will then retain. For instance, bidders will need to take insurance advice as to whether their insurances (in particular Business Interruption cover, in the absence of the contractor taking out the physical damages buildings insurance) will cover any Performance Deductions that are levied during a Relief Event. Also, *Clause 51;60 (Indemnities, Guarantees and Contractual Claims)* would need to be reviewed by the bidders' insurance advisors to confirm that the wording of the indemnities will still be covered by the bidders' public liability cover.
- 4.178 *Clauses 62 (Reinstatement and Change of Requirement after Insured Event) and 63 (Risks that become Uninsurable)* of the DBOM contain standard provisions regarding the reinstatement of facilities after insured damage, and the impact of insurance becoming unavailable. The equivalent provisions in the Leisure Operating Contract (*Clauses 54 and 55*) have been amended to reflect the presumption that the authority is retaining the buildings insurance, giving the authority more control over the reinstatement process.

NNDR

- 4.179 A suggested position on NNDR has been drafted in the DBOM and Leisure Operating Contract as follows:
- Authority to take the risk of a change in law relating to NNDR (assuming the bidder's position does not change) which removes these benefits
 - Authority to take the risk associated with a change in NNDR policy (for instance in relation to change of policy over use of discretionary rate relief) (assuming the bidder's position does not change)
 - Contractor to take the risk of "NNDR Failure" - e.g. where they fail to apply correctly for the relief
 - Contractor to take the risk of the relevant authority deciding that their structure is not appropriate for the reliefs they said they could achieve in their bid.
- 4.180 This position may need to be updated following implementation of changes in NNDR legislation whereby authorities will retain NNDR generated in their area, as this may have an impact on the financial calculations associated with the risk share.

Utilities

- 4.181 The authority will need to consider the latest position on the Carbon Reduction Commitment scheme and determine, in conjunction with its advisors, which party is best placed to take the risk of the scheme. The base position assumes that the contractor is responsible for these aspects (see *Clauses 10.3.2 (DBOM) 29.3 (Leisure Operating Contract)*) but depending on the legislative position at the time, this drafting may need to be updated to reflect the appropriate risk allocation and making clear which party is responsible for procuring the utilities/paying for them and complying with the Carbon Reduction Commitment etc.
- 4.182 A utilities benchmarking mechanism is provided as a template document, identifying a sharing of risk in relation to utility costs, such that the contractor is responsible for consumption risk and there is a shared position on tariff risk with the authority responsible for fluctuations in tariff - this is intended to avoid 'risk pricing' making schemes unaffordable. When setting the time periods for utility benchmarking, recognition needs to be given to the purchasing timelines of the contractor in relation to utilities.

Financial

Indexation

- 4.183 *Clause 1.4 (Indexation)* and associated definitions suggest the use of CPI as the suggested index, in line with government requirements.
- 4.184 Authorities will need to consider whether they would prefer to use RPI as the index for the project instead. Authorities should consider this point with their internal/external financial advisors.

Financial Adjustments

- 4.185 There is provision at *Clauses 61;69 (Financial Adjustments)* to allow for the updating of the financial model for the project in certain circumstances. The drafting reflects the industry standard position in this area, but it is suggested that the authority's advisors review this clause to confirm that it is appropriate for the project in question.

Late Payment of Sums

- 4.186 *Clauses 72; 80 (Interest on Late Payment)* provide for interest to be payable on sums due from one party to the other but which are paid late.

Loss of Revenue

- 4.187 *Schedule 23 (Loss of Revenue)* will list pre-agreed levels of revenue that the contractor can claim in certain scenarios. If the contractor does then make a claim for loss of revenue, the amount it can claim will be assessed by reference to the levels set out in this schedule, and will take into account any revenue actually received during the period in question. The intention behind this schedule is to give greater certainty to the parties over the levels of revenue that can be claimed and in effect it operates like a liquidated damage for both parties: it caps the authority's liability where the contractor is performing very well, but also gives the contractor a pre-agreed level of income even where the contractor is not actually achieving that. Bidders should be asked to complete this schedule as part of the procurement process so that the authority and its advisors can assess and verify each bidder's proposals.

Data and Information

- 4.188 Various standard provisions relating to the protection and use of information are contained within *Clauses 50;59 (Freedom of Information and Confidentiality)*, *58;66(Intellectual Property)*, *62;70 (Audit Access)*, *70; 78 (Contractor's Records)* and *71; 79 (Data Protection)*.
- 4.189 There is provision at *Schedule 21 (Confidential Information)* for a list of commercially sensitive contractual provisions and material to be agreed and included. Authorities are suggested to ask bidders to put forward their proposals over the content of such schedule as part of the bidding process so that authorities and their advisors can assess the likely range of information that the bidders are looking to protect.
- 4.190 Protection has also been included for the "Contractor IPR" in order to protect the business know-how and methodologies of bidders from use by competitors.

Disputes

- 4.191 *Clauses 56;64 (Dispute Resolution)* contain standard dispute resolution procedures allowing for consultation between the parties, then adjudication and finally recourse to the courts in order to resolve a dispute.

Liaison

- 4.192 *Clauses 45;54 (DBOM) (Liaison)* and *Schedule 10 (Liaison Procedure)* set out a standard liaison process to ensure regular liaison between the parties during the project.

Boiler Plate Provisions

- 4.193 Various standard terms and conditions have been included in relation to "Ordering of Goods and Services", "No Agency", "Entire Agreement", "Notices", "Severability", "Waiver", "Governing Law and Jurisdiction", "Sole Remedy", "No Double Recovery", "Counterparts" and "Capacity". It is not anticipated that these clauses would need to be amended.

Key risks to consider

- Inadequate scoping / drafting of the procurement documents could lead to loss of bidders, poor submissions or an inability to close dialogue
- Poorly considered risk position, leading to lack of value for money or loss of bidders
- Inadequate time / resource invested in evaluation, leading to poor analysis and increased risk of challenge to the decision.

Project management notes

- Production of procurement documentation will require coordinated input from the authority and its advisors, ensuring the documentation provides a consistent position on risk, identifies key evaluation criteria and submission requirements to enable appropriate bids to be received
- Dialogue with bidders will need to be planned and managed to ensure appropriate personnel are in attendance, outputs are minuted and documents updated according to agreed positions
- Internal and external resources allocated for evaluation of bid submissions and structures in place for coordination of clarification questions and scoring moderation
- Appropriate sign off structures in place for ratification of shortlists at each stage.

Checklist before continuing

- Before issuing any tender documents:
 - o Are the submission requirements clear and appropriate for the stage of the process?
 - o Are the evaluation criteria and weightings clearly identified and an associated scoring scale provided?
 - o Has sign-off of all documents been received, including legal compliance checks?
 - o Have arrangements for dialogue meetings been set out, dates identified and diaries 'booked'?
- Has the evaluation process been completed, a clear audit trail documented and bidders notified of the authority's decision?

Award & Implementation

Introduction

5.1 Once a preferred bidder is selected, there are a number of stages still to complete before the contract can be signed and service delivery commenced. This chapter covers the following issues relevant to this final stage:

- Legal procedural aspects - bidder notification letters / voluntary standstill period (although Part B services are currently excluded from the formal standstill periods under the Regulations)/ formal award letters
- Authority sign off procedures - internal sign off / Councillor approvals
- Staffing implications - TUPE / Pensions / Union recognition / Consultation
- Communications strategy
- Facility handover - building surveys / equipment inventories / lease arrangements
- Future contract monitoring.

5.2 Depending on whether there is to be a change in service provider, some of the information in this chapter may not be relevant, but all contracts should consider the inclusion of provisions that protect any handover in future - including provision of key information and documentation.

Legal procedural aspects

5.3 As mentioned briefly in section 4, the procedural aspects include:

- Intention to Award Letters - notifying all bidders of the authority's intention to appoint a preferred bidder and to commence clarification and confirmation of commitments with the successful tenderer
- Giving feedback to bidders on the relative advantages and disadvantages of their bid as against the successful bidder's bid
- Once the authority has made the decision to award the contract, the various letters to the successful/unsuccessful bidders are issued and any standstill period (if applicable) commences
- Formal publication of award, where an OJEU notice was issued
- Following confirmation of all commitments, the contract is signed by both parties.

5.4 The Intention to Award letter to the successful tenderer will need to set out the actions required to clarify and confirm commitments to enable the contract to be finalised for signature. Areas usually covered include:

- Confirmation and clarification of commitments / finalisation of the Leisure Management Contract and associated Schedules / execution of leases
- Confirmation of technical detail for any capital works, for example, covering demolition, design, engineers drawings, method statements, programme, M&E, room data sheets, identity of sub-contractors
- Development of any required sub-contracts
- Updating of the Schedules to the contract and associated appendices to reflect the agreed positions (where applicable)
- Updating of the TUPE information and mobilisation plan for staff transfer
- Provision of pre-commencement service documentation, for example:
 - 3-5-year maintenance plan and annual maintenance plan
 - 3-5-year marketing plan and annual marketing plan
 - PPM programme
 - 5-year sports development plan and annual plan and programmes
- Provision of final method statements covering, for example:

<ul style="list-style-type: none"> • Pricing • Programming • Opening hours • Health & safety • Child protection • Security • Staffing structures, qualifications & training • Catering & vending • Cleaning • Accommodation • Environmental & energy management • Customer care 	<ul style="list-style-type: none"> • Sports development • Health & Wellbeing • Marketing • Reporting • IT systems • Programmed & reactive maintenance • Quality management • Equality and diversity • Licences & legislation • Business continuity • Authority outcomes • Specialist sports surfaces.
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- Confirmation of change in revenue figures
- Provision of final version of financial model
- Agreement of participation targets
- Agreement of reporting scorecard.

5.5 This process should not result in any significant changes to the documents and is simply a cross-checking and confirmation process.

5.6 In relation to future reporting, the measurement and presentation of information should be carefully considered and the template design may need to involve key stakeholders, such as the clinical commissioning groups, in order to ensure that the data is useful and relevant and that it facilitates future investment from third parties.

Authority sign-off procedures

5.7 Each authority will have different sign-off requirements, and care should be taken to ensure that sufficient time has been built into the overall project plan to allow for reporting and decision-making. The lead-in times for committee / Council papers can often mean that 3-4 weeks or more will need to be added for ratification of officer recommendations.

Staffing implications

5.8 A key part of the process between selecting a preferred contractor and commencement of the contract is staff liaison and transfer. This process is governed by TUPE regulations but a clear handover plan should be provided by the preferred bidder, which covers staff engagement, Union consultation, legislative requirements and practical aspects associated with payroll, HR policies, training and inductions to the new employer.

5.9 It is essential that this process is managed professionally with due regard to the impact on staff and the uncertainty that a transfer of employment can result in. The authority's HR department should be in close consultation with the preferred bidder throughout this period to ensure the process is being managed appropriately.

5.10 Pensions implications may also be a factor, depending on the approach taken, as the preferred bidder may need to seek Admitted Body Status to the Local Government Pension Scheme, or staff pensions transferred to the contractor's broadly comparable pension scheme. Specific advice should be sought from specialist pensions advisors to ensure this process is managed carefully and there is transparency at all stages in relation to staff pensions. This can be a lengthy process so will need to be addressed early in the preferred bidder discussions.

Communications strategy

5.11 Ensuring all key stakeholders and customers are kept informed during the handover process will help to reduce any potential disruption and facilitate retention of customers. It is therefore recommended that a communications strategy is drawn up between the authority and the preferred bidder, setting out communication plans with the following key groups:

- Staff (as noted earlier)

- Council Members
- Clubs / existing user groups
- Existing individual customers / facility members
- Local community.

5.12 This should facilitate regular information sharing and reduce the potential for loss of customers or goodwill due to confusion / misinformation.

Facility handover arrangements

5.13 Some of the key aspects to be included in the handover planning are noted below and should form the basis of a structured handover process, with an associated project plan and schedule of meetings.

- Marketing arrangements, including PR and pre-launch activities
- Development of an asset register and equipment inventory
- Provision of building management systems information and training
- IT - transfer of electronic information; system compatibility; process for installation of any system upgrades / new systems; data protection issues
- Undertaking of site risk assessments
- Health and Safety audits / procedures, including checking all requisite certification and licences / approvals are in place
- Confirmation of normal and emergency operating procedures
- Café & vending - supplier arrangements, installation of new machines, equipment leasing
- Programming & pricing policy arrangements; confirmation of transferring bookings; confirmation of any income due to the new operator relating to pre-payments for bookings / memberships
- Confirm and set up insurance policies
- Set up utility supply arrangements
- Arrange financial systems, including cash collection etc.

5.14 In instances where the contract is transferring from one contractor to another, liaison with the incumbent contractor will be required to provide much of the information noted above relating to existing operations.

Future contract monitoring

- 5.15 Of paramount importance in ensuring the contract achieves the aspirations of the authority and the target outcomes, will be the future monitoring arrangements. Careful consideration should be given to how the contract monitoring will be resourced and the reporting arrangements to senior management and Councillors.
- 5.16 There are a number of options available, including:
- Outsourced monitoring function
 - Central in-house monitoring function
 - Monitoring within the service department.
- 5.17 Many authorities now have centralised monitoring arrangements, either in-house or outsourced, to ensure consistency of approach and quality of information. In this case, it will be important for the central team to work with the service department and contractor to agree how targets will be measured and reporting formats. The central team will then be responsible for ensuring information is reported on a timely basis and for interrogating the accuracy of the information on an ad hoc 'audit' basis. The service department will retain responsibility for interpretation of the data in many instances and for agreeing remedial strategies / future plans as necessary, given their specialist knowledge.
- 5.18 It is also likely that the authority's finance team will be involved at some stage of the process, given the need for the contractor to submit management fee invoices and calculations of any deductions for poor performance, which will require checking and approval.
- 5.19 In all cases, it is critical that sufficient time is set aside for monitoring the contract as this will promote implementation of the service plans and support overall quality of delivery. Where an authority does not currently have resources set aside for contract monitoring, consideration should be given to ring-fencing an element of any savings to fund a monitoring role.

Key risks to consider

- Lack of timely, appropriate and detailed information to bidders on decisions taken, resulting in a challenge to the decision
- Insufficient time for authority sign off procedures, resulting in a delay to contract award
- Poorly implemented handover, resulting in risk of legal action relating to staff transfers or loss of customers due to confusion / mis-information regarding future arrangements.

Project management notes

- Template letters for appointment of preferred bidder, subsequent contract award and standstill period need to be set up with required legal input
- Detailed handover methodology required, including staff transfers and contract commencement actions
- Management of handover process will require input from authority colleagues in HR, legal, property, IT and leisure teams.

Checklist before continuing

- Have all bidders been informed of contract award?
- Has the contract award been published?
- Have all handover actions been completed and the contract documents signed by both parties?
- Have the contract monitoring arrangements been finalised and formats for reporting agreed?

Other feedback

Introduction

- 6.1 In compiling this toolkit, beneficial additional comments have been received from various interested parties in the industry. Where appropriate, the comments have been included in the main body of the toolkit. However, a number of additional comments have been re-produced below in order that a balanced reflection of market views is provided and to capture additional points of interest.
- 6.2 The comments do not necessarily reflect the opinion of Sport England or the authors, but are provided to display the range of views and key issues noted by industry partners.
- All contracts should be market tested and not moved, as happens in many cases, directly from an authority into a 'local authority trust' - The only way to really test value for money and quality of the service is by going to the market
 - There is no problem with a 'mixed economy' for service delivery
 - Authorities should be considerate of the costs for contractors bidding. This is particularly the case around the legal documentation, contract mark up etc. This is a very costly area and where possible a fully agreed set of legal documents should only be required when down to the last 1 or 2 bidders or at preferred bidder stage depending on the nature of the contract (this point is reflected in the main toolkit, in relation to needing to be cognisant of bid costs, whilst ensuring procurement regulations are adhered to)
 - The Competitive Dialogue process can work well if managed correctly. However authorities need to be aware that due to the increase in the levels of activity in the market and Bidders previous experience of Competitive Dialogue processes that have been mis-managed, this may deter companies from bidding for a project where authorities are using the Competitive Dialogue process. In many cases, what an authority may think is a complex challenge is in fact relatively straightforward and does not require a Competitive Dialogue process
 - Where possible, at least one dialogue session is required. The bidders need to better understand the authority's objectives, vision and aspiration they also need to see if they are an authority they could work for in 'genuine partnership'. Similarly the authority also has the opportunity to test the bidders values and understanding of the contract
 - The contract needs to be fair, balanced and realistic and not one sided with the contractor having to cost for all the risks, some of which may never be realised. 'Fair' positions on most issues and sensible risk shares adopted is key
 - Tracker lists are critical to ensuring issues are addressed and resolved, not forgotten
 - The process should be governed by clearly stated deadlines and it would be prudent to seek the bidders input re the stated deadlines in advance of the commencement of the process. Instead of trying to enforce timelines that the authority wants to run

with, the authority should agree with bidders a realistic timeline. With a long procurement process account can be taken of national holidays and annual leave etc for both parties

- No more than 2 bidders should be invited to participate in the final stages of the process, given the costs and workload involved on both sides
- Monitoring and performance deduction mechanisms need to be thought through from a practical / operational point of view. For example, if the contract is surplus generating and a fee is being paid to the authority, then the mechanisms will need to be calibrated differently to a scenario where the authority is paying a management fee to a contractor
- Contract joint workshops, involving the project team, the contractor team, sub-contractors and the staff transferring under TUPE would be welcomed to run over, at high level, the contract, authority objectives and aspirations, investment, basically summarising the new arrangements and how each of the organisations are looking to work together in genuine partnership
- All parties need to agree the criteria, excusing clauses and the general mechanics of the Leisure Management Agreement and associated documents prior to contract commencement. Key procedures e.g. Performance Monitoring System should be reviewed on an annual basis to ensure the criteria remain relevant and challenging. Due to the dynamic nature of sport and leisure, flexibility needs to be built in to the performance system to ensure the contractor is realistically challenged to continually improve performance and service delivery
- Careful recognition should be given to the social capital provided through multi-use leisure facilities and in the provision of community leisure services. This position is distinct from that of purely sporting facilities. At community level it is difficult and often unnecessary to separate sporting outcomes from those delivered to individuals and communities which relate also to other public policy needs and outcomes - such as for public health and community cohesion
- There is a need to ensure that the welcome drive towards efficiency and simplification and standardisation of documents does not produce the unwelcome effect of encouraging a disregard of the full range of benefits which should be achieved from investment in local leisure facilities
- Bidders should have the opportunity to comment on the desired outcomes, particularly in terms of achievability
- Bidders should have access to Stakeholders to ensure their solutions address key objectives and practical needs of all interested parties.

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