



TREASURY TASKFORCE

Private Finance

POLICY STATEMENT No.4

Disclosure of Information and
Consultation with Staff and other
Interested Parties

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1 INTRODUCTION

1.1 STATUS OF TREASURY TASKFORCE POLICY STATEMENTS

1.1.1 This policy statement is the fourth in a series of papers issued by the Treasury Taskforce, addressing key policy issues arising from the implementation of the Private Finance Initiative (PFI). Each statement is endorsed by the Paymaster General and represents the definitive statement of general Government policy on a particular aspect of PFI.

1.1.2 In central government, Departments are responsible for the procurement projects taken forward under PFI and Accounting Officers retain responsibility for demonstrating that value for money has been obtained. This policy statement is intended to assist Accounting Officers in discharging their responsibilities and is advisory rather than mandatory. However, there is a presumption that Accounting Officers will want to follow it unless they have good reason for not doing so due to their value for money responsibilities.

1.2 PURPOSE OF THIS POLICY STATEMENT

1.2.1 Good handling of staff issues is an important client responsibility. Public sector clients need to be skilled in taking the commercial factors revolving around workforce issues into account during the PFI procurement process. A key requirement for managing this process properly is a well prepared strategy for the disclosure of information and consultation at various stages in the procurement process.

1.2.2 This statement provides a general framework of principles for disclosure of information and consultation with staff and other interested parties, but its main focus is recognised trade union representatives. It incorporates the arrangements for disclosure and consultation already outlined in the 'Trade Union Consultation' section of the recent Cabinet Office handbook "Better Quality Services". It also reflects the White Paper on freedom of information, entitled "Your Right to Know" (Cmnd 3818). It takes these established principles and suggests a procedure for implementing them in a PFI-specific context.

1.2.3 It is intended that the framework will be used by individual central government Departments when developing or refining their own existing detailed codes of practice. Exceptions to the approach will inevitably occur, reflecting Departmental concerns about protecting national security or preserving the integrity of custodial services, for example. Local government PFI procurement is subject to separate rules and DETR will discuss with the 4Ps what further action is needed.

1.2.4 The legal constraints within which this guidance has been drafted are set out in Annex A and these should be complied with in all relevant circumstances.

2 GENERAL PRINCIPLES

2.1 The “Code of Practice on Access to Government Information” produced by the Cabinet Office (Second Edition 1997) states that:

“the approach to release of information should in all cases be based on the assumption that information should be released... except where disclosure would not be in the public interest or would breach personal privacy or the confidences of a third party”.

2.2 To satisfy public accountability and assist in the development of PFI, public sector clients should not misuse the term “commercial confidentiality” as an excuse to withhold information. When public sector clients wish to withhold information on individual PFI projects “for reasons of commercial confidentiality”, they should only do so where disclosure would cause real harm to the legitimate commercial or legal interests of suppliers, contractors, the public sector client or any other relevant party.

2.3 Whilst the application of this principle is a matter of judgement for the public sector client, in consultation with its tenderers, material should only be withheld if the overall effect of any disclosure risks the procurement process failing to deliver the most economically efficient solution for the service tendered for, or otherwise is anti-competitive, or threatens legitimate commercial or legal interests. Judgements need to take into account both the outcome of individual competitions and longer term strategic market development.

2.4 What these guidelines do not provide is an option to refuse to make public the particular outputs to be purchased under the contract, or the general terms on which Government initially proposes or subsequently has agreed to do business.

2.5 It is suggested those issues where there remain good reasons to apply commercial confidentiality should be dealt with in clauses separable from the rest of a contract, for example, as annexes to the main agreement. Even then, as the reasons for confidentiality are likely to be short term (eg technical innovation or other intellectual property issues), the Taskforce recommends that, normally, such annexes should also be made publicly available within a limited period (as early as practicable and rarely longer than seven years from contract signature).

2.6 To be effective and timely, disclosure at any stage of the process should normally be restricted to the key information as outlined in Section 4 below. Detailed technical material relating to land title, ground conditions, detailed architectural designs or other similar technical specifications, for example, are not likely to be key documents.

2.7 Public sector clients also need to exercise care (over both content and timing) when releasing information to tenderers and others to ensure that it does not result in any improper gain or advantage (particularly when publicly quoted companies are involved).

3 OPENNESS, STAFF AND USER CONSULTATION

3.1 “Partnerships for Prosperity”, the Taskforce’s introductory document to PFI, explains that the Government is fully committed to take account of the needs of staff when considering the involvement of the private sector. The Government, therefore, places great emphasis on the management of people and consultation with recognised trade unions or staff representatives during the PFI procurement process.

3.2 The “12 Guiding Principles in Using Market Testing and Contracting Out”, published in November 1997 by the Chancellor of the Duchy of Lancaster, apply to any PFI projects that might involve staff transfers to the private sector. Within the context of openness and staff consultation, particular attention needs to be paid to Principle 9:

“Full, effective and continuous communication is a key to successful improvement and change. It should begin as soon as a review which might lead to change is mooted and it should continue afterwards to share what has been achieved. It should happen even when there may be little to report. That way, staff, and their recognised trade union representatives, can be engaged throughout and rumours can be avoided”.

3.3 To accompany the “12 Guiding Principles”, the Cabinet Office, in July 1998, issued the detailed handbook for senior public sector managers entitled “Better Quality Services”. The handbook provides detailed guidance in Chapter 3 on managing staff and supporting them through change.

3.4 While specifically aimed at situations involving market testing and contracting out, the Taskforce believes that the basic principles outlined in this chapter of the handbook apply, in general, to PFI projects involving the transfer of staff from the public to the private sector.

3.5 The recommended procedures for disclosure of information and consultation during the PFI process, described below, follow the principles outlined in the handbook. When following these procedures, Departments are reminded of the need to take care in observing the distinction between, on the one hand, consultation relevant to the procurement process and, on the other, negotiations with trade union representatives pursuant to recognition rights granted by the client entity. This statement is not intended to deal with the latter.

3.6 Where services will be used directly by the local community, departmental guidance should also address arrangements for providing information to such groups as, for example, parents of schools included in a PFI project.

4 STEPS TO BE CONSIDERED DURING PFI PROCUREMENT

This chapter should be read in conjunction with the legal advice in Annex A.

4.1 PRIOR TO AND FOLLOWING ISSUE OF OFFICIAL JOURNAL OF EUROPEAN COMMUNITIES (OJEC) NOTICE

4.1.1 It is recommended that the public sector client should take the following actions.

- Public sector clients are obliged under statute to notify recognised trade unions, or independent representatives of employees, of areas to be subjected to efficiency reviews, but not to negotiate on whether any particular activity should be subjected to review.
- With each procurement where PFI is an option, trade unions or staff representatives should be provided with a copy of the broad strategy to be used in tendering for the project and the likely timetable prior to the publication of an OJEC advertisement.
- While the nature and timing of information disclosed will reflect the public sector client's procurement and planning procedures, an initial explanation of the strategic planning and business objectives which support the case for investment and why PFI is an option should be made publicly available on request, alongside the OJEC notice or other advertisement.
- This initial statement should contain the key relevant business case information as outlined in the Taskforce's "Step by Step Guide to the Procurement Process" published in April 1998, including an assessment that the project is affordable. Whilst care should always be taken with commercially sensitive information, the Taskforce encourages procurers to be as open as possible. Although some information (eg public sector comparator or PSC) may need to be excluded at certain times to protect the competitive process and achievement of value for money, each case should be judged on its merits.

4.2 PRIOR TO PRE-QUALIFICATION SELECTION OF TENDERS

4.2.1 For projects involving large staff transfers, it is recommended that the public sector client should take the following action:

- After OJEC publication but prior to completion of the pre-qualification stage of the procurement process, public sector clients should consider whether recognised trade unions or staff representatives should be invited to submit relevant information about potential tenderers. Annex A defines the legal framework for obtaining and considering such information.

4.3 PRIOR TO SELECTION OF TENDERERS

4.3.1 For projects involving large staff transfers, it is recommended that the public sector should take the following actions:

- A copy of the Invitation to Tender (ITT) and/or, subsequently, the Invitation to Negotiate (ITN) should be made available to recognised staff representatives, including trade unions where appropriate, when issued to tenderers.
- In order to price bids properly, bidders should be provided with timely and accurate information on the numbers, composition and terms and conditions of staff who could transfer under TUPE.
- Having regard to the views of tenderers, public sector clients should consider inviting recognised trade unions or staff representatives to discuss relevant employment issues with short-listed bidders. Again, Annex A describes the legal framework within which such discussions could take place and how the issues raised can be taken into account as part of the client body's assessment of best value for money.
- Having regard to the views of tenderers, public sector clients should consider the introduction of independent observers of tender evaluation panels. Such observers would not participate in the proceedings, however. The observers could be proposed by both the private sector and recognised trade unions or staff

representatives (or jointly), although they must be selected for their independence and qualifications as their primary role would be to provide independent assurance that tender evaluation has been conducted fairly. Naturally, observers must give assurances beforehand that they will not breach commercial confidentiality.

- Where it is relevant to the delivery of the service (ie where there is a clear and direct relationship between the employment history and the contract to be let) each bidder should be requested, at formal bidding stage, to submit a statement of their recent track record in employment (eg within the past three years). Provided it is relevant, this could include TUPE application, wages and conditions, labour relations, health safety and training. To the extent permitted under EC procurement law, a bidder's employment track record as outlined above should be one of the factors taken into account when evaluating and deciding bids.

4.4 POST-CONTRACT AWARD

4.4.1 It is recommended that the public sector client should make publicly available:

- an explanation of the decision for contract award including, where one was produced, the final assumptions used in the PSC and the estimated savings from using PFI, together with the benefits of any risk transfer; and
- for general public information, an addendum to this explanation containing a plain English summary of the key elements of the contract.

4.4.2 The contractor should be consulted prior to publication to enable informed decisions to be made about what should be excluded from this final statement to protect commercial confidentiality, carefully following the principles outlined in Section 2.

5 DEFINITION OF “PUBLICLY AVAILABLE”

5.1 Individual Departments, if they have not already done so, should develop their own detailed proposals for making relevant documents publicly available, depending upon the specific size and nature of the project, number and type of interested parties and quantity of material involved. However, the Taskforce believes that, at a minimum, one copy of each relevant document should be made available:

- to recognised trade union representatives and/or other recognised interested bodies materially affected by the project;
- at the premises of staff being transferred from the public to private sector;
- where the service is to be used directly by the local community, at the main local public library for general viewing;
- in the Treasury Taskforce Library (significant projects only);
and
- in the Library of the House of Commons (final contract for significant projects only).

5.2 Further copies of released material should be provided on request. Departments may wish to consider recovering reasonable expenses (printing, photocopying, postage), although cost should not be used as an excuse to refuse requests improperly.

6 NEED FOR REVIEW

6.1 The Government's White Paper on freedom of information, "Your Right to Know", openly encourages the disclosure of relevant documents and papers. While this policy statement cannot anticipate any legislation, the Taskforce has developed its general principles in the light of the White Paper.

6.2 Departments will need to keep codes of practice under review. Initially, this process will be driven by the possible introduction and form of any new legislation on disclosure of Government information. It will also need to reflect developments in procurement case law. However, it is good practice in any case to evaluate the PFI procurement process at the end of each competition with arrangements for disclosure and consultation always one of the issues reviewed at this point.

7 FURTHER INFORMATION

7.1 Additional copies of this policy statement are available from the Public Enquiries Unit, HM Treasury, Parliament Street, London SW1P 3AG, (Tel: 0171 270 4558/4860/4870). The text of this statement is also available on the internet at: <http://www.hm-treasury.gov.uk>

7.2 Further advice regarding the PFI can be obtained from the Treasury Taskforce Private Finance Policy Help Desk, HM Treasury, Parliament Street, London SW1P 3AG, (Tel: 0171 270 5527).

ANNEX A

CONSULTING TRADE UNIONS OR STAFF REPRESENTATIVES

- a. In the initial stages of any competition, public sector clients may wish to consult recognised trade unions or staff representatives about whether they can provide the public sector entity with relevant and verifiable information on the fitness of potential tenderers to be in the field for selection for the competition. Where the EC public procurement rules apply, such fitness must be determined by the public sector client in accordance with the criteria specified for rejection of potential tenderers (see eg Regulation 14 of the Public Services Contract Regulations 1993, SI 93/3228). Relevant information will include information on criminal convictions or grave professional misconduct by a candidate which might include serious breaches of equal opportunities legislation in some circumstances.
- b. In considering any such consultation, public sector clients will need to decide whether to disclose to recognised trade unions or staff representatives the identity of those persons expressing an interest in the particular contract (taking into account any views of potential tenderers) or whether to seek information relating to the fitness of entities known to be competing more generally in the relevant market. In deciding what information to disclose, public sector clients should consider whether its disclosure would prejudice the contract award procedure or the legitimate commercial interests of the parties (see the main text of this policy statement).
- c. The decision about which potential tenderers should be invited to bid for a contract remains one for the public sector client, which must base such decisions on relevant and admissible evidence only.

STAFF CONTACT WITH TENDERERS AFTER SHORT-LISTING

- d. Public sector clients may wish to consider inviting recognised trade unions or staff representatives to meet the short-listed tenderers for PFI projects. This is particularly likely where significant staff transfers are expected.

- e. Public sector clients should not arrange such discussions with short-listed tenderers without first taking legal advice. Before reaching any decision on such meetings, public sector clients will need to consider the views of tenderers and the legal constraints which may exist for the process.
- f. When it is decided that such meetings should take place, public sector clients should also consider whether their representatives should attend.
- g. Discussions may be considered beneficial for passing information to recognised trade unions or staff representatives to keep them informed about the PFI process. Provided tenderers agree to participate, and appropriate confidentiality undertakings are entered into, public sector clients may use such meetings for this purpose if they wish.
- h. Where public sector clients wish to receive information from recognised trade unions or staff representatives as a result of the discussions, legal advice will be required about the nature of the information which it is proper for the public client to receive at the contract award stage. The EC public procurement rules impose constraints on the information which may be required from tenderers by public sector clients. They also prescribe the criteria which are to be used in reaching decisions on selection or award (see eg Regulation 14 -16, and 21 of Public Services Contract Regulations 1993, SI 93/3228). It is also unlawful to make contracts for supply of goods and services subject to a requirement for union membership, and to refuse to deal with a supplier or prospective supplier on union membership grounds (Section 144-145 of Trade Union and Labour Regulations Consolidation Act 1992).
- i. Consequently, there will need to be clear agreement between the public sector client and any staff representatives or recognised trade unions about the nature of the information which is to be passed on as a result of any meeting. Failure to do so could lead to legal challenge by tenderers if irrelevant or improper considerations are introduced into the procurement process.
- j. The public sector client will retain full responsibility for the final selection of the Preferred Bidder. While information submitted in line with any agreement as described above will be considered when a final decision is taken, award of a contract should always be made in accordance with all the evaluation criteria for determining best value for money.