

Department of Health PFU & PPP Forum

Benchmarking and market testing in NHS PFI projects

Code of Best Practice

This Code of Best Practice provides guidance and advice on good practice to NHS Trusts, Project Companies and Service Providers about to embark on benchmarking and market testing in a PFI scheme, and is intended as a supplement to contract provisions and current guidance. Whilst this Code predominantly concerns operational schemes, it will assist parties in handling schemes in the procurement phase in conjunction with SF3 Schedule 17 and HSG(97)5.

1. Aim of this document

- 1.1 The DH PFU and private sector representative bodies such as the PPP Forum encourage a wide range of qualified Service Providers to tender for market-tested services, or to provide information to support a benchmarking exercise. The market testing of services within PFI projects is normally performed by the private sector partner (the Project Company), instead of by the Trust as in other market tests. Given this different approach, it is important that Project Companies are able to demonstrate to Trusts, auditing bodies and funders that PFI market tests are performed through fair competition, that the process is properly governed and that value for money is secured. Similar concerns and principles apply to the use of benchmarking.
- 1.2 A number of early NHS PFI schemes are reaching the first date for reviewing and value testing their soft services prices (covering services such as portering, catering, domestics, laundry). These schemes pre-date the forms of Standard Form which have standard market testing provisions, and the contracts for the schemes will therefore each have their own provisions. The providers may be subcontractors, or part of the PFI consortium. Some will require benchmarking, some market testing. Even within SF contracts that have standard market testing provisions, there may be a few that have opted, for project-specific reasons, for benchmarking rather than the market testing provided for by Schedule 17, or a combination of the two. There is therefore a need for the NHS and the industry to establish a best practice standard in the actual process, which will include some practical measures which may be useful even for schemes that have adopted Schedule 17, and which will follow the provisions of that Schedule. Other schemes, where contract drafting does not reflect current provisions, will benefit from this guidance.
- 1.3 The Code of Practice cannot, and does not intend to, act to vary the provisions of an existing contract freely entered into between a Project Company and a Trust, except with the agreement of both parties and in accordance with the variation provisions of the contract. The aim of the Code is to facilitate the process of value testing, and enable parties to refer to an independent statement of best practice for guidance in this area. It builds on the advice contained in Health Service Guidelines HSG(97)5.
- 1.4 Subject to contractual provisions, the Trust takes the benefit and risk of price changes resulting from benchmarking and market testing. This reflects the fact that it is not usually value for money for bidders to price soft services risks for a full PFI contract at the outset, and that the Trust should pay the market price for its services. The aim of this Code of Practice is to set out criteria and a process for the benchmarking and/or market testing of services within PFI projects to ensure consistency of approach, transparency and objectivity (subject to contractual provisions and variations).

- 1.5 As a general principle, the benchmarking exercise and market testing should reflect the approach and mechanisms of governance existing for public sector procurement, whether or not a formal OJEU process is undertaken.

2. Common Issues

Project Management and Timetable

- 2.1 The value testing of PFI services is normally conducted by the Project Company. The actual process of market testing or benchmarking should start up to 24 months before the due contractual date, including preparatory work, eg, confirming or revisiting service specifications, identifying any future service needs or changes,. It is vital for this kind of work to be properly timetabled, both to ensure that contractual provisions are complied with, and to avoid any rushed work. The timetable should allow for scheduled meetings of decision-making Boards, including any additional Board meetings. All parties should take care not to underestimate the amount of planning, hard work, and time needed for a successful value test.
- 2.2 Where the soft fm provider is also the hard fm provider and/ or has overall management of the services as the 'fm provider', or is contracted to manage the tender process, both Project Company and the Trust will need to be satisfied that the process will be managed in an impartial way. It is also not advisable that the Project Company let the on-site hard FM management run the value testing exercise where they have the same parent company as the incumbent soft FM provider, and also where they are bidding. A level playing field is vital to ensure good quality competition, or benchmarking information.
- 2.3 A project team comprising representatives of the Project Company and the Trust should oversee the value testing exercise. The contract will usually set out the roles of the parties. The team should meet regularly and Project Company will maintain written records of decisions.
- 2.4 An agreement should be drawn up at the start on how to handle particular outcomes, eg, where there is no at the start on how to handle particular outcomes, eg, where there is no bidder, or a single bidder. A process should be agreed to be acted on if either situation arises. This will help to ensure the Trust has confidence in the Project Company's handling of such issues, and identify a way forward if the Trust is not happy with the outcome of the process¹. However, the parties should also recognise that the best way to solve such problems is by anticipating them and taking steps to prevent them arising. The agreement should therefore include work to identify possible causes of an undesirable outcome, eg, incorrect specifications or unrealistic price expectations, as well as action to handle any delay.
- 2.5 The Project Company should allocate appropriate resources to the management of the value testing process. The Trust will also be required to allocate resources to assist the Project Company in preparing the new tender specification, for site visits to respond to queries, for the evaluation process, and during any benchmarking/post market testing negotiations. Trusts may wish to consider appointing an external adviser from a commercial, audit or accounting background to assist them in the exercise.

Resources needed for value testing

- 2.6 As well as the resources needed by the Project Company indicated in para 2.4 above, the Trust should consider at an early stage – well before the timetable start indicated in section 6 – what resources it may need to support the benchmarking or market testing process. Reviewing the level of support needed by the services so far would be one useful indicator, as would the amount of

¹ The contract will determine who bears the risk if there are not enough bidders. In some cases this will be the Project Company In others it will be the Trust. It is not the intention that contracts should be varied. However, all parties should appreciate that, whatever it may say in the contract, it is in neither party's interests for there to be a lack of competitive bids.

work needed on, eg, the service specs when the service was first procured. It is vital to ensure an adequate resource for the best outcome.

Service specifications

- 2.7 An early meeting should be arranged between the parties to agree the timetable, process, specification and understanding of the contractual and information requirements, etc. It is vital that the parties reach agreement on the detailed process from the outset and sign this off at Project Company and Trust Board level.
- 2.8 The tender specification is to be agreed with the Trust in accordance with the requirements of the provisions of the Project Agreement, and adopting the standard NHS specifications and any agreed service variations. This applies no matter what market test process is used; it is vital to have a specification that has been continuously kept up to date, with any variations consolidated, and confirmed as accurate at least 12 months before the market test date. Trusts should ensure they understand that demanding a very high level of service (i.e., more than the standard NHS specifications) will result in commensurate costs, and they should be sure that they can afford such costs. Care should be taken to avoid going into a tender process with any risk of the outcome being that the Trust cannot afford the prices that emerge from it, thus wasting bidder time and money. Trusts should also avoid the opposite trap of lowering service specifications in order to make the services affordable – this may seem attractive in the short term, but it carries a long term cost in the quality of service. If derogations are considered, these must be confirmed at Board level so that the implications can be fully understood.
- 2.9 The process requires early discussion and joint agreement to update the Service Specifications to reflect current and foreseeable changes to NHS guidance, changes in law, standards, and industry best practice (to the extent not already included – many Trusts will already have many of these incorporated). Parties should start from the premise that all the current guidance and the most recent standard specifications should be included in the baseline specification, for example National Cleaning Standards and Better Hospital Food. Changes to specifications should be handled in accordance with contractual provisions, eg, Schedule 17 of SF3, para 2.1.1, allows specifications to be amended. If specifications are changed for reasons other than compliance with up to date requirements, the Trust should confirm whether it can afford any resulting higher prices before proceeding.
- 2.10 There may be a proposal to change the grouping of services to be provided. (i.e., adding in or taking out services, or grouping existing services differently). Schedule 17 indicates that services should be grouped or divided in whatever way will optimise the Trust's opportunity to obtain value for money. This will need to be agreed with the Project Company.
- 2.11 Similarly, it may be appropriate to amend the volume and activity adjusters to reflect current operational practices and usage. This should be done separately from any application of the variations process.

Employee issues

- 2.12 Employee issues should be borne in mind from the start, as TUPE issues may well arise. Even if they do not, all parties should ensure that staff are treated in accordance with Government and NHS standards and good practice. For example, staff consultation in good time should be ensured if a transfer of employment does arise. Consultation processes are to be observed and recorded, referring to current guidance as needed (eg, on bulk transfers). The Project Company should ensure that the incumbent service provider provides full and accurate information about employees when required, and that key members of staff are not redeployed, or major changes made to terms and conditions, in advance of value testing. The application of the Code of Practice on Workforce Matters should be considered, and the NHS Joint Statement on Agenda for Change. PFI guidance on handling staff transfers (the PFI manual) should be followed where appropriate, as should the Treasury guidance: Fair Deal for Staff and Fair Deal for Staff Pensions.

Sources of data

- 2.13 A 'basket' of schemes can be agreed from which price data can be sought. These should be drawn from other similar contracts. Technical advisers may have access to an appropriate range of information. The NHS' ERIC (Estates Returns Information Collection) data may also be helpful, although it is currently available at hospital level only. The aim should be to use a realistic group of data sources for the benchmarking, whether this is being used solely for a benchmarking exercise or as a 'sanity check' prior to market testing.

Contract extension

- 2.14 In market tested contracts outside the scope of PFI, it sometimes happens that, if the procurement process for the award of a new contract falls behind its timetable, the Trust seeks to extend the old contract to cover the gap. This is rarely a good idea in any circumstances: it can lead to poor service delivery by a contractor that will soon be replaced and sees no long term future working with the Trust. It therefore lacks an incentive to perform well. Contract extensions are also poor procurement practice. However, Trusts should not assume that this is even available as a fallback option in the case of a PFI contract, where there are other interests at stake, not just those of the Trust and the FM service provider. FM Contracts in a PFI scheme do not usually provide for an extension, so Trust must ensure that the risk of one being requested at the last moment is avoided. This means it is essential to keep to the timetable and to allow enough time for each stage. Again, a timeous start and proper preparation should minimise or eliminate this risk.

When to benchmark or market test

- 2.15 Both these processes are intended to result in a fair market price for the soft services being provided as part of a PFI contract. Benchmarking is a process of detailed comparison of the contract's prices against a range of prices for the same services provided elsewhere in order to establish a fair price.
- 2.16 Benchmarking and market testing are not interchangeable. However, benchmarking can precede a market test if the parties agree, and the contract allows. If the contract specifies only market testing, benchmarking should not be used as an alternative unless the contract is varied.
- 2.17 When a market testing exercise is completed, the relevant details of the new service contract should be input to the NHS ERIC system, in order to increase the amount of data available for comparison with other users. Contact details at the end of this document.

3. Core elements of benchmarking

- 3.1 This process primarily applies to pre-SF schemes, except where a scheme has opted for benchmarking for project-specific reasons.
- 3.2 There is a range of benchmarking processes set out in current contracts. Most of these suggest a mechanism by which the current service price can be compared to benchmark prices for similar services provided in similar facilities and with substantially the same contractual scope and risk profile. Gathering this 'normalised', or basket, range of prices will allow an informed negotiation to proceed.
- 3.3 An early meeting should be arranged between the parties to agree the timetable, process, specification, and understanding of the contractual and information requirements etc associated with the benchmarking process. Any revisions to the specification should be agreed 12 months prior to the review date. It is vital that that the parties reach agreement on the detailed process from the outset and sign this off at Project Company and Trust Board level. Should the service provider being assessed also be a shareholder in the Project Company conducting the exercise, the potential conflict of interest should be considered and a means for dealing with it agreed, eg, excluding the service provider from Project Company discussions.

- 3.4 In the unlikely event that the contract is unclear, agreement is required on which services to benchmark. Normally the objective is to keep the risk profile the same but parties could agree a change to reflect changing service requirements.
- 3.5 The Project Company may, in conjunction with the Service Provider(s), calculate the impact of wage and other cost pressures against the revised specification and put forward a price applicable to the next review point. The basis for these calculations should be transparent, and clear to the Trust, with the data used being explained. Such data should be comprehensive, reliable, representative of similar risk profiles in a variety of other schemes (including any suggested by the Trust), and fully capable of audit.
- 3.6 A timetable for the benchmarking process is outlined in section 7. The Trust may seek the advice of an independent expert to put forward a guide price(s) and to advise the Trust on the vfm of the price submitted by the incumbent Service Provider. Such an expert could also be resorted to if mutually agreed benchmark data is not available. Trust and the Project Company should agree on what skills an independent expert should have (eg, auditor, accountant). They may be sought from either the private or the public sector, depending on what precise skills are needed. Trusts should refer to the DH Estates and Facilities ERIC database, as a source of benchmark data for comparison. When a benchmark 'basket' has been established, the appropriate prices should be apparent; if they are not, eg, if there is a range, then the data may need to be revisited or expanded, or the price negotiated. Subject to contractual provisions, allocation of fees and other costs may need to be agreed in advance and time allowed for the process.
- 3.7 The price agreed will apply from the review date. This requirement highlights the need to ensure the timetable is constructed so as to meet this date.
- 3.8 In the event that agreement cannot be reached within the agreed timetable the parties will follow the terms of the contract.
- 3.9 Project Company is responsible for ensuring that the funders are kept informed of all aspects of the benchmarking process, including its outcome, in accordance with the relevant contractual provisions.

4. Core elements of market testing

4.1 Application of procurement process

- 4.1.1 Projects which use SF should follow the process outlined in Schedule 17 for the procurement of market testing, where the Project Company carries out the market test. Projects which pre-date SF should follow the contractual provisions laid down in their project agreements for market testing or benchmarking (whichever was adopted). The paragraphs below set out key issues to be considered.
- 4.1.2 Projects in any doubt about which process they should follow should seek legal advice.

4.2 Pre-Qualification

- 4.2.1 Pre-Qualification is valuable for the establishment of a successful tendering exercise as it confirms at an early stage the expressions of interest for the market test. Consideration should be given to whether there is likely to be sufficient bidder interest to justify this stage, but it is good practice as it ensures basic checks are carried out.
- 4.2.2 If this process is used, invitations for expressions of interest are to be advertised in relevant trade journals and other media to ensure that as wide a range of prospective bidders are given a fair opportunity to respond.

4.2.3 Interested bidders will complete a Pre-Qualification questionnaire (PQQ) that seeks to confirm in outline the capability of the organisation (and any parent company) to contract for the services. The invitation to submit a PQQ will be accompanied by an outline of the services to be tendered and key requirements of the tendering process. The PQQ will ascertain the suitability of the financial, technical and operational capability of the bidders. The Project Company will ensure that the financial covenant of prospective bidders will be equivalent to that required when the contract was first awarded.

4.2.4 PQQ responses are to be evaluated in accordance with pre-agreed criteria – sufficient time should be allowed in the timetable to develop these. The Trust should be invited to take part in the evaluation. The output of the PQQ evaluation is a shortlist of organisations that will receive an Invitation to Tender. In accordance with good procurement practice, the Project Company, acting reasonably, may exclude a bidding organisation that in its opinion would increase the risk to the Project Company, and will consider any request from the Trust that certain organisations also be excluded. Organisations that are not shortlisted should be given the opportunity of a debrief.

4.3 Invitation to Tender

4.3.1 Shortlisted bidders are to be invited to tender against an Invitation to Tender (ITT) that has been agreed with the Trust. The ITT is to define the services being tendered, the contractual arrangements to be applied to the new contract including the payment mechanism, requirements for the management of staff transfers and the commercial opportunities available so that bidders can tender quality services that reflect value for money. The obligations on the Service Provider must be clearly spelt out.

4.3.2 A timetable needs to be in place to enable prospective tenderers sufficient time to visit the site, review the documentation and seek clarity or additional information on areas of uncertainty.

4.3.3 Tenders are to include a certificate of collusion/canvassing from each bidding organisation. Where further similar declarations are required under the Project Agreement, they are to be completed and recorded.

4.4 Evaluation

4.4.1 The process for evaluation is to be performed in accordance with the requirements of the Project Agreement and an appropriate evaluation team established prior to receipt of bids, including any variant bids.

4.4.2 Evaluation criteria are to be objective and established prior to the opening of bids. The evaluation panel will be led by the Project Company and will include Trust representatives if required by the Project Agreement. All scorings and decisions are to be recorded and made available for audit by the Trust.

4.5 Award

4.5.1 Notification of the successful bid and its price is to be performed in accordance with the Project Agreement.

4.5.2 Once a preferred bidder has been selected, any necessary further discussions will take place to clarify and finalise the terms of the contract. Project Company will be responsible for drafting any changes to the fm subcontracts and obtaining signed parent company guarantees or other acceptable security, collateral deeds, credit committee approval and approvals from rating agencies, funders' technical advisers and insurers.

4.5.3 Unsuccessful bidders are to be given the opportunity to receive a debrief on their bid; this is regarded as good practice.

4.6 Contract commencement

- 4.6.1 Contract commencement is to be managed to ensure the successful transfer of any staff.
- 4.6.2 If there are accrued Service Provider contract penalty points at the start of a new contract, how these are handled should be in line with the Project Agreement. As a general principle, the possibility of resetting to nil should apply only at subcontract level, and not to the incumbent contractor if they win the contract. There is no automatic wipe-clean at Project Company level. (See SF3, footnote no 147.)

5. Involvement of Key Parties

- 5.1 The Project Company is to ensure full and effective communication with all relevant parties during the market testing process.
- 5.2 The Trust will comply with its obligations under the Project Agreement.
- 5.3 Incumbent Service Providers are to co-operate with the Project Company in the collation of information required for tendering including staff transfer information.
- 5.4 Should the contract be awarded to a new Service Provider, the incumbent provider is to co-operate with the new provider and the Project Company to ensure a smooth transfer of services.

6. Ensuring fair competition

- 6.1 Effective competition is essential for the performance of a successful market test. Project Companies and Service Provider organisations are encouraged to seek to ensure that fair and effective competition is maintained within PFI market testing exercises.
- 6.2 The Project Company and the Trust should consider whether any measures need to be taken to ensure that appropriately qualified bidders are attracted. This should be done at the start of the benchmarking/market testing process and not as a reaction to poor response.
- 6.3 The Trust, the Project Company and any incumbent Service Providers will liaise and cooperate in the run up to market testing. The Project Company and bidding Service Provider organisations are not to collude or canvas at any time during the process. Care should be taken to ensure that appropriate 'chinese walls' are kept, and consideration given to the use of external advisers if necessary.
- 6.4 Shareholders who operate under the same parent company as a Service Provider will normally be precluded from any involvement in the market test process involving that Service Provider by the terms of the shareholder agreement or by arrangements set in place by Project Company.
- 6.5 The Project Company is to ensure that market testing exercises are advertised sufficiently widely using established trade journals and other media.
- 6.6 Project Company will need to ensure that any benefit of prepayments made to the incumbent Service Provider that relate to periods beyond the market testing point are taken into account in ensuring fair competition.

7. Outline timetable

Phase	Action	Time from market test date (months)
Approach to testing	Decide Market Test and or benchmarking with the Trust	24m
Preparation	Agree a clear project outline, timetable and key responsibilities, approved at Board level.	
	Update service specifications to reflect current service . Note that service variations should be planned and completed before the market test benchmarking process.	
	Review key movements in service economics and expectations of market testing outcomes with Client.	
	Identify service activity, staff transfer and specification information for provision by incumbent Service Provider.	
Benchmarking Process When Preceding Market Test	<ul style="list-style-type: none"> Identify services to be benchmarked Changes to service specification Service Provider submits revised price to Project Co allowing for wage and other cost pressures Project Co submits revised price to the Trust Trust reviews price against guide price Final price agreed and relevant approvals obtained from funders 	12m
Confirm key requirements for market testing.	<ul style="list-style-type: none"> Changes to service specification Service groupings to be tendered Core and variant bid options Trust HR for ROE staff [standard guidance applies here] Shortlisting & selection processes Evaluation process Procedure should too few bidders compete Timetable for market testing process Mechanism for adjustment of Unitary Fee 	
	Confirm PFI collateral agreements that new provider will need to accept in addition to Service Contract.	
Pre Qualification	Advertise Pre-qualification	12m
	Send out Pre Qualification Questionnaires	
	Pre Qualification Questionnaires submission date	
	Evaluate and announce Shortlist	

Finalise tender specification	All parties sign off finalised tender specification. Build tender document pack	9m
Tender	Send Invitation to Tender to shortlisted bidders	9m
	TENDER SUBMISSION DEADLINE	
	Tender evaluation	
	Announcement of Preferred Provider	4m
Mobilisation	Arrange for approvals of Credit Committee and others if there is a new service provider	4m
	Financial Close	
	Commence staff transfer consultations minimum of 90 days before commencement	0m
	Service handover/ commencement	
	Contract Market Test Date	
	Adjust Unitary Fee to reflect new service	+1m

8. Key Issues

The following table summarises the key issues which are drawn from the experiences of Trusts and Project Companies to date.

Stage	Issue	Measures
Preparation	Clarity of process.	From the outset, all parties are agreed upon the steps of benchmarking and market testing, the actions to be undertaken, the handling process for different outcomes, and the timetable.
Project management	Keep to the timetable	Be robust in ensuring that all parties meet their obligations and actions, and share ownership of the timetable. Ensure that all necessary stages and actions, eg, board approvals, are scheduled.
Benchmarking	Identify a guide price	Information is gathered to allow meaningful comparison of prices.
Pre Qualification	Generate FM provider interest.	Prepare thoroughly, eg, identify appropriate advertising, to ensure sufficient provider interest to achieve effective competition.
Evaluation	Demonstrate fair competition and open governance.	Ensure that time is given to a thorough examination and that documentation meets the audit requirements.
Award of contract	Effective governance and management of transfer.	Services are properly delivered during the transition and contractual changes are formally signed off.
Adjust Unitary Fee	Amend payments.	Confirm approval mechanism for price change with Client.

References

Health Services Guidelines (97)5

Schedule 17 of Standard Form of Contract version 3 – Department of Health

Chapter 14 of Standardisation of PFI Contracts (SOPC) – HM Treasury

HM Treasury A Fair Deal for Staff and A Fair Deal for Staff Pensions

NHS PFI manual chapter on staff issues, as updated in PFI Newsletter September 2004

Contacts

NHS ERIC – Dennis Bastow – 0113 254 5531

- Paul Aitchison DH PFU – 020 7633 4122 (FM queries)
- Paul Townsend – DH PFU – 0113 254 5194 (legal queries, eg, SF3)
- Susan Peak – DH PFU – 0113 254 5305 (general guidance queries)