SCOTTISH HOSPITALS INQUIRY

Provisional Position Paper 3

The Procurement Process for the Royal Hospital for Children and Young People and Department of Clinical Neurosciences

Volume 1: The Period up to the Close of Competitive Dialogue

Purpose of the Paper

This Provisional Position Paper has been produced to assist the Chair in addressing the terms of reference. It outlines the Inquiry Team's understanding of the procurement process for the award of the contract for the Royal Hospital for Children and Young People and Department of Clinical Neurosciences (RHCYP/DCN) project (the Project). Volume 1 addresses the period from the commencement of the procurement exercise up to the close of competitive dialogue. Volume 2 will address the period from the close of competitive dialogue to the conclusion of the contract. Gaps in the Inquiry Team's understanding are also identified in both volumes. These matters will require to be explored in greater detail at the hearing set to commence on 24 April 2023. Further papers have been produced in relation to the development of the Reference Design and the Environmental Matrix.

An earlier draft of this paper was circulated to Core Participants (CP) for consideration and comment. Those comments have been considered by the Inquiry Team and taken into account in finalising this paper.

In due course, the Chair is likely to be invited by the Inquiry Team to make findings in fact based on the content of this paper. The Inquiry Team does not presently intend to lead further detailed evidence on the matters outlined in it, except where there are gaps in the Inquiry's understanding of the procurement exercise. However, it is inevitable that some of the matters covered in the paper will be touched upon to a greater or lesser extent in the hearing set to commence on 24 April 2023. In addition, it is open to any CP – through evidence or submissions – to seek to correct and/or contradict it. It is therefore possible that the Inquiry's understanding of matters set out in the paper may change, and so the position set out in this paper remains provisional. If it is the case that the Inquiry's understanding does change significantly, a revised edition of this paper may be published in due course.

Contents

1. Introduction & Overview of the Procurement Process

1.1 Following the approval of the Outline Business Case for the Project, NHS Lothian (NHSL) required to conduct a procurement exercise for the Project. The key stages in the procurement process were as follows:

(i) Publication of the Contract Notice – on 5 December 2012
The publication of the contract notice in the Official Journal of the European Union signalled the start of the procurement process. It informed interested parties of the procedure that would be adopted, the value of the contract to be awarded and the procedures that would be adopted for the award of the contract. It stated that variant bids would not be accepted. The estimated value of the contract opportunity (excluding VAT) was between £140,000,000 and £165,000,000.

(ii) Information Memorandum and Pre-qualification questionnaire – 5 December 2012.
The Information Memorandum (IM) and Pre-Qualification Questionnaire sought to identify prospective tenderers to invite to participate in dialogue. NHSL stated in the IM that its vision was to create a world-class facility. It confirmed that no variant bids would be accepted.

(iii) Invitation to Participate in Dialogue (ITPD) – 12 March 2013
The ITPD set out more detail on the procurement process and the procedure for assessing the most economically advantageous tender. NHSL's requirements were detailed in the ITPD.

(iv) Competitive dialogue procedure – 12 March 2013 – 13 December 2013
The ITPD set out how the competitive dialogue procedure would work. In short, a series of dialogue meetings would take place with tenderers

to discuss the development of their proposals before NHSL invited final tenders to be submitted.

(v) Invitation to Submit Final Tenders – 16 December 2013
NHSL concluded the competitive dialogue stage on 13 December 2013 and invited the submission of final tenders on 16 December 2012 by issuing a letter to bidders along with a document entitled 'Invitation to Submit Final Tenders' (ISFT) volumes 1 to 3. On 13 January 2014, final tenders were submitted by three tenderers.

(vi) Assessment of tenders and identification of Preferred Bidder – 5 March 2014
NHSL required to assess the tenders against the published criteria to ascertain the most economically advantageous tenderer. A preferred bidder was identified. No formal contract was awarded or concluded at this stage.

(vii) Publication of the Contract Award Decision – 25 March 2015
NHSL published a notice confirming the contract award. IHS Lothian Limited (IHSL) was the economic operator awarded the contract. The value of the contract was £150,014,000.

(viii) Conclusion of Contract and Financial Close – 12 to 13 February 2015
The contract was formally concluded between NHSL and IHSL.

2. Legal Principles

2.1 NHSL required to conduct the procurement exercise for the RHCYP/DCN in compliance with the Public Contracts (Scotland) Regulations 2012 (the 2012 Regulations). That was because the value of the proposed public contract was above the relevant financial threshold for the 2012 Regulations to be engaged.

2.2 The 2012 Regulations consolidated Scots law in relation to public procurement. They gave effect to: Directive 2004/18/EC of the European Parliament and Council of 31st March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services; Directive 89/665/EEC of 21st December 1989 on the co-ordination of the laws, regulation and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended; and Directive 2007/66/EC of the European Parliament and Council of 11th December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

2.3 The 2012 Regulations sought to ensure open and fair competition for public contracts. The 2012 Regulations set out the procedures to be followed at each stage of a procurement process from the publication of a contract notice (the formal start of the process) through to the publication of the contract award notice (formally concluding the process and stating the party that was to be awarded the contract opportunity).

2.4 Regulation 4(3) of the 2012 Regulations required a contracting authority, at all stages of the procurement exercise, to:

(a) treat economic operators equally and without discrimination; and

(b) act in a transparent and proportionate manner.

2.5 For example, documents issued to prospective tenderers required to be drafted in a manner that would allow for uniform interpretation. Otherwise, the documentation would lack transparency. The courts adopt an objective standard when interpreting procurement documents. The key issue is how the document would be interpreted by the “reasonably well informed and normally diligent tenderer” (the RWIND Tenderer) (Healthcare at Home Ltd v Common Services Agency 2014 SC (UKSC) 247). The documentation must be sufficiently clear to permit of uniform interpretation by all RWIND tenderers.

2.6 The 2012 Regulations contained a range of options in terms of procedure. These included the 'open procedure', 'restricted procedure', 'negotiated procedure' and 'competitive dialogue procedure'. For 'particularly complex contracts', where a contracting authority considered that the use of the open or restricted procedure would not allow for the award of the contract, the contracting authority could use the 'competitive dialogue procedure'.

2.7 A 'particularly complex contract' was defined in regulation 18(1) as meaning a contract:

> "…where a contracting authority is not objectively able to –
>
> (a) define the technical means…capable of satisfying its needs or objectives; or
> (b) specify either the legal or financial make-up of a project or both"

2.8 The contracting authority required to ensure that the number of economic operators invited to participate in the dialogue was sufficient to ensure genuine competition (Regulation 18(13)).

2.9 The 2012 Regulations provided that during the competitive dialogue procedure, a contracting authority:

> "(a) may discuss all aspects of the contract with the participants selected;
>
> (b) must ensure equality of treatment among all participants and, in particular, must not provide information in a discriminatory manner which may give some participants an advantage over others; and
>
> (c) must not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement.
>
> (Regulation 18(22))"

2.10 The contracting authority was entitled to conduct dialogue in successive stages. The contracting authority was also entitled to continue the competitive dialogue procedure until it could identify one or more solutions, if necessary, after comparing them, capable of meeting its needs (Regulation 18(25)).

2.11 In terms of regulation 18(26) of the 2012 Regulations, when the contracting authority declared that the dialogue stage was concluded, it required to:

(a) inform each participant that the dialogue had concluded;

(b) request each participant to submit a final tender containing all the elements required and necessary for the performance of the project on the basis of any solution presented and specified during the dialogue; and

(c) specify in the 'invitation to submit a tender' the final date for the receipt of tenders.

2.12 The contracting authority was permitted to make a request for a participant to clarify, specify or fine-tune a tender referred to in regulation 18(26)(b). However, such clarification, specification, fine-tuning or additional information could not involve changes to the basic features of the tender if those variations were likely to distort competition or have a discriminatory effect (Regulation 18(27)).

2.13 The contracting authority required to assess the tenders received on the basis of the award criteria specified in the contract notice, or descriptive document, and required to award the contract to the participant that submitted the most economically advantageous tender (Regulation 18(28)).

2.14 The contracting authority was entitled to request the participant identified as having submitted the most economically advantageous tender to clarify aspects of that tender, or confirm commitments contained in the tender, provided that any such request did not have the effect of modifying substantial aspects of the tender and did not risk distorting competition or causing discrimination (Regulation 18(29)).

2.15 The contracting authority could specify that payments were to be made to a participant in respect of the participant's expenses incurred in participating in the competitive dialogue procedure (Regulation 18(30). However, payment was optional rather than mandatory.

2.16 In terms of regulation 31, a contracting authority which awarded a public contract is required, no later than 48 days after the award, to send to the Official Journal of the European Union a notice, in the form of the contract award notice in Annex III to Commission Regulation (EC) No. 1564/2005 including the information therein specified.

2.17 A contracting authority is also required to inform any economic operator that submitted a tender, of its decision in relation to the award of the contract by way of a notice in writing (Regulation 32). The notice is required to include:

"(a) the criteria for the award of the contract;

(b) where practicable, the score obtained by–

(i) the economic operator receiving the notice; and

(ii) the economic operator to be awarded the contract;

(c) the name of the economic operator to be awarded the contract;

(d) in the case of an unsuccessful tenderer, a summary of the reasons why the tenderer was unsuccessful;

(e) in the case of an unsuccessful tenderer, the characteristics and relative advantages of the successful tender; and

(f) a precise statement of the standstill period that would apply before the award of the contract."

2.18 The 2012 Regulations imposed a standstill period before a contract could be awarded. A contracting authority required to allow the relevant standstill period to elapse before formally concluding any contract.

2.19 The obligations imposed on a contracting authority by the 2012 Regulations mirrored underlying principles of European law. Procurement exercises, with the potential for cross-border interest, had to comply with Community obligations in addition to the 2012 Regulations. These obligations include transparency, objectivity, proportionality and non-discrimination (Henry Brothers (Magherafelt) & Others v Department for Education for Northern Ireland [2007] NIQB 116).

2.20 The obligations imposed on a contracting authority do not end at the conclusion of the contract. Any proposed 'material' change to an awarded contract could trigger the need for a new procurement exercise to be conducted (Pressetext Nachrichtenagenteur [2008] ECR I-4401 (hereinafter "Pressetext"). A proposed change will be material if it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted (Wall (C-91/08, 13 April 2010), at paragraphs 37-38). A change will be material if it extends a contract to include the provision of services that were not initially covered in the procurement exercise or if the change alters the economic balance of the contract in favour of a contractor in a manner not provided for in the original contract (Pressetext, paragraph 37).

3. Roles in the Project

3.1 The governance arrangements in respect of reporting structure, oversight and assurance, and project team structure, changed at various stages of the project. The key roles during the procurement phase following Outline Business Case approval are set out below.

3.2 NHSL was the contracting authority for the purposes of the 2012 Regulations. It was the 'client/owner' with overall responsibility for the procurement of the Project. The project governance arrangements agreed up to the appointment of the preferred bidder were set out in a paper for the Royal Hospital for Sick Children (RHSC) and DCN Re-provision Project Steering Board on 14 December 2012, which was noted with amendments. The Investment

Decision-Maker (IDM) was the Board of NHSL, which was ultimately accountable for the project. The Board delegated oversight of the Project to the Finance and Performance Review Committee (F&PRC), which changed its name to the Finance and Resources Committee (F&RC) in December 2012. NHSL's director of finance was the 'Project Owner'. The 'Project Owner' had the executive responsibility for decision making relating to the Project. The F&PRC established a Project Steering Board (PSB), chaired by the Project Owner.

3.3 The PSB's remit was:

- To assist the Project Owner and Project Director in the decision-making process for issues relating to the project
- To support the Project Owner and Project Director in preparing submissions to the F&RC, to satisfy that Committee's assurance needs on governance and internal control and monitoring of key performance milestones
- To serve as the Capital Management Group, with delegated authority to approve capital enabling works for the Project up to £250,000, and will be the first place to review schemes higher than £250,000
- To be the arbiter of matters arising from the implementation of the Project Design and the Strategic Delivery Programme

3.4 PSB membership included:

- Project Owner (chair)
- Project Director
- Medical Director
- Non-executive member(s) of the Board of NHSL
- A representative from the service

- Project Clinical Director
- Director of Capital Planning and Projects
- Associate Director of Finance
- Project Operational Lead
- Communications Manager
- A representative from the Lothian Partnership Forum
- A representative from the South-East & Tayside Regional Planning Group (SEAT)
- A representative from the Scottish Government
- A representative from the Scottish Futures Trust

3.5 NHSL's technical advisors were Mott MacDonald (MM). They were appointed in terms of a contract signed on 13 June 2011 and 11 October 2011, with a service commencement date of 22 March 2011.

3.6 As technical advisor, MM advised NHSL on how to set out the technical specifications for construction works, prepared all the technical schedules and drafted the invitation to participate in dialogue (ITPD). MM drafted the documents with input from MacRoberts and Ernst & Young (NHS Lothian's legal and commercial and financial advisers respectively). Thomson Gray, acting through MM, were cost consultants.

3.7 This was not MM's first involvement in the wider project for a new children's hospital. MM had been involved at an earlier stage when the project was to be capital funded. MM was originally the New Engineering Contract (NEC) Supervisor appointed under the under Frameworks Scotland agreement. That appointment was terminated when the project switched to being funded through a Non-Profit Distributing model (NPD), and MM was reappointed through a different procurement route, the OGC Catalyst framework agreement for Multi-Disciplinary Services. According to a High Level Review

of Project Arrangements conducted by PWC, MM's previous involvement in the project was a key reason for their re-appointment for the role.

3.8 MM engaged with NHSL to appoint a number of sub-contractors, also with previous experience of the project. On 10 May 2011, Davis Langdon was appointed by MM as a sub-consultant with a project management and technical advisory role. MM and Davis Langdon appointed a Reference Design Team made up of sub-contractors, with a member from NHSL taking a project interface role.

3.9 According to a Project Execution Plan, dated September 2011, NHSL's Project Director led the Project Team, made up of the NHSL Project Delivery Team and the Advisory Team. The Project Director was supported by the Commission Director and Commission Manager from MM and Lead Project Manager from Davis Langdon. Together they made up the Project Management Executive. NHSL's delivery team worked with advisors on a number of groups and workstreams, including the Business Case Task Group, and the Procurement, Commercial, Design and Construction and Facilities Management workstreams.

3.10 The Project was to be funded by way of a Non-Profit Distributing model (NPD). Scottish Futures Trust (SFT) was established as a national centre of expertise in infrastructure procurement. SFT provided assistance and expertise in relation to the management of the NPD programme. SFT had a dual role in the project: a 'support' role to provide advice to NHSL regarding NPD procurement; and an 'oversight' role.

3.11 SFT sat on the Project Steering Board and attended meetings of the commercial sub-group and procurement workstream of the Project.

3.12 SFT also sought to ensure value for money for the Scottish Government, by carrying out Key Stage Reviews (KSRs) for the Project. In addition, SFT provided input to SG's Capital Investment Group (CIG) during the approval process for the Outline Business Case and Full Business Case for the Project.

3.13 SFT sat on the Infrastructure Investment Board (IIB), which has an oversight role over all infrastructure procurement in Scotland. SFT's oversight role extended to the terms of the standard NPD project agreement and the financing terms agreed with the preferred bidder. NHSL raised operational matters directly with SFT and, if required, through NHSL's governance structures, such as at the Project Steering Board where senior representatives of SFT were present.

3.14 Scottish Government Health Directorate (SGHD) was the government sponsor department for the Project. SGHD has ultimate responsibility for health services in Scotland. SGHD made the decision on how the project was to be funded, namely by way of an NPD model rather than a capital model. It approved the business cases and provided the funding for the RHCYP/DCN Project.

3.15 The Scottish Capital Investment Manual (SCIM) sets out the procurement process to be followed for schemes procured under Public Private Partnerships (PPPs) or the NPD model in the NHS in Scotland. It includes guidance on the business case process. SFT was involved in revising the 2009 version of the SCIM Public Private Partnership (PPP) Guide to capture NPD-specific requirements.

3.16 The CIG reviewed all business case stages, including the outline business case and full business case, to recommend approval. Approval would be issued by the Chief Executive, Director General or Ministers of the SGHD. As part of their consideration of the business cases, CIG used Scottish Futures Trust's KSRs and other special input. The chair of the CIG was the Scottish Government Deputy Director (Capital Planning and Asset Management) within the Health and Social Care Directorates.

3.17 While the Scottish Government had responsibility for financing the Project, the Inquiry Team understands that it was NHSL that made the operational decisions in relation to the procurement phase of the Project.

3.18 Health Facilities Scotland (HFS) is a division of NHS National Services Scotland. It is the NHS' centre of expertise on technical aspects of facilities and the healthcare built environment. HFS is responsible for developing, publishing and maintaining technical standards. HFS managed the Frameworks Scotland programme under which the RHSC re-provision project was originally developed prior to the switch to NPD funding. Following this switch, HFS did not have a direct role in the procurement process for the RHCYP/DCN.

3.19 HFS could also be called upon, on an ad hoc basis, to advise on specific issues. For example, any queries related to published guidance such as Scottish Health Technical Memorandums (SHTMs).

3.20 In 2011, HFS was asked to comment on an Independent Design Review commissioned by SFT. The Independent Design Review undertaken by Atkins Consultants Ltd (the Atkins Report) assessed 'the capacity of the project to deliver value for money by meeting the strategic aims of the programme; by making best use of space and opportunities for maximising sharing with other assets; and by minimising the whole-life costs,' and did not focus on or contain information relating to the technical aspects of engineering systems. The Inquiry Team understands that HFS was not called upon to advise on, or review, technical information relating to the ventilation system for the RHCYP/DCN prior to a preferred bidder being identified by NHSL.

4. Project Oversight and Assurance

4.1 Following the switch to the NPD model, SFT had a significant role in project assurance, by carrying out 'Key Stage Reviews'. Each review was an assessment of whether the project was suitably developed in terms of 'Project Readiness'; 'Affordability'; 'Value for Money'; and 'Commercial Robustness'.

4.2 The KSR process had operated for PPP projects in Scotland prior to the establishment of SFT by Partnerships UK. Partnerships UK was set up in 2000 to succeed the Treasury Taskforce. The KSR process superseded the Gateway Review procedure for NPD Projects.

4.3 Scottish Government raised the issue of whether there was a potential conflict between SFT's advisory role on the Project Board and its role in project assurance/review.

4.4 The potential conflict was addressed within SFT by separating the role of providing advice on the Project Board and the role of undertaking project assurance through KSRs. SFT's role was clarified by Peter Reekie and Mike Baxter at the Project Steering Board on 25 January 2013.

4.5 SFT's role is set out in a number of documents including:

i. letter from the Scottish Government to the NHS Board Chief Executives dated 22 March 2011.

ii. letter from Peter Reekie on behalf of SFT, to Jackie Sansbury, of NHSL, dated 1 June 2011.

iii. email exchange between Barry White (SFT Chief Executive) and James Barbour (Chief Executive of NHSL) on 22 July 2011.

iv. document entitled 'Role of SFT in Project Delivery – RHSC/DCN Project' dated 21 July 2011.

v. SFT guidance, 'Validation of Revenue Funded Projects, the Key Stage Review Process', December 2011

vi. SFT document titled 'Project Assurance', May 2013.

4.6 'Project Assurance' (document vi above) outlined how SFT would undertake the KSR process:

"7. SFT Resourcing of KSRs

…KSRs provide a formal checklist for project teams to consider in relation to their project and also provide a benchmarking opportunity to test the readiness of projects in advance of key milestones in the procurement process. They are designed to require the reviewer, as well as the reviewee, to consider whether the project teams: a) have sufficient clarity

over the requirements of the competitive dialogue process, b) have the necessary information and resources available for the tender process to be run efficiently and c) are satisfied that the project will produce a good value for money outcome. In order to ensure a degree of separation between the immediate project team and project sponsoring department and to incorporate external commercial expertise…

…SFT resources KSRs by assembling a small team internally to undertake each review. These review teams normally consist of individuals not directly involved with the specific project. This approach ensures that KSRs are carried out with no external cost to SFT or the project sponsor. In addition, in line with SFT's evolving approach to supporting the revenue funded investment programme the approach to carrying out validation was remodelled during 2011 to remove the burden on project teams in providing additional background information together with completed KSR checklists to reviewers unfamiliar with the specific circumstances of each project. These KSR checklists are now completed by the relevant SFT staff member as part of his or her ongoing project support role. This reduces the overall delay impact of reviews and ensures that the review process is integrated into the overall project development. It also allows relevant aspects of the review to be considered on an ongoing basis.

In order to preserve the integrity of independent assurance each KSR report is separately reviewed and signed off by a member of the SFT senior management team unconnected with the project. Consequently, the KSR pro-forma checklists have been updated and relevant guidance made available to project teams as well as SFT staff members undertaking KSRs.

The approach has now been fully operational for 12 months and feedback from project teams and sponsors has been entirely positive."

4.7 SFT's dual role was also expected to provide benefits in respect of oversight. With SFT sitting on the Project Board and advising on ad hoc issues it was

anticipated that SFT would be alert to issues as they arose and could help to resolve them with NHSL without needing to escalate the matter to the Scottish Government. According to the document prepared by SFT entitled 'Role of SFT in Project Delivery – RHSC/DCN Project':

> "...In the unlikely event that agreement on key issues cannot be reached then a three way discussion would take place between the Chief Executives of SFT and NHS Lothian and the Finance Director of NHS Scotland. Beyond that, referral to firstly the Infrastructure Investment Board and secondly Ministers remain as options should very significant issues remain unresolved.
>
> The benefit of SFT's dual role is to reduce the chances of significant issues being raised during the approvals process or elsewhere and therefore reduce the chances of delay to the Project."

4.8 The Inquiry Team understands that KSRs do not have a strong focus on technical details and do not expressly consider compliance with SHTMs. However, in conducting KSRs, SFT would seek assurance on a number of aspects of the project which may include, for example, compliance with Project requirements. KSRs are the point at which issues or risks could be flagged and highlighted.

5. Guidance and Stages of the Procurement Process

5.1 Some of the guidance relating to NPD projects was still being developed when the procurement process started for the RHCYP and DCN project. Although certain guidance may not have been published, SFT provided NHSL with NPD-specific advice.

5.2 The guidance below was applicable to the procurement process of the RHCYP and DCN re-provision project from the date of publication:

1) Treasury Green Book, 2003

2) Procurement Handbook and Scottish Procurement Policy Notes, 2008

3) Scottish Government's General Procurement Guidance – Competitive Dialogue

4) Scottish Capital Investment Manual (SCIM) 2009 with amendments

5) SCIM Supporting Guidance: Design Assessment in the Business Case Process (2011)

6) Scottish Government Construction Procurement Manual

7) Scottish Public Finance Manual, 2011

8) A policy on Design Quality for NHSScotland, CEL (2010) 19 read in conjunction with the accompanying 'SCIM Supporting Guidance: Design Assessment in the Business Case Process (2011)', specifically section 1.4 Transitional Arrangements. Prior to 2 June 2010, 'A policy on design quality for NHSScotland' HDL (2006) 582 would have applied.

9) Policy on Sustainable Development for NHSScotland, CEL (2012) 23

10) Prior to 25 January 2012, 'Environmental Management Policy for NHSScotland' HDL (2006) 214 would have applied.

11) Scottish Futures Trust (SFT) Validation of Revenue Funded Projects: The Key Stage Review Process Information Note to Projects, 2011

12) SFT Value for Money (VfM) Assessment Guidance, 2011

13) SFT Value for Money Supplementary Guidance for projects in £2.5 billion Revenue Funded Investment Programme October 2011

14) SFT NPD Guidance Note on Approach to Tender Evaluation, 2013

15) SFT, Standard Project Agreements (hub DBFM & NPD Model) User's Guide June 2011.

16) SFT, Standard Project Agreements (hub DBFM & NPD Model) User's Guide June 2012.

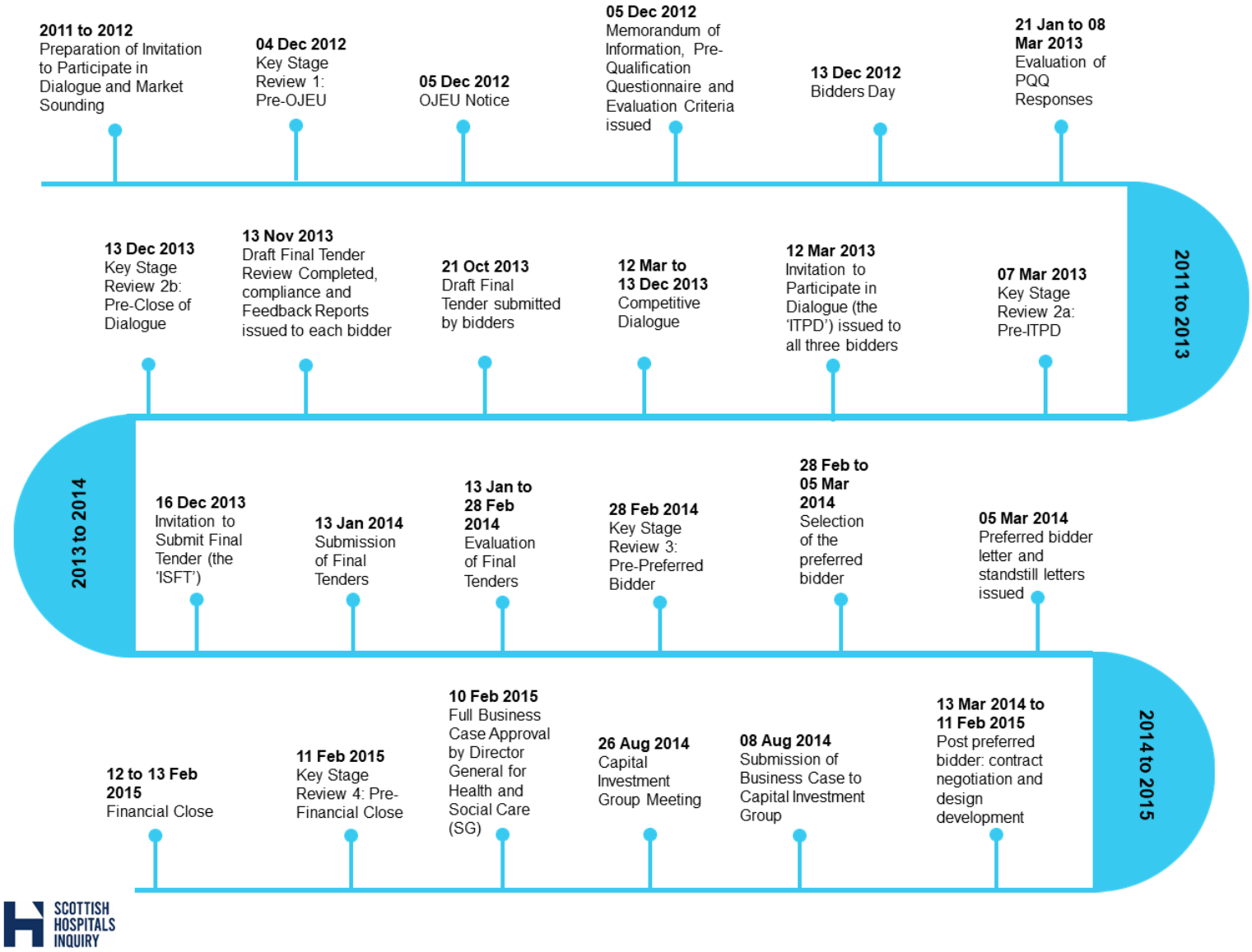
5.3 SFT prepared the following standard NPD contract documents:

1) SFT, Standard Form Project Agreement (NPD Model) 2 June 2012
2) SFT, Standard Form Project Agreement (NPD Model) July 2011
3) SFT NPD Articles of Association, 2011
4) SFT NPD Articles of Association, 2012
5) SFT NPD Articles of Association, Nov 2014 ESA amendments
6) SFT NPD Articles of Association, Feb 2015

5.4 Procurement timeline with dates

Preparation of Invitation to Participate in Dialogue and Market Sounding	2011- 2012
Key Stage Review 1: Pre-OJEU	4 December 2012
OJEU Notice	5 December 2012
Memorandum of Information, Pre-Qualification Questionnaire and Evaluation Criteria issued	5 December 2012
Bidders Day	13 December 2012
Evaluation of PQQ Responses	21 January 2013 to 8 March 2013
Key Stage Review 2a: Pre-ITPD	7 March 2013
Invitation to Participate in Dialogue ('the ITPD') issued to all three bidders	12 March 2013
Competitive Dialogue	12 March 2013 – 13 December 2013
Draft Final Tender submitted by bidders	21 October 2013

Draft Final Tender Review completed, Compliance and Feedback Reports issued to each bidder	13 November 2013
Key Stage Review 2b: Pre-Close of Dialogue	13 December 2013
Invitation to Submit Final Tender (the 'ISFT') issued to all three bidders	16 December 2013
Submission of Final Tenders	13 January 2014
Evaluation of Final Tenders	13 January 2014 to 28 February 2014
Key Stage Review 3: Pre-Preferred Bidder	28 February 2014
Selection of the preferred bidder	28 February – 5 March 2014
Preferred Bidder Letter and standstill letters issued	5 March 2014
Post preferred bidder: Contract Negotiation and Design Development	13 March 2014 to 11 February 2015
Submission of Business Case to Capital Investment Group	8 August 2014
Capital Investment Group Meeting	26 August 2014
Full Business Case Approval by Director General for Health and Social Care	10 February 2014
Key Stage Review 4: Pre-Financial Close	11 February 2015
Financial Close	12 February 2015 – 13 February 2015


2011 to 2012
Preparation of Invitation to Participate in Dialogue and Market Sounding
04 Dec 2012
Key Stage Review 1: Pre-OJEU
05 Dec 2012
OJEU Notice
05 Dec 2012
Memorandum of Information, Pre-Qualification Questionnaire and Evaluation Criteria issued
13 Dec 2012
Bidders Day
21 Jan to 08 Mar 2013
Evaluation of PQQ Responses
2011 to 2013
13 Dec 2013
Key Stage Review 2b: Pre-Close of Dialogue
13 Nov 2013
Draft Final Tender Review Completed, compliance and Feedback Reports issued to each bidder
21 Oct 2013
Draft Final Tender submitted by bidders
12 Mar to 13 Dec 2013
Competitive Dialogue
12 Mar 2013
Invitation to Participate in Dialogue (the 'ITPD') issued to all three bidders
07 Mar 2013
Key Stage Review 2a: Pre-ITPD
2013 to 2014
16 Dec 2013
Invitation to Submit Final Tender (the 'ISFT')
13 Jan 2014
Submission of Final Tenders
13 Jan to 28 Feb 2014
Evaluation of Final Tenders
28 Feb 2014
Key Stage Review 3: Pre-Preferred Bidder
28 Feb to 05 Mar 2014
Selection of the preferred bidder
05 Mar 2014
Preferred bidder letter and standstill letters issued
2014 to 2015
12 to 13 Feb 2015
Financial Close
11 Feb 2015
Key Stage Review 4: Pre-Financial Close
10 Feb 2015
Full Business Case Approval by Director General for Health and Social Care (SG)
26 Aug 2014
Capital Investment Group Meeting
08 Aug 2014
Submission of Business Case to Capital Investment Group
13 Mar 2014 to 11 Feb 2015
Post preferred bidder: contract negotiation and design development

6. Preparation for Procurement

6.1 During 2011 and 2012 NHSL, with the assistance of advisers and SFT, planned how to undertake the procurement of the RHCYP/DCN Project. This included: market sounding; progressing the design; preparing a programme with target dates for key milestones and preparing the Invitation to Participate in Dialogue (ITPD) which marks the start of a period of Competitive Dialogue.

6.2 Competitive Dialogue is a process through which bidders engage with the procuring authority to refine tender submissions to ensure they meet the contracting authority's stated requirements. At the end of Competitive Dialogue, the final tenders are evaluated by a Core Evaluation Team in accordance with the agreed evaluation criteria and methodology. Detail on the Competitive Dialogue process, tender submission requirements, the evaluation criteria and weightings, and the Board's Construction Requirements for the Project are all contained within the ITPD.

6.3 Market Sounding

6.3.1 Market Sounding usually takes place before the publication of the contract notice. According to the SCIM NPD Guide Section 2: From OJEU to Contract Award, market sounding is useful in situations where assessment of the viability of the project reveals it to be 'borderline', or there are unusual elements in the project. Approaching the market should provide insight into the likely level of interest in the market but without giving any one potential participant a head start in the procurement process. Actions taken at this stage must not prejudice the future procurement process.

6.3.2 SFT carried out programme level market sounding. This involved speaking to market participants to gather insight as to whether there would be bidders for the project and whether or not the project would be 'bankable'. The principal question of the market sounding was "is there a market for 25-year project finance?" That was anticipated to be the greatest challenge in the period following the global financial crisis.

6.3.3 Prior to the procurement process, MM and Davis Langdon spoke to contractors about the intention to go to market. The aim was to explore the market's reactions to the potential procurement options under consideration, specifically, the extent to which NHSL would develop the design of the hospital, and which aspects of the design would be the responsibility of bidders. The options were as follows:

- Option A – Mandate Clinical Functionality;
- Option B – Mandate Full Design;
- Option C - Mandate More Detailed Exam and Novate; and
- Option D – Exemplar Design

6.3.4 This is referred to at section 5 of the paper titled: 'NHS Lothian RHSC + DCN Little France – Procurement Options' (June 2011) which states:

> "5. Soft Market Testing. A soft market testing exercise was conducted to gauge the market's view on the above proposals. The organisations approached were Morgan Sindall, Brookfield, Galliford Try Investments and Morrison Construction. Each respondent was asked if it they were interested in bidding the project as an NPD. All except 1 confirmed they would be. Each respondent was advised of the option A, B & C approach. The consensus was that bidders would prefer the design to be treated as an exemplar to enable them to have the freedom to truly innovate on the project. Whilst option A gives some degree of flexibility, this was considered to be fairly limited. None of the respondents could see a benefit in Option B over options A & C. And this was considered to be the least favourable. Given that clinical functionality is being fixed under Option A and the ability to innovate is limited by this, all of the respondents preferred Option C primarily because it significantly reduces bid costs. All respondents confirmed that they would be comfortable with a full risk transfer under all 3 options (with the exception of clinical functionality). None of the respondents expressed a concern about the

incumbent design team joining another bidder. The respondents felt that they can engage with other designers who may be able to significantly improve what has been carried out to date."

6.3.5 Project-specific market testing was also undertaken by NHSL, described in the Pre-OJEU Key Stage Review:

"NHS Lothian's Project Director and Director of Capital Planning & Projects have responded to market interest in the project by meeting with representatives of firms potentially interested in bidding for the project.

These meetings commenced from shortly after the procurement route change and have continued to the current date. It is planned that these informal discussions will cease before publication of the OJEU notice.

There have been a variety of bid managers and similar coming forward and the Board representatives have received differing levels of assurance as to the respective corporate interest and depth of consortium members in the project - see abridged list attached.

It is clear from the meetings that initial concerns over a dominant bidder have been alleviated, subject to this being borne out through procurement contract documentation.

Similarly, all the interested parties have indicated high level engagement with SFT regarding the project as part of the NPD programme. NHS Lothian has not been represented at SFT meetings, but the project working group has received feedback from SFT consistent with our informal discussions.

The abridged list attached has been produced for the sole purpose of CIG consideration of the Outline Business Case and should not be more widely distributed.

The Board at this time cannot confirm that there will be multiple bidders as that will be dependent on a positive response from the market to the project…"

"The Project Director and Director of Capital Planning & Projects and/or Associate Director of Finance have met with the following parties (listed alphabetically) to maximise their knowledge of the project, pre-procurement, and to elicit the levels of interest forthcoming. Where a consortium has been identified, this is shown as a single entry.

All have demonstrated a track record in major UK healthcare/PFI/PPP projects, except FCC whose experience is international.

1. BAM/Balfour Beatty

2. Bouygues

3. Brookfield

4. Carillion

5. FCC

6. John Laing Investments/Laing O Rourke

7. Skanska/Miller

More recently, Carillion advised that it did not intend to bid and the Board considers that Bouygues and FCC are not likely to proceed".

6.4 Reference Design

6.4.1 On 12 January 2011 the Finance and Performance Review Committee approved the use of a reference design for the RHCYP/DCN project. The Reference Design essentially involved providing bidders with a more developed design than would otherwise be the case with an exemplar approach and was a factor in decisions regarding the programme for procurement, and the tender evaluation criteria and weightings. It also had implications for what bidders were expected to produce in their final tenders, and how the requirements for bidders were set out in the ITPD. MM developed and advised on the 'Approach to Reference Design' in 2011 and 2012. The Reference Design is the subject of a separate Provisional Position Paper by the Inquiry Team.

6.4.2 A reason for choosing a reference design approach was to retain as much of the design work already undertaken before the Project switched to a different funding model. Amongst the design work already in development was an 'Environmental Matrix' (EM), prepared by Hulley and Kirkwood (H&K). H&K were M&E engineering consultants sub-contracted by MM when the Project was being procured under Frameworks Scotland and appointed again to form part of the Reference Design team in 2011.

6.4.3 The EM set out the environmental conditions for all the rooms in the hospital. This included the specifications for the ventilation system. The EM is addressed in a separate PPP. The EM was included within the Invitation to Participate in Dialogue (ITPD) that was sent to all bidders. The ITPD outlined NHSL's requirements for the hospital and explained what bidders would need to submit in their final tenders to demonstrate that they could meet those requirements, or they would need to highlight derogations.

6.5 Procurement Programme

6.5.1 All parties were concerned about the timescale for the Project and wished to avoid unnecessary delay. The Project Steering Board Action Notes of a meeting of 13 May 2011 record that the proposed timetable was unacceptable to NHSL, SFT and SGHD given the estimated slippage in operational date from the previous capital funded project.

6.5.2 SFT was keen to reduce timescales, where possible, without impacting the effectiveness of the process. SFT suggested areas where NHSL could look to shorten the programme.

6.5.3 In June 2011, in a paper titled 'Procurement Paper', Gordon Shirreff (SFT) raised the possibility of 'down selecting' to one bidder. The decision was taken not to down-select. This became a factor in discussions about the programme, described below.

6.5.4 On 27 June 2011 a 'Procurement Workstream Meeting' was held, at which Brian Currie (Project Director, NHSL), Gordon Shirreff (SFT), Denise Kelly

(Davis Langdon), Paul Hampson (MM) and David Cunningham (Davis Langdon) were present. Ahead of that meeting Paul Hampson circulated additional papers to all attendees including, 'Developed procurement/CD programme'. The minutes record:

> "A revised procurement programme was circulated, with suggested days for CD activity included. Discussions took place around format of meetings. Confirmed that allocating 1 full day of dialogue for each bidder during each dialogue cycle was the preferred option. PH/DK/DC to consider how ISOS and ISDS should be handled. Initial thoughts are that these interim phases should be high level review of activity and direction rather than full evaluation given that bidders will also submit a draft final tender as part of the procurement process. This will be reviewed at the next workstream meeting".

6.5.5 The Minutes of the Project Steering Board Meeting of 11 May 2012 note amongst the benefits of the Reference design that it "shortens Competitive Dialogue Phase" and "minimises abortive design cost for unsuccessful bidders."

6.5.6 On 24 October 2012, Donna Stevenson (Associate Director, SFT) emailed Brian Currie (NHSL) in relation to the programme, stating:

> " …Programme and Down selection. We think that the programme is longer than it need be in certain respects…In the context of the Board's view that there [sic] all three bidders should be taken through to final tender we consider that the dialogue period of over 8 months could be shortened particularly in the context of the advanced stage of the reference design and the Board's views on the extent of mandatory elements. The other area where we consider that there is the potential for a reduction in timescale is the period for return of tenders and evaluation, in the dialogue and draft final tenders process."

6.5.7 At a project meeting with SFT regarding "Procurement and Competitive Dialogue Issues", held on 26 October 2012, the following points were raised:

"…SFT's view that a reference design approach allows for less design development through competitive dialogue, therefore lower costs for bidders than without. However, it also increases the threshold for bidder engagement in the first instance. With the market being wary of bid costs, a longer programme is a disincentive.

…

Down selection would take extra time as a step not yet accounted for. It would improve the chances of bidders committed to final submission costs and could therefore be popular with the market.

Discussion re: shortening competitive dialogue period to lengthen time from appointment of preferred bidder to financial close.

[Susan Goldsmith (NHS Lothian)] expressed anxiety if bidders reduced from three to two, particularly if one of the bidders was associated with the current PFI partner. Taking three bidders from ITPD to final submission continues to be NHSL's preferred route."

6.5.8 The PSB minutes of 9 November 2012 state:

"Project Procurement Update

Further to an email from SFT [Peter Reekie] of 1st November 2012 to NHSL [Susan Goldsmith] instructing NHSL, as a condition of funding, to reduce the current length of Competitive Dialogue and consider down selecting, a proposal has been prepared by the Project Team for the Project Steering Board's consideration.

Down Selection

All agreed that given the particular circumstances of this project and the need to maintain a "level playing field" continuously through the procurement process down selection to two bidders would not be prudent.

Compression of Competitive Dialogue + Tender Evaluation Programme.

SFT reiterated the need to create an attractive as possible proposition to the market given the current economic situation. SFT continued that given the decision not to down select, seen as attractive to the market, there was an ever more pressing need to shorten the Competitive Dialogue process. The use of a Reference Design and a Standard Form of Agreement should, in SFT's view, allow such a compression.

The issue of market attractiveness was queried by BC [Brian Currie] who through soft market testing was only aware of one potentially credible bidder from four who had expressed concern that they may not be able to secure Board approval to bid for the project given the potential bid costs. BC added that one potential bidder had expressed concern that too short a programme may inhibit their ability to offer an appropriate package and sufficiently robust tender to secure their Board approval.

[Mike Baxter] commented that Scottish Government's view was that of SFT's and that there is an established general market view prevailing that the current procurement programme for this project is too long causing difficulties when considering bid intentions.

An alternative compressed programme of some 155 days to close dialogue compared to current duration of 209 days was tabled by BC and the merits or otherwise discussed at length by all parties present. The Evaluation duration has also been shortened from 75 days to 39 days in this alternative programme. Be advised that this programme did give the Project Team a number of concerns, particularly given the complexity of the project.

After much debate, all present unanimously agreed to adopt the compressed programme. NHSL, however, stated that their reservations remain and that in practice the decision to close dialogue would still dictate the achievement of this revised programme.

NHSL to communicate the following actions to the project team immediately:

1 OJEU Notice release date to be set as 26th November 2012.

2 Bidders Day to be set for 3rd December 2012.

3 The PQQ period is to be extended to allow for the Festive Period with a return date of 11th January 2013.

4 The activities and durations proposed in the "Compressed Programme (as per SFT Condition of Funding)" recently prepared are to be adopted in full.

5 Financial Close is to **remain** as 7th August 2014.

6 All other milestones/dates and activities post FC are to remain as the current programme

…

8 Down Selection of Bidders will **not** be adopted. Current strategy to prevail ie., 3 Bidders through to close of dialogue and final tender…"

6.5.9 The revised timetable as of 30 November 2012 was as follows (changes in bold):

Stage	
OJEU Dispatch	**5 December 2012**
Bidders Day	**13 December 2012**
Submission of PQQs	**21 January 2013**
PQQ Evaluation and shortlist	**8 March 2013**
Issue Invitation to Participate in Dialogue to shortlist	**11 March 2013**
Submission of Final Draft Tenders	**30 August 2013**
Submission of Final Tenders	**22 November 2013**
Announce Preferred Bidder	Early 2014

Financial Close & contract award	Summer 2014
Start on site	Autumn 2014
Building operational	Summer 2017

6.6 The Core Evaluation Team and development of tender evaluation criteria and weightings

6.6.1 The PSB was responsible for signing off the tender evaluation criteria and weightings that the Core Evaluation Team would use to assess bidders' proposals and be included in the ITPD. The Inquiry Team's understanding is that bidders would be expected to focus time and resources on elements that, firstly, have a pass or fail scoring and secondly, carry the highest weightings.

6.6.2 Papers presented to the F&PR Committee on 18 April 2012 proposed membership of the Core Evaluation Team and outlined the proposed Scheme of Delegation for Procurement:

> "3.18 The Core Evaluation Team will be led by the Project Director, supported by a lead from each of the technical, financial and legal advisers. In addition, the Project's full time Clinical Director will be on the Core Evaluation Team
>
> 3.19 As agreed by the Committee on 8 February 2012, the Director of Capital Planning & Projects and the Associate Director of Finance will join the core evaluation team for the duration of the procurement phase. In agreement with SFT and SGHSCD, the Director of Capital Planning & Projects will fulfil their requirement for a commercial lead for the Board on the evaluation and competitive dialogue phases through to Financial Close. The Executive Director responsible for the procurement is the Director of Finance. It is important that consistency of membership of the Core Evaluation Team is maintained across the whole bid programme and engagement with bidders.

3.20 The core evaluation team will be supported by specialist groups led by NHS Lothian personnel including Partnership and Facilities. These groups feed into the dialogue process through the core evaluation team and will engage with specific elements of the bidding process appropriate to those functions. These groups will be further supported by the Project Team and advisers, supplemented by identified leads from NHS Lothian Employee Relations, eHealth, Health and Safety and Procurement."

6.6.3 The scheme of delegation was as follows:

"The Project Steering Board will sign off the Invitation to Participate in Dialogue (ITPD) evaluation criteria following technical, legal and financial input and workshops involving members of the Project Steering Board and evaluation groups.

The outcome of the PQQ scoring will be presented to the Project Steering Board, by the Core Evaluation Team, with recommendations that the three highest scoring submissions be invited to proceed to competitive dialogue. The Project Steering Board's recommendation will be brought to the Finance & Performance Review Committee for approval on behalf of the Lothian NHS Board.

In the same way, the outcome of competitive dialogue and the scoring of final submissions will be presented to NHS Lothian Finance & Performance Review Committee with the recommendation from the Project Steering Board, to approve the preferred bidder."

6.6.4 The (Finance and Performance Review) F&PR Committee agreed the membership of the Core Evaluation Team and agreed the proposed scheme of delegation for the non-profit distribution procurement process as outlined in the paper.

6.6.5 The Core Evaluation Team included:

Sorrel Cosens – Project Manager, NHSL

Brian Currie – Project Director, NHSL

Iain Graham – Commercial and Legal Lead, NHSL

Janice Mackenzie – Clinical and Service User Lead, NHSL

Carol Potter – Financial Lead, NHSL

Jackie Sansbury - Operations and Commissioning Lead, NHSL

Andrew Orr – Lead Legal Adviser, MacRoberts

Michael Pryor – Lead Financial Adviser, Ernst & Young

6.6.6 As competitive dialogue was being adopted, the award criteria to be utilised was the "most economically advantageous tender". The factors for evaluating economic advantage of the bid included: period for completion or delivery, quality, aesthetic and functional characteristics, technical merit, after-sales service, technical assistance and price.

6.6.7 According to the SFT NPD Guidance Note on Approach to Tender Evaluation, SFT requires a 60:40 price versus quality split. This is justified in paragraph 5, page 4, where it is stated that:

> "Procuring authorities should be mindful of the fact that, in contrast to previous revenue funded programmes, there is now more scope to manage the risk of poor quality proposals. The reasons for this include (i) use of exemplar/reference designs that give bidders greater clarity on the procuring authority's expectations (ii) a narrower range of FM services to be included in the projects and (iii) opportunity to use the competitive dialogue procedure to ensure that bidders develop proposals that meet the procuring authority's requirements. Combined with a shift in focus in the current financial climate to 'needs' rather than 'wants', and in order to capitalise on the opportunity in the current financial climate to take advantage of competitive pricing, this suggests that it is appropriate for price to carry a heavier emphasis than it perhaps has in the past.

SFT requires that, in the absence of project-specific factors that might indicate otherwise, price carries a weighting of at least 60% and, correspondingly, that quality is weighted at no more than 40%.

In developing a tender evaluation strategy, it will be important to run sensitivities, based on likely bidding scenarios for the project. SFT will review each project's evaluation methodology to ensure that the mechanisms that are applied in scoring the individual elements of price and quality do not undermine the overall relative weightings that they carry."

6.6.8 NHSL were concerned that the 60% weighting for price and 40% weighting for quality undervalued quality. In a paper to the Finance and Performance Review Committee dated 18 April 2012, Susan Goldsmith and Jackie Sansbury explained the approach to be taken by the PSB:

"The evaluation criteria will now be influenced by guidance produced by Scottish Futures Trust for the pipeline of NPD projects. This sets out high level thresholds of at least a 60%/40% weighting for cost and quality. The Project Team are working with the legal, financial and technical advisers to recognise the cost of quality and to ensure that the Board's key quality objectives are fully met. The reference design for the Project already sets a high design quality threshold and bids will be assessed on the basis of pass/fail. A workshop with Project Board representatives and key project stakeholders is to be held shortly to fully define the 'cost of quality' and articulate the detailed design criteria beyond the reference design standard. This has been described as 'what will the Board be willing to pay more for'. This requires to be balanced against the SGHSCD/SFT approach to 'ensure as economic an outturn as possible and not to assume that all the budget is available without challenge'".

6.6.9 Between March and April 2012, NHSL held a first round of workshops to determine the elements that would make up the overall quality score. Workshops were attended by the Core Evaluation team and individuals from

NHSL's advisers, namely MM and Davis Langdon. An ITPD Evaluation Workshop on 'Design and Construct' (which includes mechanical and electrical engineering) took place on 10 April 2012. According to the meeting schedule:

> "The purpose of the workshop is to review and agree in outline, the Design & Construct Evaluation Criteria. The first part of the work shop will be to agree the criteria and then those that should be deemed pass or fail and those that should be marked. Each of the criteria will then be examined in greater detail to obtain agreement, in outline, the issues each of the criteria should address. The importance of each criteria will also be assessed on a high, medium, low scale so that marking can be allocated for agreement with the forum attending at a later date. This will be carried out following a review of the feedback received from the Strategic and Management Evaluation Workshop and the FM Evaluation Workshop."

6.6.10 An NHSL document with the draft ITPD evaluation criteria was produced in advance of the workshop. For 'D8 M&E engineering service design', the document stated that:

> "Bidders shall provide an environmental conditions/room provisions matrix for both mechanical and electrical services for each room in the Facilities.
>
> Whilst Bidders are required to undertake their own design, NHS Lothian has provided draft matrices as part of the ITPD. Bidders are required to complete their matrices in identical format, or confirm general acceptance of NHS Lothian's draft matrices, highlighting differences on an exception basis."

6.6.11 CEL 19 (2010) is addressed in detail in the Reference Design and Environmental Matrix PPPs. It required NHSScotland bodies to utilise room data sheets produced using the ADB (Activity Database) system for briefing, design and commissioning of new hospitals. If a different tool is to be adopted, the onus is placed on the NHS body to demonstrate that it is of equal value. It is not clear to the Inquiry Team why a 'matrix' was adopted by

NHSL and how it had been demonstrated that this approach was of equal value to room data sheets produced using the ADB system. This issue will require to be explored with witnesses at the hearing diet commencing on 24 April 2023.

6.6.12 The first page of the document stated that the scoring approach was ‘Scored’ as opposed to ‘Pass/Fail’. However, the detailed breakdown for D8 proposed the scoring approach as “Pass/Fail or marked to relate to comfort”. The comments section stated “high as it relates to environmental comfort”.

6.6.13 MM and Davis Langdon also produced a draft of the ITPD evaluation criteria ‘for discussion’ where M&E engineering service design proposals were scored ‘medium’.

6.6.14 A second draft of the ITPD evaluation criteria was produced, dated 24 April 2012. The scoring of D8 “clarity, robustness, quality and level of M&E engineering service design proposals” was now assessed as “medium” with a suggested marking of 1%. No comment has been provided for the change in scoring approach.

6.6.15 A second and third round of workshops were held from June to August 2012 to discuss and agree the criteria and weightings for ‘Strategic and Management Approach’, ‘Design and Construct’ and ‘Facilities Management’, as well as the weightings split between these three categories. The “draft ITPD evaluation criteria calibration scoring” was approved by the Project Steering Board on 10th August 2012.

6.6.16 In June 2012, NHSL’s financial advisors, Ernst and Young, provided advice on the evaluation framework for the final evaluation of bids and developed an evaluation methodology that sought to incorporate features that maximise the impact of quality evaluation. The approach, aimed at achieving the desired balance between price and quality while still meeting SFT requirements that price accounts for 60% of the available marks and quality 40%. This was also addressed in a further discussion paper produced in September 2012 entitled “Combining Price and Quality in Evaluation”.

6.6.17 According to the paper produced by Ernst and Young in September 2012:

- "The majority of quality evaluation elements are assessed on a pass/fail basis, with the scored element reserved for key differentiating factors.
- Commercial considerations are dealt with entirely within the price score, freeing the available quality marks to be focussed on design, build, FM and management/strategic issues.
- The lowest price bid is awarded the maximum 60 marks. The quality mechanism has been set up so that the highest scoring quality proposals are given the maximum 40 marks, with the quality score of other bids being marked in proportion to this.
- The price marks awarded are calibrated so that proposals that are close in price terms are given similar price marks, thus making the quality score more likely to be the deciding factor. As price differentials become greater, the price marking system becomes more sensitive so that a bid significantly more expensive than the lowest priced will lose a far higher number of price marks."

6.6.18 On 26 October 2012 at a Project Meeting took place with SFT on 'Procurement and Competitive Design Issues'. The paper by Ernst and Young was discussed. According to the minutes of that meeting:

> "PR [Peter Reekie, SFT] emphasised that there was no intention to undervalue quality in the standard form proposed by SFT and that the reference design allows NHSL to specify a high degree of quality in mandatory criteria. SG [Susan Goldsmith, NHSL] accepted that the building will be of good quality, following the work of the reference design to specify the Board's requirements, and highlighted NHSL's need to find a partner for a 25 year relationship beyond construction was a critical quality issue.

It was agreed that the distribution curve used for price evaluation is sensitive. NHSL to focus on finalising the curve and review FM weightings on ITPD questions.

Pass/fail questions

Discussion about questions with a clear compliance threshold that bids could be judged to simply pass or fail. Agreed that NHSL would revisit these questions.

Awarding the maximum quality score to the highest scoring bid

The Project Agreement (PA) outlines the high quality threshold set; any derogations to change the minimum standards suggest that the Project Co are expecting to fail to deliver what NHSL has specified is a quality service. Derogations have to be agreed.

Consensus that there should be a mechanism for adjusting the scores and NHSL will review the legal and commercial elements to be scored against 'price'.

Awarding the maximum score of 40 to the highest scoring bid in terms of quality

Agreed that rather than pursue the proposal to automatically award a maximum score of 40 to the highest quality bid, NHSL would look at calibrating the quality threshold. DO'K [Dennis O' Keeffe] suggested that the quality threshold should be based on performance, process and product.

MB [Mike Baxter, Scottish Government] supported the need to reassure staff and Board members that NHSL will not accept bids below a 'quality threshold', and this should be determined."

6.6.19 Scottish Ministers accept that they were aware of the discussion regarding the percentage weighting for price and quality but consider that this was a decision for NHSL.

6.6.20 In the final ITPD, a pass/fail threshold was used for some elements. This approach was adopted to ensure a minimum standard to which bidders must comply before progressing to the next stage in the procurement process. The scored elements were used to differentiate between bidders who had already met the minimum requirements.

6.6.21 The final break-down of the quality evaluation criteria included within the ITPD was as follows:

Strategic and Management Approach – 5%

Approach to Design and Construction – 23%

Approach to Facilities Management – 12%

6.6.22 The 'Approach to Design and Construction' was made up of 31 separate criteria, of which 12 were scored and the rest assessed on a pass or fail basis.

Quality Evaluation Criteria Reference	Quality Evaluation Criteria	Quality Evaluation Basis	Quality Evaluation Criteria Weighting
C1	Clarity, robustness and quality of approach to meeting the stakeholders requirements in their design	Scored	2.64
C2	Clarity, robustness and quality of approach to design quality	Scored	1.85
C3	Clarity, robustness and quality of architectural and landscape design	Scored	2.64
C4	Clarity, robustness and quality of approach to delivering innovation	Scored	2.64
C5	Clarity, robustness, and quality of approach to adaptability and flexibility	Scored	2.64
C6	Clarity, robustness and quality of way finding and signage proposals	Scored	1.06

Quality Evaluation Criteria Reference	Quality Evaluation Criteria	Quality Evaluation Basis	Quality Evaluation Criteria Weighting
C7	Clarity, robustness and quality of interior design proposals	Scored	2.64
C8	Clarity, robustness and quality of M&E engineering design proposals	Scored	1.06
C9	Clarity, robustness and quality of natural and artificial lighting proposals	Scored	1.06
C10	Clarity, robustness and quality of energy management proposals	Scored	1.85
C11	Clarity, robustness and quality of equipment proposals	Scored	1.06
C11A	Compliance with Minimum Level of Group 1 Equipment	Pass/Fail	
C12	Compliance With Mandatory Reference Design Requirements	Pass/Fail	
C13	Acceptable approach to achieving planning permission	Pass/Fail	
C14	Acceptable vertical and horizontal movement strategy	Pass/Fail	
C15	Acceptable ICT strategy	Pass/Fail	
C16	Acceptable fire planning strategy	Pass/Fail	
C17	Acceptable structural design proposals	Pass/Fail	
C18	Acceptable services, utilities and infrastructure proposals	Pass/Fail	
C19	Acceptable approach to achieving required BREEAM rating	Pass/Fail	
C20	Acceptable post Preferred Bidder stage design development proposals and design programme	Pass/Fail	
C21	Compliance with Board's Construction Requirements	Pass/Fail	
C22	Acceptable design life proposals	Pass/Fail	
C23	Acceptable construction programme and approach to monitoring	Pass/Fail	
C24	Clarity, robustness and quality of construction methodology	Scored	1.85

Quality Evaluation Criteria Reference	Quality Evaluation Criteria	Quality Evaluation Basis	Quality Evaluation Criteria Weighting
C25	Acceptable approach to commissioning and handover	Pass/Fail	
C26	Acceptable approach to quality and environmental management systems	Pass/Fail	
C27	Acceptable approach to health and safety management	Pass/Fail	
C28	Acceptable approach to compliance with CDM regulations	Pass/Fail	
C29	Robustness of technical costs	Pass/Fail	
C30	Acceptable list of summary assumptions, clarifications and derogations	Not scored	
C31	Acceptable Interface Proposals	Pass/Fail	

6.6.23 A ‘Pass’ would be awarded if the Bidder’s approach:

- Demonstrates a satisfactory understanding of the Board’s requirements; and
- delivers a satisfactory level of compliance with the Board’s requirements.

6.6.24 There was no further elaboration on what would be deemed ‘satisfactory’.

6.6.25 C21 concerned ‘Compliance with Board’s Construction Requirements’. It was scored on a ‘Pass/ Fail’ basis.

6.6.26 C8 ‘Clarity, robustness and quality of M&E engineering design proposals’ was given a quality evaluation criteria weighting of 1.06. C10 ‘Clarity, robustness and quality of energy management proposals’ was given a weighting of 1.85. These are the elements that relate to bidders proposals for ventilation design. These were lower than other criteria, such as interior design, architectural and landscape design, adaptability and flexibility, which had a score impact of 2.64.

7. OJEU Notice, Pre-Qualification Questionnaire and the Memorandum of Information

7.1 The Project was advertised to prospective bidders through publication of a contract notice in the Official Journal of the European Union (OJEU). According to the Scottish Capital Investment Manual Section 2 paragraph 4.4, the NHS body 'should be ready to issue the Memorandum of Information and a Prequalification Questionnaire to everyone who responds to the contract notice and these documents should be prepared in advance of issuing the contract notice in OJEU.'

7.2 The Scottish Capital Investment Manual Section 2 paragraph 4.5 states, the Memorandum of Information and accompanying Pre-Qualification Questionnaire should aim to:

- "enable potential participants to decide whether they want to continue to be involved in the bidding process by providing appropriate information about the NHS body, the project and its prospects;

- invite expressions of interest in bidding for the project from the private sector;

- obtain information that will establish whether potential participants are technically and financially capable of delivering the project. NPD contracts are complex and expensive to procure. NHSScotland bodies must ensure that only consortia with the appropriate resources and skills-base are selected;

- enable the NHSScotland body to gain an understanding of the economic, financial and technical status and previous experience of the potential participants."

7.3 Regulations 23-26 of the Public Contracts (Scotland) Regulations 2012 set out the criteria for the rejection of economic operators, information as to economic and financial standing and information as to technical or

professional standing that can be used as qualifying criteria to determine the suitability of prospective tenderers.

7.4 According to a report produced for the Finance & Performance Review Committee on 18 April 2012:

> "The OJEU notice has been approved by the Project Steering Board. The date for the Bidders Day to launch the project onto the market cannot be set until approval of the OBC and to proceed to OJEU has been granted.
>
> The information and Pre-qualification Questionnaire (IM/PQQ), with evaluation criteria, have been developed through the Commercial Workstream with NHS Lothian's technical, legal and financial advisers, and with direction from SFT…The content has been approved by the Project Steering Board and the designed documentation will be shared as a final draft with NHS Lothian Directors in mid-April."

7.5 The Outline Business Case was approved on 18 September 2012 although it was noted in the approval letter that the OJEU notice could not be issued until negotiations with Consort regarding enabling works were successfully concluded. On 4 December 2012, Derek Feeley, the Director General Health and Social Care and Chief Executive of NHS Scotland sent a further letter approving the publication of the OJEU notice subject to certain conditions, including the successful completion of the Pre-OJEU Key Stage Review.

7.6 The Pre-OJEU KSR was completed on 4 December 2012. It confirmed that 'The draft OJEU, PQQ and Information Memorandum have been completed, subject to final points checking and have been reviewed by the Board's advisers and SFT's comments have also been taken into account.' The OJEU Notice was published on 5 December 2012.

7.7 The Memorandum of Information (IM) provided information about: the procuring authority; the project and opportunity; the site and work to date; the project management arrangements; the completion and submission of PQQ responses; conditions for participation; and the pre-qualification evaluation process. Annex 1 contained the Pre-Qualification Questionnaire.

7.8 The IM explained that the PQQ evaluation would comprise the following stages:

> all PQQ submissions submitted in accordance with the PQQ submission requirements…will firstly be checked by the Board for compliance and completeness. Non-compliant and/or incomplete PQQ submissions may be rejected by the Board
>
> the Board will then carry out a preliminary assessment of each remaining PQQ submission to evaluate the 'Pass/Fail' questions. If a Candidate is assessed as failing any such question their PQQ submission will be rejected by the Board. Candidates should note that the preliminary assessment will include an assessment of each remaining Candidate's financial standing submission(s) and any Candidate's PQQ submission assessed as failing the financial standing evaluation will be rejected by the Board.
>
> the Board will then carry out a detailed assessment of each remaining PQQ submissions to evaluate the scored questions. During the detailed assessment the Board will calculate a score for each remaining PQQ submissions using the section weightings and question sub-weightings shown in the evaluation table at paragraph 8.6…
>
> …The scored questions identified in the evaluation table at paragraph 8.6 will be scored using the scoring system described at paragraph 8.4."

7.9 Paragraph 8.4 of the IM stated: "Evaluation guidance is provided in the PQQ for each question that will be scored. Unless otherwise indicated, responses to each question will be scored out of 10 and based on the degree to which the response covers the range of factors specified in the relevant evaluation guidance and as appropriate/relevant to the question, depth of understanding of the issues and/or quality of examples and experience".

7.10 The evaluation table at paragraph 8.6 of the IM included the following details:

Section	Subject	Status	Question Sub Weighting	Section Weighting
A	The Candidate			30%
	General Information	Not scored		
	Resourcing	Scored	30%	
	Capacity	Scored	10%	
	Working Together	Scored	30%	
	Conflicts	Pass/Fail		
	Raising Finance	Scored	30%	
	Financial capacity & economic standing	Pass/Fail		
		Sub-weighting Total	100	
	Construction Contractor: minimum turnover	Pass/Fail		
	Construction Contractor: minimum financial standing	Pass/Fail		
	Subordinated Debt Providers: minimum financial standing	Pass/Fail		
	CDM ACoP	Pass/Fail		

Section	Subject	Status	Question Sub Weighting	Section Weighting
B	Construction Contractor			30%
	General information	Not scored		
	Healthcare experience PPP	Scored	40%	
	Healthcare experience non-PPP	Scored	20%	
	Experience operational site	Scored	15%	
	Other experience	Scored	10%	
	Claims	Scored	5%	
	References	Not scored separately		
	Quality	Pass/Fail		
	Health & Safety	Pass/Fail		
	Environmental	Pass/Fail		
	Employment	Pass/Fail		
	Employment	Scored	5%	
	Employment	Scored	5%	
	Employment	Pass/Fail		

Section	Subject	Status	Question Sub Weighting	Section Weighting
		Sub-weighting Total	100	

Section	Subject	Status	Question Sub Weighting	Section Weighting
C	FM Service Provider			30%
	General information	Not scored		
	Healthcare experience PPP	Scored	45%	
	Healthcare experience non-PPP	Scored	25%	
	Other experience	Scored	15%	
	Claims	Scored	5%	
	References	Not scored separately		
	Quality	Pass/Fail		
	Health & Safety	Pass/Fail		
	Environmental	Pass/Fail		
	Employment	Pass/Fail		
	Employment	Scored	5%	
	Employment	Scored	5%	
	Employment	Pass/Fail		
		Sub-weighting Total	100	

Section	Subject	Status	Question Sub Weighting	Section Weighting
D	Designated Organisations*			30%
	General information	Not scored		
	Healthcare experience PPP	Scored	40%	
	Other PPP experience	Scored	20%	
	Healthcare experience non-PPP	Scored	25%	
	Other experience	Scored	15%	
	References	Not scored separately		
		Sub-weighting Total	100	
E	PQQ declaration	Not scored		
F	Statement of Good Standing	Not scored		

			Weighting Total	100%

7.10.1 "* Each designated organisation will be scored separately with sub-weighting split evenly across them."

7.11 The IM also stated, at paragraph 8.5, that: "Following the detailed assessment stage, the Board shall rank the remaining Candidates in numerical order against their cumulative score. A short list of Candidates to be invited to participate in the dialogue stage shall be drawn up. The Board only intends to select three Candidates for inclusion on its short-list. The three short-listed by the Board shall be those achieving the highest scores during detailed assessment."

7.12 Three candidates submitted a PQQ response: B3 (also referred to as 'Candidate A', later 'Bidder A'); Integrated Health Solutions Lothian (also referred to as 'Candidate B', later 'Bidder B' or 'IHSL'); and (c) Mosaic (also referred to as 'Candidate C', later 'Bidder C').

7.13 Evaluation of PQQ responses and the preparation of the PQQ shortlist took place from 21 January 2013 to 8 March 2013.

7.14 The PQQ Core Evaluation Team included: Brian Currie (NHSL Project Director), Carol Potter (NHSL Associate Director of Finance), Iain Graham (NHSL Director of Capital Planning & Projects) Jackie Sansbury (NHSL Chief Operating Officer), Janice Mackenzie (NHSL Clinical Director), Richard Cantlay (MM Technical Advisor), Michael Pryor (Financial Advisor with Ernst & Young) and Andrew Orr (Legal Advisor with MacRoberts).

7.15 The Core Evaluation Team received Evaluation Support, including technical advice on design, construction and facilities and management. The lead on design and construction was Andrew Scott (MM) and on Facilities Management was Simon McLaughlin (Davis Langdon). The Evaluation Support team also received additional specialist support. Specialist support on NHSL Infection Control was provided by Fiona Cameron, head of NHS Lothian Infection Prevention & Control Services.

7.16 At the PSB meeting on 25 January 2013, Peter Reekie (Director of Finance and Structures, SFT) requested that NHSL consider accelerating the evaluation of PQQ due to the relatively low number of returns received. Brian Currie responded:

> ‘due and proper process is upper most in the evaluation team’s mind and that a detailed programme of evaluation activities has been agreed which may prove difficult to re organise at short notice. However, the intention is to make final recommendation to next P St Bd on the 22nd of February, some 7 business days ahead of current programme A subsequent extraordinary F+R Meeting may be required to be called to authorise progression to dialogue – SG to advise. 11th March commencement of dialogue remains target."

7.17 Brian Currie gave the outcome of the PQQ evaluation process in a paper presented to the PSB held on 22 February 2013. Mosaic scored 75 out of 100, B3 scored 74, and IHSL scored 72. The PSB unanimously approved the recommendation that all three candidates be invited to participate in dialogue.

7.18 IHSL’s scores for ‘Candidate’ and ‘Designated Organisations’ pulled their overall score down. The ‘Candidate’ refers to the bidding consortium, while ‘Designated Organisations’ include sub-contractors identified by the bidding consortium to provide particular services. Other parties assessed in the PQQ are the Construction Contractor and FM Contractor. For IHSL’s bid, the ‘Candidate’ was IHSL, the ‘Construction Contractor’ was Multiplex, the ‘FM Contractor’ was ETDE, FM and ‘Designated Organisations’ included HLMAD, Wallace Whittle and Robert Bird.

7.19 In the PQQ candidate feedback for IHSL it was noted that “that Wallace Whittle have no health PPP experience.” NHSL has advised the Inquiry Team that although Wallace Whittle may not have previously worked on a health PPP project, they had both health and PPP experience separately. MM have advised the Inquiry Team that Wallace Whittle having no health PPP experience was flagged as something to be aware of, but it would not prevent a client moving forward with that consortium. The evaluation process looks at

all parts of a consortium team. MM informed the Inquiry Team that in it's experience, it is unrealistic to expect that there would ever be a perfect consortium. A lack of PPP experience cannot lead to a "fail" and instead the bidder will be scored with fewer marks.

8. Bidders Day

8.1 A bidders day was organised for 13 December 2012. Susan Goldsmith, Director of Finance (NHSL) gave an overview of the project, Peter Reekie, Director of Finance (SFT), gave insight into the wider NPD pipeline and Brian Currie, Project Director (NHSL), gave detail on the project, the reference design and the procurement process.

8.2 The speakers notes for the bidders day contain the following information relating to design documentation:

> "To clarify what we really mean by a Reference Design:
>
> What were the attractions given the departure from previous PPP/PFI projects where an "exemplar" design was the norm?:
>
> - assists with the OBC and accuracy of pre-procurement costing.
> - provides greater certainty over the final design solution.
> - assists significantly in defining a quality threshold.
> - optimises the input required from stakeholders and in particular clinicians and clinical management teams.
> - utilises programme time available as a result of essential parallel activities prior to commencement of procurement.
> - reduces risk and bidding costs to bidders, we would contend.
> - shortens the competitive dialogue phase.
>
> …
>
> Mandatory Requirements Comprises the information that defines Operational Functionality* and is indicated in:
>
> - Interdepartmental Layouts (1:500)

- Departmental Layouts (1:200)
- Room Layouts (1:50) for Key and Generic Rooms Compulsory Requirements
- Planning in Principle as granted by The City of Edinburgh Council.
- Interface, access/egress and infrastructure provisions enshrined in (SA6 + SA Enabling)
- Clinical, D+C and FM Output Specs.

The Reference Design drawings are a diagram or graphical representation of these requirements.

*We refer to Operational Functionality as opposed to Clinical Functionality since some of the mandatory areas of the Reference Design will cover non-clinical functions such as Supplies, Storage, Distribution and Waste Management (Soft FM) and ICT Requirements).

Operational Functionality means:

- The point of access to and within the development, buildings and departments.
- The adjacencies between different departments.
- The adjacencies between rooms within the departments.
- The quantity, description and areas of those rooms and spaces shown on the Schedule of Accommodation.

The level of design development can be described as approximating to RIBA Plan of Work Stage C + (Concept Design) and covers 52% of all spaces at 1:50 scale including the key and generic rooms.

Bidders will be required to generate up to 10 other room types at 1:50 scale for final tender with the remainder being concluded before Financial Close.

Room Data Sheets

Standard format Room Data Sheets have not been prepared by the Board for the Project instead specific room requirements are detailed in a combination of the following documents:

- General Requirements
- Clinical Output Spec
- Environmental Matrix
- Schedule of Operational/Design Notes
- Equipment Schedule
- Schedule of Accommodation
- Operational Functionality elements of the Reference Design

Note: Bidders will be required to develop Room Data Sheets as part of their proposals. The full set of RDS will be completed from appointment of Preferred Bidder to Financial Close.

Schedule of Accommodation

The Schedule of Accommodation, based on the Reference Design drawn layouts, along with the Target or Model (Minimum) Schedule of Accommodation will be issued to Bidders.

This 'Drawn' Schedule of Accommodation for Plant Rooms and Hard FM Rooms is indicative only and should certain other rooms vary in area terms from the Model Schedule this is acceptable on a specific room only basis.

Indicative Requirements

Bidders will be encouraged to propose innovative solutions in response to:

- Information that has been developed to verify the feasibility of the Reference Design in terms of architecture and engineering.
- Information developed for issue to Bidders in regard to site and servicing information. Bidders must however refer to the Board's Construction Requirements for the detailed requirements for all such

indicative elements of the Reference Design for which they may ultimately carry the risk.

Note: The Board's Construction Requirements will always take precedence over the Reference Design for matters which do not define Operational Functionality."

9. The Invitation to Participate in Dialogue (ITPD)

9.1 The ITPD sets out the contracting authority's requirements and the information needed by bidders to prepare their tenders. According to the SCIM:

> "A well drafted and comprehensive ITPD is vital to the smooth running of a project. It will help the participants produce accurate proposals and will avoid misunderstandings that can lead to later problems."

9.2 The SCIM recommends that the ITPD should follow a 'standard form' and include:

- Volume 1: Instructions to Participants (include schedule of deliverables, weightings and contact details)
- Volume 2: Standard Form Project Agreement including project specific amendments
- Volume 3: Technical Specification for Construction Works
- Volume 3 Annex A: Clinical Output Specifications
- Volume 3 Annex B: Non-clinical Output Specification
- Other standard documents will form further appendices

9.3 The ITPD issued for the RHCYP/DCN project is comprised of four volumes:

9.3.1 Volume 1: This set out the general requirements of NHSL in relation to the Project, including:

i. Background information on the Project;

ii. the arrangements for competitive dialogue;
iii. use of the Reference Design including mandatory and indicative elements and the concept of Operational Functionality;
iv. the informal submissions bidder should provide;
v. the Draft Final Tender requirements and the envisaged Final Tender requirements;
vi. evaluation requirements and the evaluation weighting criteria; and
vii. Appendix A(ii) – Submission Requirements.

9.3.2 Volume 2: This set out the contractual requirements of NHSL in relation to the Project in a 'NPD Project Agreement' and 'NPD Articles of Association'.

9.3.3 Volume 3: known as the 'Board Construction Requirements' sets out the specific technical requirements of NHSL in relation to the Project, these being the construction (clinical and non-clinical) requirements, equipment requirements and facilities management requirements:

i. Appendix A included 'interface with Campus Site and/or Campus Facilities.
ii. Appendix B included the Interface Output Specification.
iii. Appendix C included the draft Environmental Matrix.

9.3.4 Volume 4: This sets out the Data Room available to bidders, which was used for sharing information.

9.4 The following section of this paper provides extracts from the ITPD that relate to

- NHSL's requirements for mechanical and electrical engineering, specifically with regard to the ventilation system;
- the design documents in which ventilation requirements are captured and which bidders were expected to produce; and
- the status of the information contained in or with the ITPD.

9.5 The ITPD was revised during Competitive Dialogue to reflect changes to NHSL's requirements.

9.6 Volume 1

9.6.1 An 'Important Notice' at the beginning of Volume 1 of the ITPD states:

> "Any summaries or descriptions of documents or contractual arrangements contained in any part of the Invitation cannot be and are not intended to be comprehensive, nor any substitute for the underlying documentation (whether existing or to be concluded in the future) and are in all respects qualified in their entirety by reference to them."

9.6.2 Section 2 of Volume 1: 'Technical Overview' provides an overview of the technical requirements of the Project. Section 2.4.1 provides an overview of the design and construction elements and states:

> "The specific requirements for the Facilities to be provided are set out in the Board's Construction Requirements. This comprises: -
>
> - General Requirements;
> - Specific Clinical Requirements; and
> - Specific Non-Clinical Requirements.
>
> The Board's Construction Requirements are set out in Section 3 of Volume 3 of the ITPD and will ultimately form Section 3 of Schedule Part 6 (Board's Construction Requirements) of the NPD Project Agreement...
>
> …. it should be noted that certain elements of the design as they relate to aspects of Operational Functionality are mandatory, as described below and in Appendix E (Reference Design Elements) of Volume 1 of the ITPD."

9.6.3 Section 2.5 sets out the 'Reference Design and Mandatory Reference Design Requirements' (this is addressed in detail in the Inquiry's PPP on the Reference Design). The sub-sections describe design documents that bidders were required to develop as part of their bids and, if successful, during the

preferred bidder stage. It also explains which elements of these design documents had already been developed as part of the reference design. Section 2.5 addressed a number of issues including:

2.5.1 Schedule of Accommodation and Reference Design Schedule of Accommodation

2.5.2 Room Layouts

2.5.3 Room Data Sheets.

9.6.4 Section 2.5 does not explicitly address requirements relating to building services engineering solutions, mechanical and electrical engineering or ventilation more specifically. However, section 2.5.3 does contain information on room data sheet production.

9.6.5 Section 2.5.3 sets out the requirements for the production of Room Data Sheets and mentions the Environmental Matrix as a source of 'room information' to be used to compile room data sheets:

"Standard format Room Data Sheets have not been prepared by the Board for the Project. The specific room requirements (the 'Room Information') are detailed in a combination of the following documents:

- The Board's Construction Requirements;
- The Environmental Matrix;
- The Schedule of Operational/Design Notes;
- The Equipment Schedule;
- The Equipment Responsibility Matrix;
- The Draft Schedule of Accommodation; and
- The Operational Functionality elements of the Reference Design.

During Dialogue Bidders will be required to develop Room Data Sheets, incorporating the Room Information, for those rooms for which 1:50 layout

drawings have been prepared. For the avoidance of doubt this shall include all Key Rooms and Generic Rooms in addition to those rooms identified in the table at paragraph 2.5.2 above. The Room Data Sheets will form part of the Bidders proposals. The Preferred Bidder will be required to complete Room Data Sheets for all remaining rooms prior to Financial Close."

9.6.6 Section 2.6 of the ITPD Volume 1 addresses 'Indicative Elements of the Reference Design':

"During the preparation of the Mandatory Reference Design Requirements, other information has been generated both as a by-product of preparing the Reference Design itself and as a general Project requirement as follows:

- FM goods handling and distribution;
- Structural engineering solutions;
- Building services engineering solutions;
- Servicing strategies and space allocations; and
- Hard FM solutions and space allocations.

This constitutes the 'Indicative Elements of the Reference Design'.

Such information is issued to the Bidders for "information only" so that they may understand the intent of the Reference Design. Bidders must however refer to the Board's Construction Requirements for the detailed requirements for all such Indicative Elements of the Reference Design for which they will ultimately carry the risk. Bidders are advised that the Board's Construction Requirements will always take precedence over the Reference Design for matters which do not define Operational Functionality. The full distinction between Mandatory Reference Design Requirements and Indicative Elements of the Reference Design are set out in Appendix E (Reference Design Elements)."

9.6.7 Mechanical and Electrical/Building Services Engineering solutions is not included in Appendix E as a mandatory element of the reference design. The Environmental Matrix, which contains specifications for the ventilation system amongst other things, is also not included. However, the Environmental Matrix is referred to in the Board's Construction Requirements.

9.6.8 Section 2.8 of the ITPD volume 1 addresses Building Research Establishment Environment Assessment (BREEAM):

> "Bidder's designs must achieve, as minimum, a 'Very Good' BREEAM rating in line with the requirements for healthcare facilities as set out in the BREEAM Scheme Document for New Construction (SD5073) 2011. The designs must also achieve a minimum of 6 credits ("Excellent" rating) in accordance with the BREEAM Scheme Document for New Construction (SD5073) Section 6.0 ENE1."

9.6.9 Section 2.9 of the ITPD Volume 1 addresses Sustainable Design and Quality:

> "Bidders are required to promote sustainable development by demonstrating an integrated approach to the social, environmental and economic well-being of the area served, now and for future generations. The Facilities will reflect the objectives of any local agenda strategy supported by the CEC and also satisfy the requirements of all health and social care guidance notes, as set out in Board's Construction Requirements associated with sustainability and environmental performance."

9.6.10 Information relating specifically to ventilation requirements is set out in 'Appendix A (ii) – Submission Requirements', under section C (Approach to Design and Construction). Appendix A states that "The technical submission requirements submitted by the Bidders in response to section C (Approach to Design and Construction) below will ultimately form part of Project Co's Proposals in accordance with the NPD Project Agreement." Relevant sections are reproduced in the table below.

Table: Summary of submission requirements relating to ventilation in Appendix A (ii) – Submission Requirements, ITPD Volume 1.

Quality Evaluation Criteria & Reference	**Quality Evaluation Basis**	**Quality Evaluation Criteria Weighting**	**Submission Requirement reference and submission requirement**
C8. Clarity, robustness and quality of M&E engineering design proposals	Scored	1.06	C8.2 Bidders must submit proposals setting out how their design will be developed to include the following: … iii. How temperature, ventilation and comfort for occupants will be maintained in accordance with the minimum criteria and how, if possible, these criteria will be improved; iv. How the quality of the environment and prevention of sick building syndrome shall be ensured; vi. How sustainability has been incorporated into their design, including details of the maintenance and operation philosophy for all mechanical and electrical equipment; The following information should be also be provided to help demonstrate the design proposals noted above, including: x. An environmental conditions / room provisions matrix for both mechanical and electrical services for each room in the Facilities; …

Quality Evaluation Criteria & Reference	Quality Evaluation Basis	Quality Evaluation Criteria Weighting	Submission Requirement reference and submission requirement
			C8.3 Whilst Bidders are required to undertake their own design, the Board has provided a draft Environmental Matrix as part of the ITPD documentation. Bidders must confirm acceptance of the Board's Environmental Matrix, highlighting any proposed changes on an exception basis.
C10. Clarity, robustness and quality of energy management proposals	Scored	1.85	C10.1 Bidders must submit proposals setting out their approach to energy management. This should be provided as set out in C10.1 and C10.2 below. Bidders must submit an energy model, complete with supporting information, demonstrating how their design solution will achieve an optimum level of energy and utility conservation (linked with the requirement for a sustainable development in C4) and show that their design fulfils the following: … iv. The inclusion of passive design strategies for ventilation and thermal control. The environmental control system is to be co-ordinated and integrated with the design of the structure and the occupied areas in order to maximise the control and flexibility of the installations.

Quality Evaluation Criteria & Reference	Quality Evaluation Basis	Quality Evaluation Criteria Weighting	Submission Requirement reference and submission requirement
			In addition Bidders must submit an analysis of their design solution which demonstrates energy consumption proposals along with cost estimates of specific measures or innovations to be introduced C10.2 For information purposes only in addition to the model referred to above a dynamic thermal energy model is to be submitted which should comply with the parameters set out in Appendix F of the ITPD Volume 1.

9.6.11 Appendix A also set out the requirement and scoring approach for C21 'Compliance with Board's Construction Requirements'. This was assessed through a pass or fail mark. The submission requirement was that:

> "Bidders must confirm their compliance with the Board's Construction Requirements. If as their design has been developed there are specific areas of the Board's Construction Requirements that Bidders would seek to change, these shall be scheduled and provided in support of the statement. The Board shall not be required to accept any proposed amendments".

9.6.12 The amendments referred to above were to be summarised in their submission response to C30: 'Acceptable list of summary assumptions, clarifications and derogations.' This was not scored.

9.6.13 According to Appendix A, bidders were "permitted to submit its responses in a format…which they consider most appropriate to best demonstrate an

understanding of the Board's requirements and/or a solution which complies with the Board's requirements. However, as a minimum, the Board would require all design deliverables set out in AP1.1 and AP1.2 to be submitted as part of the Submission Requirements for C (Approach to Design and Construction)".

9.6.14 Appendix AP1.1 contains further design deliverables in respect of ventilation for the RHCYP/DCN:

3. Approach to Design & Construction - Interior Design Proposals

3.2 - Loaded 1:50 room layout drawings for the RHSC indicating interior design proposals and demonstrating the coordinating aspects of all design disciplines, including floors, walls, ceilings, façade ventilation, mechanical and electrical services.

5. Mechanical & Electrical Services

5.7 - 1:200 internal services concept schematic and zoning plans for both heating and ventilation; indicating of heating and ventilation in each room

5.9 - Mechanical schematic layouts and report (co-ordinated and consistent with all drawings and design information contained within the Bid Submission Requirements) denoting details and extent of proposed:

5.9.6 - Natural Ventilation strategy

5.9.7 - Mechanical Ventilation strategy

5.9.10 - Specialist ventilation strategy

5.12 - 1:50 mechanical and electrical services sections to illustrate use of ceilings, natural daylight, ventilation strategies, cooling and heating strategies, lighting strategy, acoustic strategy, specialist installations strategy, services concept

7. Environmental Services and Energy Management Strategy

7.1 - Natural Ventilation drawings and proposals

9.6.15 Appendix F – Thermal and Energy Model Parameters states:

"Project Co shall undertake Dynamic Thermal Energy Modelling to assess the energy performance and thermal performance of Project Co's Proposals.

The thermal performance of the Facilities shall be dynamically thermally modelled to the Project specific parameters, identified within Section 3 (Board's Construction Requirements) of Schedule Part 6 (Construction Matters). Thermal modelling shall inform the sizing of all heating, ventilation and comfort cooling requirements for Project Co's Proposals, inclusive of all natural ventilation pathway and overheating analysis.

In conjunction with energy performance, CO2 emissions shall also be required to be equal to, or better than, the agreed Carbon Emissions requirements in Section 3 (Board's Construction Requirements) of Schedule Part 6 (Construction Matters). The following documentation shall be used in providing the targeted thermal energy modelling requirements for the building;

- Scottish Health Technical Memorandums
- EnCO2de
- Health Building Notes
- CIBSE Design Guides
- Building Regulations (Scotland) Technical Standards"

9.7 Volume 2

9.7.1 Volume 2 of the ITPD is the NPD Project Agreement for the Project. It was based upon SFT's standard form contract.

9.7.2 The NPD Project Agreement included project specific amendments, which had been pre-agreed by the Board of NHSL and SFT. Bidders were encouraged to accept positions within the NPD Project Agreement, which

reflected SFT's standard form project agreement. However, bidders were also encouraged to raise any comments in relation to the project specific amendments by dialogue meeting 3, in order that these issues could be flagged to SFT at that time. Any proposed bidder amendment to the NPD Project Agreement would be a derogation. All derogations required the approval of SFT.

9.7.3 In general, all matters in relation to the NPD Project Agreement were to be raised with NHSL prior to close of dialogue. Only matters in relation to fine tuning and clarification would be permitted post-close of competitive dialogue.

9.7.4 Volume 2 of the ITPD defines 'Board's Construction Requirements' as meaning "the requirements of the Board set out or identified in Section 3 (Board's Construction Requirements) of Schedule Part 6 (Construction Matters) as amended from time to time in accordance with the terms of this Agreement". The Board's Construction Requirements were initially provided to bidders as Volume 3 of the ITPD.

9.7.5 The Project Agreement provided as Volume 2 of the ITPD included Section 5 (Reviewable Design Data) of Schedule Part 6 (Construction Matters) which explains the concept of reviewable design data:

> "This Section 5 (Reviewable Design Data) of Schedule Part 6 (Construction Matters) sets out the details of the specific design information, materials, samples and required approvals (as more specifically set out in the table below) ("Reviewable Design Data") to be reviewed by the Board in accordance with Schedule Part 8 (Review Procedure) before such Reviewable Design Data is incorporated into the Facilities and/or the Site by Project Co.
>
> For the avoidance of doubt, if Project Co's Proposals incorporate Room Data Sheets and/or Reviewable Design Data there shall be no requirement for Project Co's Proposals to be issued to the Board for review under Schedule Part 8 (Review Procedure). However, if Project Co subsequently revises or amends its Project Co's Proposals in relation to the Room Data Sheets and/or Reviewable Design Data, then such

revisals or amendments shall require to be issued to the Board for review under Schedule Part 8 (Review Procedure)."

9.7.6 Section 5 provides a table of Reviewable Design Data. The environmental matrix is not included in the table. However, Room Data Sheets are included. The Inquiry Team understands that this approach was adopted because room data sheets should have been completed for every room in the hospital by financial close. Therefore, the Environmental Matrix should have become obsolete as a briefing and design tool.

9.8 Volume 3

9.8.1 Volume 3 of the ITPD consists of Schedule Part 6 (Construction Matters), Section 3, of the NPD Project Agreement. It set out the Board's Construction Requirements. Sub-Section C set out the General Requirements and Sub-Section D the Specific Clinical Requirements.

9.8.2 Paragraph 2 of Sub-Section C set out the Project Wide Requirements, which included:

2.1 Approach to Design

2.2 General Requirements of the Board

2.3 NHS Requirements

2.4 Minimum Design and Construction Standards

2.5 Hierarchy of Standards

9.8.3 Section 2.1, "Approach to Design" states that:

"The new building will follow the design aspirations and guidance laid out in the Policy on Design Quality for NHS Scotland (2010) to which the Board subscribes and implements through its Design Champion.… The Design Champion for the project is the NHS Lothian's Project Sponsor, supported by the Director of Capital Planning and Projects, and the design process is managed by the reprovision project team."

9.8.4 Section 2.2 ‘General Requirements of the Board’, states that “Project Co shall ensure the Facilities comply with the following general requirements of the Board”. The list of requirements that follow include:

> “Adherence to the requirements set out in CEL 19 (2010) “A Policy for Design Quality for NHSScotland, 2010 Revision published by the Scottish Government.”

9.8.5 CEL 19 (2010) is addressed in detail the Reference Design and Environmental Matrix PPPs. It required NHSScotland bodies to utilise the ADB system for briefing, design and commissioning of new hospitals. If a different tool was to be adopted, the onus was placed on the NHS body to demonstrate that it was of equal value.

9.8.6 Paragraph 2.3 ‘NHS Requirements’:

> “In addition to the standards listed in paragraph 2.4 of this Sub-Section C, unless the Board has expressed elsewhere in the Board's Construction Requirements, a specific and different requirement, the Facilities shall comply with but not be limited to the provisions of the NHS Requirements as the same may be amended from time to time.”

9.8.7 Included in the list of guidance that follows is

> “…
>
> b) New Policy on Design Quality for NHS Scotland published by SGHSCD;
>
> …
>
> h) HTM and SHTM…
>
> …Health Technical Memoranda & Scottish Health Technical Memoranda (HTM & SHTM)

Project Co shall, in relation to all SHTM and all HTM (except HTM where an SHTM exists with the same number and covering the same subject matter): take fully into account the guidance and advice included within such SHTM and HTM; ensure that the Facilities comply with the requirements of such SHTM and HTM; and adopt as mandatory all recommendations and preferred solutions contained in such SHTM and HTM."

9.8.8 Paragraph 2.5 sets out the 'Hierarchy of Standards'. It states that:

"…Where contradictory standards/advice are apparent within the terms of this Section 3 of Schedule Part 6 (Construction Matters) and the Appendices then subject to the foregoing paragraph then (1) the most onerous standard / advice shall take precedence and (2) the most recent standard / advice shall take precedence. When the more onerous requirement is to be used the Board will have the right to decide what constitutes the more onerous requirement.

Where there is a conflict of interest resulting from the use of the standards /advice Project Co shall involve the Board in the decision making process. The Board shall be entitled to make the final decision regarding the standards / advice to be used for the Facilities including any contradictions that may arise between items (1) and (2) above…

…In certain instances, NHS publications include a number of options or alternative solutions. Where the Board has defined their preference specifically, Project Co shall adopt these preferences as a mandatory requirement. Where no Board preference is stated, Project Co shall engage the Board in the design development process to seek and incorporate the Board's preference within the Facilities."

9.8.9 Paragraph 3 sets out the General Design Requirements and includes the following instructions regarding Room Data Sheets.

"Paragraph 3.6.3 Room Data Sheets

Project Co shall provide Facilities that, as a minimum, meet all the requirements specified in the Room Data Sheets included in this Schedule Part 6 Section 6. Room Data Sheets not included in Schedule Part 6 Section 6 shall be provided through RDD.

Project Co shall provide fully developed Room Data Sheets submitted to the Board as Reviewable Design Data for review by the Board in accordance with Schedule Part 8 (Review Procedure) and clause 12.6 of the Project Agreement.

As part of the commissioning process, Project Co shall be responsible for demonstrating compliance with the requirements included within the Room Data Sheets.

For the avoidance of doubt, Project Co shall provide mechanical ventilation, comfort cooling and air conditioning to suit the functional requirements of each of the rooms in the Facilities. Irrespective of the ventilation requirements in Room Data Sheets, where rooms are clearly intended to be occupied and/or become internal spaces during design development and natural ventilation is not possible, mechanical ventilation and/or extract ventilation shall be provided as appropriate to suit the function of the space."

9.8.10 Paragraph 5 set out the General Construction Requirements. Paragraph 5.2 'Infection Prevention & Control' states:

"Project Co shall ensure all aspects of the Facilities allow for the control and management of any outbreak and/or spread of infectious diseases in accordance with the following:

f) Ventilation in Healthcare Premises (SHTM 03-01);"

9.8.11 Paragraph 5.3 ‘Thermal Requirements’ states:

> “Project Co shall ensure the buildings’ envelopes complies with Section 6 of 2011 Non-domestic Technical Handbook to The Building (Scotland) Amendment Regulations 2010 and the following criteria:
>
> c) The building fabric shall include passive design measures to limit summer temperatures to figures given within the Environmental Matrix;”

9.8.12 Paragraph 5.25.1 ‘BREEAM’ states:

> “Project Co shall ensure that the Facilities achieve as a minimum a ‘Very Good’ rating when assessed against BREEAM 2011 New Construction (SD5073). Under the BREEAM 2011 New Construction (SD5073) there are now mandatory requirements specifically under energy, CO2 emissions, water and ecology. In addition, BREEAM embraces energy efficiency and passive design strategies for ventilation and thermal control to enhance internal comfort. The Facilities shall therefore also meet a BREEAM ENE1 target of 6 credits (excellent) in accordance with the BREEAM Scheme Document for New Construction (SD5073) Section 6.ENE1”

9.8.13 Paragraph 5.26 ‘Energy Strategy’ states:

> “Project Co shall provide Facilities that achieve an optimum level of energy and utility conservation. Project Co shall:
>
> a) Minimise internal areas requiring mechanical ventilation;”

9.8.14 Paragraph 8 set out the ‘Mechanical & Electrical Engineering Requirements’:

> “Project Co shall provide the Works to comply with the Environmental Matrix.
>
> Project Co shall in carrying out the Works comply with the following non-exhaustive list of mechanical & electrical requirements.

…

Project Co shall take cognisance of all the building services implications of the requirements described in the Board's Construction Requirements of this Schedule Part 6 Section 3 Sub-Section D (Specific Clinical Requirements) and Sub-Section E (Specific Non-Clinical Requirements).

For the avoidance of doubt the hierarchy of standards and advice detailed in paragraph 2.5 shall apply to this paragraph 8."

9.8.15 Paragraph 8.1 lists the 'Minimum Engineering Standards' including "a non exhaustive list of SHTM's, HBN's and HTM's applicable to the Facilities" which includes:

"…

h) SHTM 03-01: Ventilation in Healthcare Premises;"

9.8.16 Paragraph 8.2 'Infection Control' states:

"Mechanical and Electrical equipment selections and designs shall take cognisance of HAI-SCRIBE in its entirety."

9.8.17 Paragraph 8.5.2 'Thermal Comfort' states:

"Where maximum internal summer time temperature calculations indicate that the internal temperature will exceed those limits set out in the Environmental Matrix, Project Co shall provide means of reducing the temperature rise.

Measures shall be assessed, modelled and implemented to demonstrate that the internal air temperature of any room or area does not exceed the maximum acceptable level of 25°C for more than 50 hours per annum.

For any room or area that does not meet this criterion, there should be a hierarchy of remedial action to prevent the high temperature by passive means as a priority, adopting a suitable means of comfort cooling as a last resort."

9.8.18 Section 8.5.3 ‘Air Quality’ states:

"…

i. Internal

…Particular attention shall be given to the risk of cross infection within the hospital / healthcare environment and shall be such as to minimise the spread of infection. Project Co shall demonstrate through submission of information to the Board as Reviewable Design Data for review by the Board in accordance with Schedule Part 8 (Review Procedure) and clause 12.6 of the Project Agreement, how the proposals facilitate the control and management of an outbreak and spread of infectious diseases, and in particular shall comply with the requirements of SHTM 03-01 (Ventilation in Healthcare Premises). In order to reduce cross-contamination, the design of the Facilities shall incorporate 100% fresh air supply systems only.

Project Co’s demonstration referred to above is to cover all aspects of the building, its services, spatial relationships, soft and hard FM proposals and incorporate requirements of the Board’s Infection Control Team.

Project Co shall provide natural ventilation wherever possible, except where:…

d) Where inflows of air are undesirable;

e) Clinical requirements, as detailed in the Room Data Sheets, do not allow in areas such as isolation rooms, where positive or negative pressure are required; and

f) Areas which are air-conditioned.”

9.8.19 Section 8.7.8 ‘Mechanical Ventilation & Air Conditioning’:

“…The need to maintain comfort conditions in accordance with the Room Data Sheets in all areas but particularly in clinical areas is of paramount

importance and Project Co shall develop strategies for achieving these conditions together with minimum energy consumption.

Project Co shall provide natural and mechanical ventilation, comfort cooling, and air conditioning to suit the Facilities and clinical requirements and provision of the Clinical Services…

…Project Co shall demonstrate how the proposals facilitate the control and management of an outbreak and spread of infectious diseases in accordance with SHTM 03-01, SHFN 30 and HAI-SCRIBE..."

9.8.20 Paragraph 8.7.22, 'Ventilation and Air Conditioning of Isolation Rooms' states:

"Project Co shall provide air conditioning systems to Isolation Rooms to support the Board's Construction Requirements of this Schedule Part 6 Section 3 Sub-Section D (Specific Clinical Requirements), NHS Standard Infection Control Precautions (SICPs) and maintaining strict positive / negative pressure differentials.

Ventilation and air conditioning systems for these rooms shall be designed and installed in accordance with SHTM 03-01, 04-01 and NHS Model Engineering Specification C04. Project Co shall demonstrate how the proposals facilitate the control and management of an outbreak and spread of infectious diseases."

9.8.21 No similar instructions are provided for the Critical Care Department.

9.8.22 Part 6 Section 3: The Boards Construction Requirements, Sub-Section D: Specific Clinical Requirements states:

"This Schedule Part 6 Section 3 Sub-Section D forms the Specific Clinical Requirements included in the Board's Construction Requirements Specification. Project Co shall satisfy all the requirements under this Sub-Section D.

It contains design philosophy and specific requirements for each of the clinical services to be provided from the Facilities."

9.8.23 The clinical requirements for the Critical Care department were set out in the Clinical Output Specification for Critical Care. This states:

- "Flexibility in the use of the Critical Care beds for both High Dependency and Intensive Care is key to maintaining efficient use of high specification beds. All three critical care areas must be co-located
- Single cubicles will be used for privacy or isolating ordinary infectious conditions
- Lobbied single bed isolation cubicles are required for both source and protective isolation of patients and they all require to have identical design of pressure control with positive pressure lobbies with filtered air, and negative extraction cubicles. It is required that Contaminated air must not flow back into any of the open Critical Care areas. It is required that the lobby must be joined to the room at the foot end of the bed.
- All PICU and HDU bed spaces are required to be of the same specification to allow greatest flexibility of use."

9.8.24 Appendix C contained the environmental matrix. This is addressed in detail in a separate PPP.

10. Key Stage Review 2a: Pre-ITPD

10.1 The Pre-ITPD KSR was finalised on 7 March 2013. Question 4 of the KSR under section 2 "Project Requirements" stated:

"Please explain the approach that the Procuring Authority is taking in presenting its design and specification requirements to bidders (e.g., use of exemplar or reference designs) and the opportunities available for bidders to propose alternative or innovative solutions. Please demonstrate that this approach is consistent with (i) allowing opportunity for improved value for money through bidder innovation (ii) allowing scope for value engineering required to deliver the project within the affordability limits (iii)

the procurement timetable and (iv) bidder access to project stakeholders during the procurement."

10.2 The answer provided was:

"The ITPD, Volume 1 section 2.5 and Appendix E sets out the elements of the Reference Design which is being provided to bidders are mandatory. These relate to the Operational Functionality as defined in the Project Agreement and there are elements of flexibility in relation to non-mandatory elements of the Reference Design."

10.3 There was no explanation, or analysis, in the KSR of the purpose of the environmental matrix.

11. Competitive Dialogue

11.1 The ITPD was issued by NHSL to all three bidders on 12 March 2013. This marked the start of Competitive Dialogue.

11.2 Paragraph 5.15 of the SCIM NPD Guide: OJEU to Contract Award states that the aim of Competitive Dialogue:

"is to 'identify and define the means best suited of satisfying [the contracting authority's] needs.' This stage formally acknowledges the need in complex projects to talk around solutions, develop ideas and explore options as part of the tender process…It should therefore continue until the contracting body is satisfied that it has identified the solution or solutions capable of meeting its needs and requirements with sufficient precision to enable Final Tenders (which fully meet these requirements) to be submitted."

11.3 NHSL's Core Evaluation Team were involved in Competitive Dialogue, assisted by technical, legal, financial and cost advisors. NHSL did not have an external healthcare planner to advise them during the Competitive Dialogue process.

11.4 The Reference Design Team who had produced the reference design and associated documents were not retained by NHSL during the procurement period to allow members to join bidding teams during the procurement stage. According to the August 2012 version of MM's "Approach to Reference Design" paper:

> "The Reference Design will therefore have to be handed over to the Technical Advisory team and actions will have to be taken to cover for the fact that the Reference Design team will not be available to address queries during the procurement process.
>
> In terms of the handover and sign-off of the Reference Design, the following matters will have to be addressed:
>
> - Is the Reference Design fully aligned with the requirements of the Clinical Output specifications;
> - Has NHSL taken ownership of the Reference Design on the basis that some areas of the design will be a compromise between the requirements and what can be achieved through design;
> - Is the Reference Design fully aligned with the Board's Construction Requirements – architectural, engineering and Soft FM requirements;
> - The Technical Advisory team during procurement must be in a position to fully understand the development of the Reference Design from a technical point of view. The Team will need to take ownership of the design as if it was its own work."

11.5 In November 2012, the PSB agreed to adopt a compressed programme for competitive dialogue. The competitive dialogue period was reduced from 209 days to 155 days.

11.6 The ITPD sets out the process for Competitive Dialogue in paragraph 4. It was envisaged that the dialogue process would comprise a series of meetings leading to submission of the Final Tender, and that dialogue would be

continued until NHSL was satisfied that solutions from one or more Bidders were capable of meeting NHSL's requirements. Bidders were expected to provide informal submissions in advance of dialogue meetings, and a draft final tender before being invited to submit final tenders at the Close of Dialogue.

11.7 Informal submissions would not be evaluated but feedback on these submissions would be given to Bidders at each stage of the Dialogue and would inform the basis for the remaining Dialogue. The ITPD noted that objective of Dialogue "…is to ensure Bidders are clear on the Board's requirements and allow each Bidder to develop a Solution that is capable of meeting the requirements set out in the ITPD."

11.8 The ITPD provided the following timetable of dialogue meetings.

Activity	Week	Bidder A	Bidder B	Bidder C
Dialogue Opens				
Issue ITPD	0	12/03/13		
Briefing Meeting \ Q and A Sessions	1	Tue 19/03/13	Wed 20/03/13	Thu 21/03/13
Informal Submission 1	2	Mon 25/03/13	Tue 26/03/13	Wed 27/03/13
Dialogue Meeting 1	3	Tue 02/04/13	Wed 03/04/13	Thu 04/04/13
Informal Submission 2	6	Mon 22/04/13	Tue 23/04/13	Wed 24/04/13
Dialogue Meeting 2	7	Tue 30/04/13	Wed 01/05/13	Thu 02/05/13
Informal Submission 3	10	Mon 20/05/13	Tue 21/05/13	Wed 22/05/13
Dialogue Meeting 3	11	Tue 28/05/13	Wed 29/05/13	Thu 30/05/13
Informal Submission 4	14	Mon 17/06/13	Tue 18/06/13	Wed 19/06/13
Dialogue Meeting 4	15	Tue 25/06/13	Wed 26/06/13	Thu 27/06/13
Informal Submission	18	Mon 15/07/13	Tue 16/07/13	Wed 17/07/13
Dialogue Meeting 5	19	Tue 23/07/13	Wed 24/07/13	Thu 25/07/13
Draft Final Tender Submission	24	26/08/13		
Dialogue Meeting 6	28	Tue 24/09/13	Wed 25/09/13	Thu 26/09/13
Dialogue Closes				
Invitation to Submit for Final Tenders	30	11/10/13		
Submission of Final Tenders	35	11/11/13		

11.9 The expected format and requirements for these meetings were set out in the ITPD as follows:

"4.2.2 Each monthly Dialogue Meeting (Dialogue Meetings 1-6) shall involve the Board spending time with each Bidder. The format of such monthly meetings shall be:

(a) Initial meeting between the Board's full Core Evaluation Team and Bidder's team;

(b) The initial meeting shall (if required) break out into a series of sub-meetings concentrating on legal, technical and financial aspects of Bidder's proposals;

(c) The sub-meetings shall re-convene for a final wrap up meeting with the Board's full Core Evaluation Team and Bidder's team.

4.2.3 In advance of each Dialogue Meeting, Bidders are invited to submit specific material related to the agenda topics to be discussed (Informal Submissions) as more fully set out in paragraph 4.5.3. These Informal Submissions by Bidders prior to the Dialogue Meetings shall enable the Board and its advisers to:

(a) review the work undertaken by Bidders since the previous Dialogue Meeting;

(b) provide any meaningful and relevant comments to the Bidders; and

(c) avoid any time disconnect between the Board's comments and the development of Bidders' Solutions

4.5.3 The proposed agenda topics and submission requirements for each Dialogue Meeting are set out in the following appendices to Volume 1 of the ITPD:

(a) Appendix A (i) (Technical Agenda Topics and Informal Submission Requirements) and (ii) (Submission Requirements);

(b) Appendix B (i) (Financial Agenda Topics and Submission Requirements); and

(c) Appendix C (i) (Legal Agenda Topics) and (ii) Submission Requirements and Evaluation).

4.5.4 With each technical submission, Bidders are also required to provide a completed Annex 2 to Appendix A (ii) – 'Schedule of Design Deliverables for Technical Meetings during Dialogue Period' confirming the supporting drawings and information that Bidders are providing to support the Submission Requirements of the ITPD. Bidders should note that all drawings must be submitted at least once before submission of the Draft Final Tender."

11.10 An initial briefing meeting was held with all the bidders to introduce the team and provide an overview of the project, including 'in particular the detail and importance of the Reference Design and the demarcation between Mandatory Reference Design Requirements and Indicative Elements of the Reference Design."

11.11 The initial briefing meeting with bidder B (IHSL) was held on 20 March 2013. It was attended by Susan Goldsmith, Project Sponsor, the NHSL Core Evaluation Team and Advisers, and 15 members of the bid team.

11.12 On 8 April 2013 NHSL issued an update to prospective tenderers entitled "Reference Design - an update on requirements for Operational Functionality". According to this update, "the Board have agreed to relax the requirements in relation to a limited number of departments whose location within the RHSC and DCN is less critical." This did not relate to Critical Care or neutropenic patient wards. The ITPD was revised to reflect these changes.

11.13 On 22 April 2013, IHSL submitted its informal submission for Dialogue meeting 2 which addressed C8, 'M&E engineering design proposals', C9 'Lighting' and C10 "Energy Management Proposals". The submission contains the following statements:

"At this stage we have reviewed the Reference Design and Plant and Services Strategies of the Exemplar Design…we think it is fair to say that

the Reference Design appears to ourselves to provide economic, practical and energy efficient solutions and we don't expect the final solutions to be dramatically different.

'Design Control and Operational Philosophy:

The designs will be undertaken in house utilising computer based modelling, calculation and drawing packages... These outline designs will be subject to ongoing review for compliance with SHTM's, HTM's etc and sustainability and BREEAM targets.'

'Sustainability:

Designs will be fully compliant with current legislation and NHS Targets the aim being to meet and exceed where possible.

We are currently holding separate BREEAM and Sustainability reviews with the Team and will advise on progress…

…We are therefore looking closely at materials and passive measures to reduce energy base loads as a parallel exercise with the Architects.'

'C8.3 Environmental Matrix:

No changes proposed at this time nor envisaged in the future but we will continue to review and advise back'

'C10. 1 Energy Management, iv. Passive Design Measures:

Natural ventilation being developed in line with Reference Design and viewed as achievable further thermal performance of building being reviewed with Thermodynamic Model. Will form part of Final Solution with detailed Thermal and Energy Performance Data taken from Thermodynamic Modelling exercise.'"

11.14 Dialogue meeting 2 for bidder B (IHSL) took place on 1 May 2013. Colin Macrae from MM led on responses regarding M&E within the Design and Construction Breakout group.

11.15 The action notes from the meeting do not reflect any detailed discussion regarding ventilation strategy, for example for passive design (using natural ventilation where possible), or consideration of the environmental matrix. Compliance was discussed, with the following action note recorded:

> 2.1.4 Where the Operational Functionality is compromised by virtue of compliance with the Board's requirements as set out in paragraph 5.2.2 of ITPD volume 1 then IHSL shall identify the specific areas affected and provide a supporting commentary. Any such changes will require discussion with an agreement by the Board. NHSL will issue a clarification to all Bidders.
>
> NHSL are still reviewing our position on compliance (in respect of your informal submission 2 D&C proposals) and will issue a bulletin in the week commencing 06/05/13.

11.16 Another Bidder, 'Bidder C' (Mosaic) provided a narrative to explain their ventilation strategy which would 'result in a lower air flow than the 6 air changes/hour specified in SHTM 03 where mechanical ventilation is utilised'. Bidder C also described instances where they would move away from the reference design (environmental matrix), including 'where it is non-compliant with relevant design guidance'. Their submission on C8 and C10, for Dialogue Meeting 2, dated 24 April 2013, contained the following statement:

> "Only move away from the Reference Design where we see real benefit to NHS Lothian in terms of: reduced energy usage; better system resiliency; ease of operation; improved maintenance; or where it is non-compliant with relevant design guidance
>
> …
>
> Natural ventilation facility to be provided where possible to allow a low energy solution within a sustainable design…
>
> …Ventilation can be provided by natural infiltration of outside air via opening windows or other openings or mechanical i.e. fan assisted ventilation. Both natural and mechanical ventilation are appropriate in

particular circumstances however where a specific clinical need applies mechanical ventilation will be provided in accordance with SHTM guidance.

…

The selection of 25°C as the maximum temperature for bedrooms determines that mechanical ventilation and cooling will be the likely solution as simulations have shown that this level of temperature control is not achievable using natural ventilation.

Having established the need for mechanical control of room temperature the ventilation & cooling strategy must be defined…

…The use of terminal cooling devices such as chilled beams are widely accepted as an effective, energy efficient method of cooling which is acceptable in patient bedrooms. In order to maximise energy efficiency the air flow rate should be based on the calculated flow to suit occupancy and provide the required cooling. This will generally result in a lower air flow than the 6 air changes/hour specified in SHTM 03 where mechanical ventilation is utilised.

We would like to explore the acceptability of the above strategy with the Health Board and also review the specialist ventilation strategy for clinical areas such as:

1. Operating theatres

    a. Generally as SHTM

    b. The use of “skirt-less” canopies in UCV theatres

    c. The use of single plant for a pair of theatres

2. Isolation rooms

    a. A common supply system is proposed in the reference design with design as HBN4 supplement 1

b. Application of isolation room guidance to Critical Care single rooms

3 Imaging rooms, in particular;

a. Intra operative MR scanner suite

b. Interventional imaging"

11.17 Bidder C's informal submission also included a presentation for Dialogue Meeting 2. The following points were made regarding building services and energy:

"• Aim for minimum fresh air, rather than 6 air changes/hour for in-patient bedrooms

• Include for natural ventilation wherever possible

• Utilise Mechanical vent with chilled beams

• treat critical and non-critical spaces differently"

11.18 Feedback notes regarding Bidder C's submission on M&E, prepared for Dialogue Meeting 2, include:

"Any suggestions/proposals will be considered if they help achieve sustainability target.

Clarify our attitude to reference design."

11.19 Dialogue meeting 2 for Bidder C took place on 2 May 2013. The action notes do not reflect detailed discussion regarding the ventilation strategy. However, revised action notes included within Bidder C's informal submission for Dialogue Meeting 3 included the following addition in track changes, "[bidder C was] proposing a reduction from 6AC/Hr to 4 AC/hr as set out in the reference design."

11.20 On 9 May 2013 NHSL issued a bulletin to all bidders offering clarification of operational functionality. This bulletin states:

> "The Board will consider, and may accept, changes to the Mandatory Reference Design Requirements (i.e. those elements relating to Operational Functionality) where a Bidder considers that those Mandatory Reference Design Requirements are not capable of meeting the Board's requirements (as described in paragraph 5.2.2 of Volume 1 of the ITPD)."

11.21 The bulletin also provides a reminder of the definition of operational functionality set out in the ITPD. (See the previous section of this paper on the content of the ITPD).

11.22 At the meeting of the PSB on 31 May 2013, Brian Currie (NHSL) noted that the Core Evaluation Team were comfortable that all bidders would proceed to submit draft final tenders in late August, but that bidders had fed back that the programme was challenging to meet. Brian Currie also noted that bidders were "only now submitting 1:200 departmental layouts…for which Bidders were expected to provide a robust rationale for any changes to the Reference Design." This related to changes in adjacencies and layouts.

11.23 IHSL provided an update on M&E engineering design proposals, for Dialogue Meeting 3, on 29 May 2013. With regard to 'C8.3 Environmental Matrix' IHSL stated:

> "No changes proposed at this time nor envisaged in the future but we will continue to review and advise back (as previous).
>
> Additional floor plans layouts developed to demonstrate Heating/Cooling/ Ventilation Strategies."

11.24 The floor plan layouts for ventilation strategy were high level and showed that a number of rooms in Critical Care were 'HBN4 dependent', some would receive central air supply and some central supply and extract. Exact air

change rates, pressure regimes and descriptions of the room function were not provided.

11.25 The update on 'C10 Energy Management' included an update on progress with Environmental Modelling:

> "Experiences from the adjacent ERI prove ward conditions are not acceptable when reliant on natural ventilation alone – maximum allowable internal temperature 25^{o}C.
>
> Single Bedroom Ward, South Facing Exposed (Summer)
>
> Mixed Mode Ventilation
>
> - Opening windows – restricted opening to 100mm.
> - Supply air provided if the room air temperature is great than 25oC.
> - External air 4 ACH cooled to 18^{o}C.
> - No reliance on uncontrolled infiltration for cooling."

11.26 The Action Notes from Dialogue meeting 3 record that:

> "IHS Lothian provided an update on their Environmental Matrix and Energy Model. Further details to be provided for the next dialogue meeting."

11.27 The Action notes for Bidder C's Dialogue meeting 3, held of 30 May 2013, do not record any discussion of ventilation strategy or the environmental matrix.

11.28 IHSL's Dialogue meeting 4 took place on 26 June 2013. In their informal submission for this meeting no mention is made of ventilation strategy or the environmental matrix. In their update on design development, IHSL referred to the use of ADB with regard to agreeing equipment proposals and signing off room layouts. Their submission arrived after the deadline and it was noted in

the notes for the Chair for Dialogue meeting 4 that "NHSL will respond to these submissions today, but you should be aware that late submissions cannot receive the same attention as those of other bidders that arrive on time."

11.29 The Action notes for Dialogue meeting 4 with Bidder B (IHSL) do not show any discussion of ventilation strategy, the environmental matrix or use of ADB. There was discussion regarding instances where NHSL's requirements cannot be delivered as a result of a specific Mandatory Reference Design Requirement:

> "IHS Lothian to provide the schedule in word format which identifies the department, room, perceived non compliance in the Reference Design, proposed solution and the requirement with which it now complies and with the following additional columns – a 'comments' column and a 'yes/ no' column in order that NHSL can add commentary."

11.30 IHSL submitted a document titled 'Compliance with Mandatory Reference Design – B1', dated 27 June 2013. This document shows differences between the Reference Design and IHSL's design of the Critical Care (PICU/HDU) department. Under the sub-heading 'variances' it is noted that "The non-compliances with the requirements of the operational policy are the same as the reference design." The summary of IHSL's "proposed improvements/alterations" to the reference design included:

> "Improved connectivity and flexibility
>
> We have improved the flexibility of the high and low acuity bed areas of the HDU by standardising the multi bed bays and single rooms This enables the provision of the same level of equipment in each room, enabling the boundary between the sub departments to flex as demands on the service vary.
>
> It also provides the potential for the department to become all single bedrooms if future service demands change (as has happened in other departments to accommodate the infection control…"

11.31 On 10 July 2014 the Project Steering Board approved the prolongation of competitive dialogue by 8 weeks in order to promote design compliance. The minutes noted:

> "[Brian Currie] proposed that an 8 week prolongation of the competitive dialogue phase was introduced to facilitate design compliance across all three bidders. This milestone was to be met under current programme at Dialogue Round 5 (end of July) but it has become increasingly clear in recent weeks that due to the volume and intensity of design development and review iterations required to bring the 1:200 scale drawings and minimum areas to compliance with the Board's requirements this will not be achievable.
>
> It is the project team's firm view that the procurement process cannot progress to Draft Final Tender Stage until three design compliant bids are evidenced.
>
> The May 2017 Operational date would remain under this proposal but anticipated Financial Close date would move back 8 weeks to early October 2014. The intention is that this proposed prolongation would be absorbed in a shortening of the construction duration.
>
> The PSB were reminded that the project team have communicated previously growing concern of the inadequacies of the programme to deal with the level of design development necessary for a major acute health facility regardless of the availability of a 'Reference Design':
>
> 28 March 2013, 26th April 2013 and 31st May 2013 – 'Ability of Bidders to submit meaningful design proposals within competitive dialogue programme remains to be confirmed'.
>
> BC also confirmed that all three bidders had been asked for their view on the need for prolongation and, with varying degrees of duration, all confirmed that additional time was necessary. One bidder reluctantly agreed, when pressed, that they would be unable to comply in the time allocated given the status of their design submission to date.

> The PSB accepted this proposal given the maintenance of the operational date however [Mike Baxter] expressed concern that Consort may use this prolongation to further delay completion of key enabling works. SFT have also previously noted this proposal in an email communication to the Project Director following a detailed briefing session."

11.32 On 12 July 2013, bidders received a brief change from NHSL. The brief change notified bidders that NHSL had applied for a single room derogation in DCN Acute Care. Bidders were requested to design DCN Acute Care to meet the clinical output specification. Changes were also made to the Project Brief for Theatres in both the RHCYP and DCN. The brief change also involved the inclusion of the former petrol station site within the Project site boundary following its acquisition by NHSL. These changes were raised with bidders and the relevant changes were made to the Project Agreement and construction documents (practical and legal changes only).

11.33 NHSL has advised the Inquiry Team that the Brief Change had limited impact on the Competitive Dialogue process. Competitive dialogue was extended not just to accommodate the Brief change but due to the overall process taking longer than initially anticipated.

11.34 By Dialogue Meeting 4B on July 24, 2013, IHSL's 1:200 design for Critical Care had 'B status: comments to be incorporated'. 'A status' was defined as 'no comments' and 'C status', which was given at the previous meeting of 20 June, meant 'unacceptable/resubmit'. The Action notes include comments on the drawings received for PICU/HDU/Critical Care/NICU. None relate to ventilation.

11.35 IHSL's informal submission for Dialogue meeting 4C included 'M&E Engineering Design Approach' (C8). This contained similar content to previous C8 submissions and noted outline designs have been subject to ongoing review for compliance with SHTM's, HTM's, etc. IHSL stated that:

- "We have undertaken internal Peer Reviews at Concept and Proposal Stages and will carry out a final review.

- C8.3 Environmental Matrix: No changes proposed at this time nor envisaged in the future but we will continue to review and advise back".

11.36 Also included with the submission were 1:200 drawings of the ventilation strategy. The drawings for the First Floor where Department B1 (Critical Care/HDU/Neo-natal surgery) as well as P1 (Theatres) were to be located provide a legend to show which rooms would require central supply and extract ventilation, central air supply, central general extract, central dirty extract, be HBN4 Dependent (isolation room guidance), be in line with SHTM 03-01, or have natural ventilation. No rooms in Critical Care are shown to be SHTM 03-01 dependent. Isolation rooms are shown to be 'HBN4 Dependent'. Single bed cubicles and open plan bays are shown as requiring central supply air. Central air supply for rooms in Critical Care is in line with the requirements in SHTM 03-01. A number of single bed cubicles have en-suites.

11.37 On 16 August 2013 Tim Davison, Chief Executive of NHSL, sent an email to Iain Graham, Brian Currie, Susan Goldsmith, Alan Boyter, Fiona Mitchell, and Edward Doyle, regarding a meeting with consultants in which they had expressed concern 'about the capacity and design of the new hospital, the lack of a 'service strategy' and most audibly, their feeling of being disconnected from influencing what was happening.' The consultants felt disengaged from the design process. A meeting was arranged for 6 September 2013 to discuss these issues. It is not clear to the Inquiry Team how this matter was resolved.

11.38 A paper was prepared by Sorel Cosens on 10 September 2013 for the Project Steering Board meeting on 13 September 2013. According to the paper, four additional dialogue meetings had been arranged to focus 'primarily on Bidders' compliance with operational functionality and room sizes' and the meetings were held with 'the Clinical Director, an NHSL Project Manager with detailed knowledge of the Reference Design, and our Architectural Adviser from Mott MacDonald.' The paper also notes:

"Outstanding design compliance after September will be addressed in feedback on the Draft Final Tenders; non-compliance would result in a bidder being informed that their submission would have been discounted without full evaluation had it been their Final Tender."

11.39 IHSL produced certain room data sheets dated 8 October 2013. They contain the acronym 'ADB' in the top left corner, 'Activity Database' in a banner at the bottom of each page and the Department for Health logo in the bottom corner. They contain the following information for rooms in Department B1 'PICU and HDU's':

Room name	Code	Revision date	Mechanical Ventilation	Ventilation type	Pressure	Filtration
Single-bed cubicle	B1401	25/09/2013	4ac/hr (supply)	Central supply air	positive	G4 – minimum
Single bed cubicle: isolation	B1401-01	08/10/2013	HBN4 dependent	HBN4 dependent	balanced	F7 - minimum
Open Plan Bay 3 Cots: neonatal	B1407-01	25/09/2013	4ac/hr supply	Central supply air	positive	G4- minimum
Single cot cubicle: neonatal	B1421	8/10/2013	4ac/hr supply	Central supply air	positive	G4 minimum
Multi-bed bay 4 beds low acuity	B1609-01	25/09/2013	4ac/hr supply	Central supply air	positive	G4 minimum
Multi-bed bay: 4 beds High Acuity	B1609-02	25/09/2013	4ac/hr supply	Central supply air	positive	G4 minimum

11.40 Draft Final Tenders

11.40.1 Draft Final Tenders were submitted by bidders on the 21st October 2013. This was a 'dry run' for the Final Tender, allowing bidders to set out their solutions to NHSL and for NHSL to provide feedback on whether aspects of the Draft Final Tender met NHSL's requirements as set out in the ITPD.

11.40.2 The draft final tender was not scored. It was aimed at ensuring that no bids would be dismissed for non-compliance and that there would be three compliant bids to assess. The focus was on ensuring the bids submitted were complete and able to be evaluated. A 'compliant tender' is one which complies

with the bid submission requirements set out in the ITPD, and which does not fail any of the pass/fail criteria.

11.41 The Inquiry Team understands that one bidder – Bidder C – submitted a marked up version of the EM. This sought to amend some of the entries to reflect Bidder C's ventilation strategy, "to enhance the proposed design criteria or to adjust values based on intended room use". Bidder C changed the air change rates for single bed cubicles and open plan bays in the PICU (Paediatric Intensive Care Unit) and Low Acuity department sub-groups from 4 ac/hr to 10 ac/hr. For single bed cubicles and open plan bays in the Neo-Natal and High Acuity department sub-groups Bidder C modified the air change rates to 6 ac/hr.

11.42 The Draft Final Tender review was completed on 13 November 2013 with Compliance and Feedback Reports issued to each Bidder. In order to "ensure fairness between bidders" no detailed feedback was to be provided "beyond setting out where that bidder does not meet minimum requirements". All of the bidders received the following feedback:

> "The Bidder should note there are a number of responses submitted in the Draft Final Tender that are unsatisfactory and, as such, currently constitute a 'fail' against the Board's minimum requirements; these unsatisfactory responses (clearly identified by inclusion of 'the Bidder has not provided a satisfactory response') MUST be addressed and failure to do so within the Bidder's Final Tender is likely to result in the Final Tender being rejected…
>
> The Bidder has not provided all the requirements as set out in ITPD Volume 1 Appendices AP1.1 Design Deliverables and AP1.2 Specifications; where these have not been submitted the Bidder has not provided a satisfactory response and this is likely to result in the Final Tender being rejected."

11.43 Feedback provided to IHSL alone was that:

> "The Board is disappointed that submissions have not developed in line with feedback and discussions in dialogue to date. The Board is unable to confirm whether the Bidder would meet the minimum requirements where an incomplete submission has been provided."

11.43.1 The Board held a final dialogue meeting with each bidder at which they provided feedback in relation to the draft final tender and clarified outstanding points. This final meeting took place on the following dates for each bidder:

> "(a) 19th November 2013 for Bidder A (B3);
>
> (b) 20th November 2013 for Bidder B (IHSL);
>
> (c) 21st November 2013 for Bidder C (Mosaic.)"

11.44 The action notes for dialogue meeting 6 held with bidder B do not record any feedback on the ventilation design, environmental matrix or room data sheets.

11.45 The following comments were provided with regard to the 'Approach to design and construction':

> "Where sections were 'under development' the Board cannot comment on IHSL's submission. The level of incomplete information caused considerable anxiety in a draft of final tender.
>
> NHSL will not review further submissions at this stage, however for sections submitted as part of Draft Final tender that the Board could not locate, IHSL are to confirm the title and location of the documents in Conject for the team to review.
>
> The Bidder will be informed if any such submissions do not meet the Board's requirements…"

11.46 The Action notes for Dialogue meeting 6 held with Bidder A and Bidder C do not record feedback on C8 Mechanical and Electrical engineering, nor do the

notes contain comments showing concern over the completeness of the draft final tender.

12. Close of Competitive Dialogue

12.1 Paragraph 5.15 of SCIM Guide 'From OJEU to Contract Award' states that the competitive dialogue stage should continue:

> "…until the contracting body is satisfied that it has identified the solution or solutions capable of meeting its needs and requirements with sufficient precision to enable Final Tenders (which fully meet these requirements) to be submitted."

12.2 Paragraph 5.19 states that:

> "There is no limit on the number of stages which can be used provided that, at the end of the dialogue, there are sufficient participants to allow for a genuine competition".

12.3 Paragraph 5.24 states that:

> "It is vital that the dialogue continues until the contracting body has clearly identified and specified its detailed requirements, the solution(s) capable of meeting its needs and this, the basis upon which final tenders should be submitted. It must be confident that the remaining participants have sufficient information/clarity to be able to submit fully developed and 'final' tenders as the next stage only permits 'fine tuning'"

12.4 The project team recommended to the PSB that the competitive dialogue phased was concluded. The recommendation to close dialogue was discussed at the PSB meeting held on 29 November 2013. After discussion of a number of points to do with outstanding bidder's concerns and land issues:

> "SG [Susan Goldsmith] asked the Steering Board to confirm their support for closing dialogue as planned on 6 December. PR [Peter Reekie] noted that while the points discussed were outstanding, he saw no reason for them not to be completed in the next week to achieve Close of Dialogue.

> BC [Brian Currie] summarised the position that the team had reached, with three affordable bids for designs that met the Board's requirements. The team were to be congratulated on this achievement, and SG asked BC to pass on her thanks to the wider project team."

12.5 At this meeting Brian Currie also "raised again the project team's concerns about achieving Financial Close with the Preferred Bidder in six months."

12.6 Given the feedback provided at the draft final tender stage, which included an expression of considerable anxiety in relation to incomplete information in IHSL's tender, it is not clear to the Inquiry Team why the project team and the PSB considered that it was appropriate to close the dialogue phase. This issue will require to be explored with witnesses at the hearing diet commencing on 24 April 2023.

13. Key Stage Review 2b: Pre-Close of Dialogue

13.1 The Pre-Close of Dialogue Key Stage Review was finalised on 13 December 2013.

13.2 Section 2: 'Project Requirements', question 2 asks:

> "Is the Procuring Authority, and are its advisers, satisfied with the overall quality and level of detail supplied by bidders during dialogue in respect of the design and build and service delivery solutions and that bidders' proposals are capable of meeting its requirements?"

13.3 The response given is:

> "Recommendation: That, prior to close of dialogue, the Board receives and copies to SFT, letters, in the form of the drafts which the Board have earlier provided to SFT, from each of its financial, legal and technical advisers confirming that each consider that it is appropriate for the Board to close dialogue."

13.4 Question 3 asks: “Based on dialogue with bidders is the Procuring Authority satisfied that the final tenders will contain solutions that satisfy its operational and functional requirements?”

13.5 The answer provided is: “Yes”.

13.6 Question 16 asks:

> “Please confirm what further development of technical information is required from bidders between now and final tender submission and from the preferred bidder between appointment and financial close. Is the Procuring Authority, and are its advisers, satisfied that this is achievable within the current project timetable?”

13.7 The answer provided is “yes” with the comment:

> “100% compliance for operational functionality and minimum room layouts has now been achieved with all bidders. The Board has reviewed the bidders’ programmes for design development through to financial close. The Board consider that the programme from preferred bidder to financial close is challenging.”

13.8 The conclusion in the KSR was that the Project was ready to proceed to the next stage subject to certain recommendations. These included letters being provided from financial, legal and technical advisers confirming that each consider that it is appropriate for NHSL to close dialogue.

13.9 The issues highlighted at the final tender stage, which included an expression of considerable anxiety in relation to incomplete information in IHSL’s tender, were not addressed within the KSR. It is not clear to the Inquiry Team why these issues were not addressed. This issue will require to be explored with witnesses at the hearing diet commencing on 24 April 2023.

**Volume 2 of the PPP will address the period from the close of Competitive Dialogue until the award of the contract. Provisional conclusions will be set out at the end of Volume 2 in relation to the entire procurement phase.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