

Leisure Procurement Toolkit

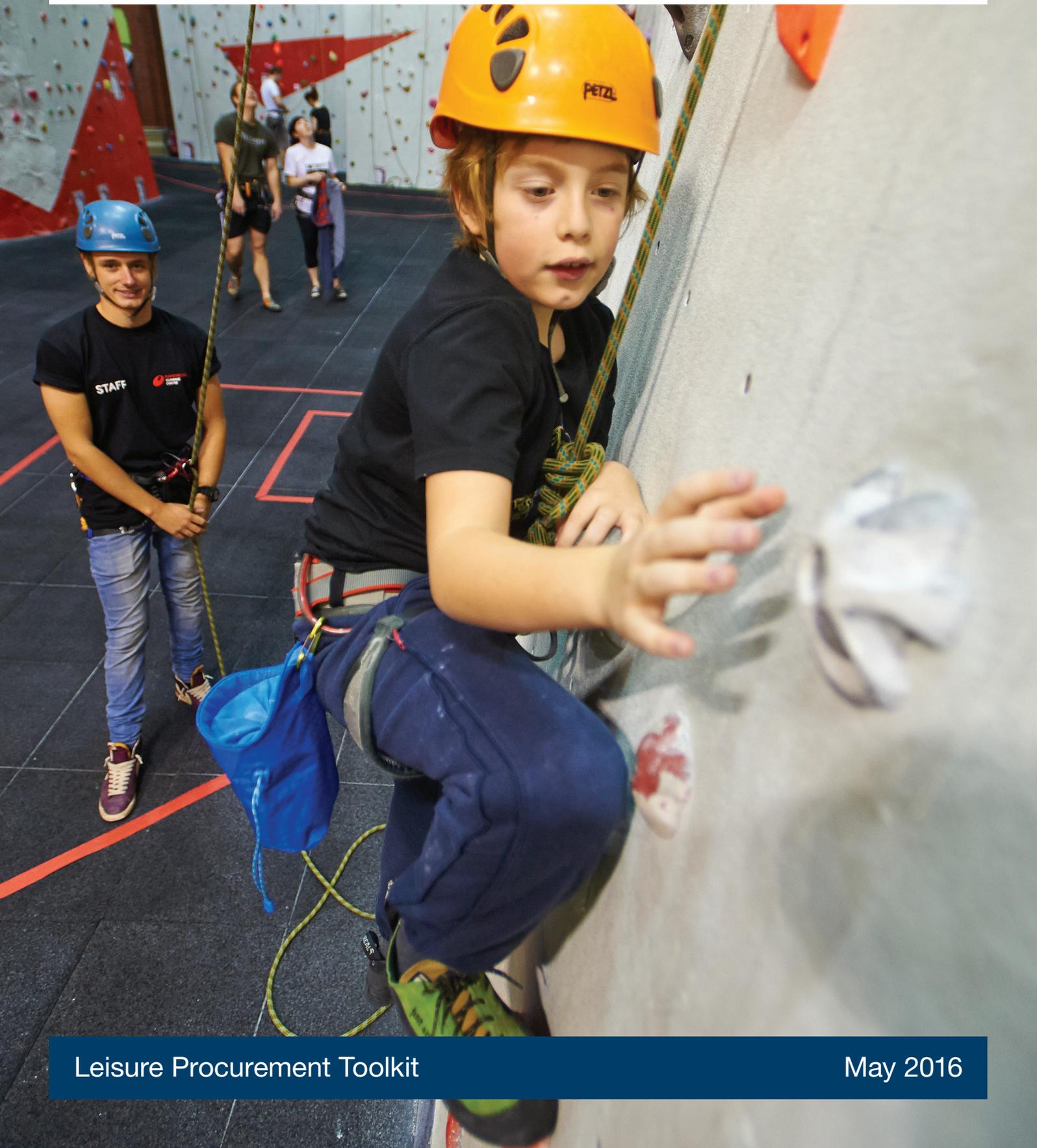


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Appendix D	Template document: DBOM Facilities Requirements, Technical Specification and Zone Data Sheets
Appendix E	Template document: DBOM Services Specification
Appendix F	Template document: LOC Services Specification
Appendix G	Template document: DBOM and LOC appendices to the Benchmarking Schedule
Appendix H	Template document: Legal and contractual issues list

Foreword

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

The Government Strategy, Sporting Futures, places a clear emphasis on the need to harness sport and physical activity for social good and how it can have a meaningful and measurable impact on improving people’s lives. There is a need to be clear on the social outcomes required and not just what we invest in but why. This guidance can help to ensure that local investment in sport and physical activity delivers those outcomes which bring benefit to the whole community.

In addition to the guidelines on procurement and contracts we will continue to look at approaches to attracting inward investment to the sector, potentially relieving pressure on the public purse, whilst encouraging continued investment into the sport and physical activity infrastructure.

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

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

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

The objectives were to

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

We aimed to produce

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

The toolkit is intended to be guidance that evolves to reflect up to date procurement regulations, the latest market trends and key issues and ensures that lessons learnt and best practice continue to be captured and adopted. With that in mind the toolkit and contract documentation now reflect an updated version of the original 2013 draft following a 24 month period of implementation and extensive consultation.

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

Continued

Foreword

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

The document will be web based and will continue to be updated on an annual basis or when legislative changes occur. The documents will not replace the need for quality specialist advice though it may enable clearer more focused briefs to be developed to ensure that consultants are deployed as effectively as possible in the process, enabling them to add value through focusing on key areas.

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

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

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

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



Charles Johnston
Director of Property
Sport England

01. Introduction and Overview

Introduction

1.1 Promoting good ideas, sharing best practice and ensuring everyone involved with sport has access to high quality tools, advice, support and information is essential if we are to succeed in creating a world-leading community sport system.

1.2 Sport England recognises the key role that local authorities play in delivering sport: local government spends approximately £1 billion per year on sport and leisure - more than 50% of the total resources available to sport every year. Within this, the provision of high quality facilities and services at a local level is of paramount importance.

1.3 This toolkit therefore provides information, resources and case studies that will be of use for local authorities contemplating procurement of services and/or facilities in their area and for which there is a need to procure a service provider under a competitive process which is compliant with the relevant procurement rules. The toolkit will also be useful for those authorities considering trust vehicles, particularly in relation to some of the template documentation that can be used to govern the contractual/service delivery relationship with the trust. When deciding whether to set-up a trust, careful consideration should be given to how value for money will be assessed and the need to demonstrate best value. This toolkit does not however specifically address procurement issues relating to the types of contracts which do not require a competitive exercise because the value of the leisure contract is below the relevant EU thresholds (be it a works or a services contract), or where the local authority is able to award a contract to an “in-house” entity on the basis that the arrangement is “Teckal” compliant. We would recommend that local authorities obtain specific procurement advice if it considers that it wishes to and is able to award a contract successfully under an in-house arrangement.

1.4 The core aims of developing a procurement toolkit are three-fold:

- Reduce costs and time for the local authority and bidders in the procurement of a leisure contract, thus ensuring that resources are spent on maximising the benefits to the local communities, rather than on procurement
- Achieve fair contractual positions, which encourage market engagement, ensure a focus on service quality and provide a framework for innovation
- Encourage partnerships which deliver increases in participation and financially sustainable leisure provision.

1.5 This toolkit therefore provides:

- Toolkit information for authorities, with guidance on procurement routes and processes to facilitate a competitive exercise
- Template contract documentation and guidance
- Guidance on balancing quality, increasing participation, community engagement and cost.

1.6 This toolkit is not intended to be an ‘off the shelf’ set of complete documentation, as this could discourage local, project-specific thinking, which is key to ensuring the processes meet local needs. The toolkit and associated template documentation therefore provides a level of detail that explains the options, identifies the issues and provides industry best practice in relation to key principles. It does not provide exhaustive general procurement information as this is contained elsewhere in Cabinet Office publications and other government guidance, which has not been replicated here but which authority procurement officers will be familiar with.

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

01. Introduction and Overview

Overview and structure of the toolkit

1.8 The purpose of this document is to provide guidance to authorities seeking to maximise future service delivery in their area, and considers:

- Procurement routes and options:
 - overview and key features of routes (open, restricted, competitive dialogue, competitive procedure with negotiation, concessions and the light touch regime (both in terms of public contracts and public concessions)
 - both management contract & investment contracts (Design, Build, Operate and Maintain & Leisure Operating Contract)
- Project management
- Risk models
- Case studies
- Achieving desired outcomes and sporting objectives
- Evaluation models
- Template documents.

01. Introduction and Overview

1.9 This toolkit covers the following topics and phases of the procurement process:

Structure of the toolkit		
Phases of a project	Topics covered	Checklists
Pre-procurement	<ul style="list-style-type: none"> • Step 1: Developing local outcomes and deriving specific local, measurable targets • Step 2: Developing key documentation • Step 3: Procurement route selection, contract route selection & setting the timetable (the procurement strategy) • Step 4: Considering budgets and affordability (procurement and project) • Step 5: Setting up project management structures • Step 6: Developing a data room 	<ul style="list-style-type: none"> • Key risks to consider • Project management notes • Checklist before continuing
Pre-qualification (as applicable to the specific procurement process adopted)	<ul style="list-style-type: none"> • Step 1: Advertising the project either via OJEU, a PIN or a voluntary below threshold notice • Step 2: Release of pre-qualification questionnaire, evaluation matrix & information memorandum (where applicable) • Step 3: Bidders open day (can take place prior to OJEU advert, for example, via advertising in a PIN) • Step 4: Evaluation of pre-qualification submissions & selection of bidders to be invited to tender 	<ul style="list-style-type: none"> • Key risks to consider • Project management notes • Checklist before continuing
Tender stages	<ul style="list-style-type: none"> • Step 1: Determine the risk profile • Step 2: What documents should be issued and what should be requested of bidders • Step 3: Ensure that documents are project specific • Step 4: Confirm how bids will be evaluated 	<ul style="list-style-type: none"> • Key risks to consider • Project management notes • Checklist before continuing
Award & Implementation	<ul style="list-style-type: none"> • Step 1: Legal procedural aspects • Step 2: Authority sign off procedures • Step 3: Staffing implications • Step 4: Communications strategy • Step 5: Facility handover • Step 6: Future contract monitoring 	<ul style="list-style-type: none"> • Key risks to consider • Project management notes • Checklist before continuing
Variations to contracts	<ul style="list-style-type: none"> • Variations to contracts under the Procurement Regulations 	<ul style="list-style-type: none"> • N/A

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

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

01. Introduction and Overview

Links to other useful information

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

- <http://www.local.gov.uk/culture-tourism-and-sport> – Culture, Tourism & Sport
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf – DCLG – Localism Act
- <https://www.gov.uk/government/organisations/department-for-culture-media-sport> – DCMS
- <http://www.neweconomics.org/publications/guide-social-return-investment> – Cabinet Office - Guide to Social Return on Investment
- <http://responsibilitydeal.dh.gov.uk/> – DoH – Public Health Responsibility Deal.

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

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

- http://www.sportengland.org/facilities__planning/design_and_cost_guidance/swimming_pools/affordable_swimming_pools.aspx
- http://www.sportengland.org/facilities__planning/design_and_cost_guidance/swimming_pools/affordable_swimming_pools.aspx
- http://www.sportengland.org/facilities__planning/design_and_cost_guidance/sports_halls/affordable_sports_halls.aspx
- http://www.sportengland.org/facilities__planning/design_and_cost_guidance/sports_halls/developing_a_sports_hall.aspx
- http://www.sportengland.org/facilities__planning/design_and_cost_guidance/artificial_sports_surfaces.aspx

Further information and assistance

1.15 This toolkit has been developed by Sport England with input and assistance from a range of experienced consultants, operators, Sporta and advisors.

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

National contact point and Sport England Project Manager – Kevin Mills, Director of Capital Investment Tel: 020 7273 1727 kevin.mills@sportengland.org

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

01. Introduction and Overview

Facilities & Planning Relationship Managers

Hub	Area	Relationship Manager	Contact details
North	North East Durham, Northumberland, Newcastle, Teesside, Tyneside	Andrew Pearson	andrew.pearson@sportengland.org 0791788 6346
	North West Lancs, Merseyside, Cheshire, Greater Manchester (not Manchester City Council)	John Berry	John.berry@sportengland.org 07789 003959
	Cumbria	Andrew Pearson	andrew.pearson@sportengland.org 0791788 6346
	Manchester City Council	Andrew Fawkes	andrew.fawkes@sportengland.org 07785 345323
	Yorkshire Sheffield, Barnsley, Rotherham, Doncaster, Leeds, Humberside, NE Lincs	Alistair Copeland	alistair.copeland@sportengland.org Leeds Office 020 7273 1612 Mobile 07747 780564
	North Yorkshire, Bradford, Calderdale, Kirklees, Wakefield, Leeds	Andrew Pearson	andrew.pearson@sportengland.org 0791788 6346
Central	East of England (Beds, Cambs, Essex, Herts, Norfolk, Suffolk)	Nick Boulter	nick.boulter@sportengland.org 07766 504469
	East Midlands (Derbyshire, Notts, Leics & Rutland, Lincs, Northants, plus Black Country)	Andy James	andy.james@sportengland.org Loughborough Office 020 7273 1760 Mobile 07795 666053
	West Midlands (Herefordshire, Staffs, Shrops, Worcs, Warks, West Midlands County - not Black Country)	Ian Silvera Strategic Lead	ian.silvera@sportengland.org 07788 695636
South	London (33 London Boroughs, GLA)	Stuart Makepeace	stuart.makepeace@sportengland.org 21 Bloomsbury St Office 020 7273 1736 Mobile 07785 517445
	South East (Berks, Bucks, Kent, Surrey, Hampshire, Oxon, Isle of Wight, Sussex)	Warren Tucker	warren.tucker@sportengland.org Bisham Office 0207 2731932 Mobile
	South West (Avon, Cornwall, Devon, Dorset, Gloucestershire, Somerset, Swindon, Wiltshire)	Nick Lockwood	nick.lockwood@sportengland.org Crewkerne office 020 7273 1864 Mobile 07801 755423
	National Centre Team	Kevin Burton National Centres Manager	kevin.burton@sportengland.org 07766 071992

02. Pre-Procurement Phase

2.1 Arguably, the most important part of a procurement process is the pre-procurement phase, during which the framework for the project is created, the procurement strategy agreed and key decisions taken.

2.2 The Public Contracts Regulations 2015 (“the **2015 Regulations**”) for the first time touch upon a number of pre-procurement considerations or options which local authorities may wish to implement within their procurement process;

2.2.1 Preliminary Market Consultation: (Regulation 40) expressly permits public bodies to conduct such consultations with a view to preparing for procurement and taking the opportunity to inform potential bidders of its procurement plans and requirements. Such advice can effectively be used in the planning and conduct of the procurement procedure with a view to facilitating a targeted, informed and efficient process. The only requirements under the 2015 Regulations are that such process does not have the effect of distorting competition and is conducted in line with the EU Treaty principles of non-discrimination and transparency.

2.2.2 Prior involvement of candidates or tenderers: (Regulation 41) relates to the scenario where an individual or organisation has been involved or advised the contracting authority during the preparation for procurement stage and then subsequently wishes to participate as a tenderer (or a consortium member) within the same procurement process. The Regulations confirm that the public body should not automatically exclude such a party from the procurement process but instead “take appropriate measures to ensure that the competition is not distorted by the participation of that candidate or tenderer”. “Appropriate measures” in this case may include sharing with other tenderers, information made available to that specific tenderer during their prior involvement and also fixing appropriate time limits for receipt of tenders, as well as any other appropriate measures that a contracting authority may identify.

2.2.3 Division into Lots: (Regulation 46) requires contracting authorities to consider dividing their contracts into Lots primarily so as to encourage greater SME participation, (one of the main drivers behind the revised Regulations). If a contracting authority considers that their contract is unsuitable for division into Lots it must set out its rationale either within the procurement documents or within the report to be formulated on the procurement process pursuant to Regulation 84.

2.2.4 Development of Procurement Documentation: (Regulation 53) requires contracting authorities to provide, free of charge and “by means of the internet”, unrestricted and full direct access to the “procurement documents” from the date of publication in the Official Journal of a notice or if a Prior Information Notice (“**PIN**”) is used as a means of calling for competition, from the date on which an invitation to confirm interest is sent (see section 2.69 for further details). “Procurement documents” are defined under the Regulations as “*any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including contract notice, the prior information notice (where it is used as a means of calling for competition) the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents*”. This clearly places an onus on contracting authorities to have the full scope of their tender documentation prepared much earlier than historically may have been the case, in practice.

2.2.5 Transitional Provisions: Regulation 118 confirms that where a contract award procedure was commenced prior to 26th February 2015 then the Public Contracts Regulations 2006 (“the **2006 Regulations**”) will apply to that award procedure. Clearly if a contract notice or any other form of advertisement seeking offers or expressions of interest was issued before 26th February 2015 then it is clear that the 2006 Regulations will continue to govern that process. However, local authorities should also be aware that if it has contacted *any* economic operator to seek informal expressions of interest or has responded to an unsolicited expression of interest or offer received from that economic operator in relation to any public contract, then even in those cases, the contract award procedure will be deemed to have commenced under 2006 Regulations.

02. Pre-Procurement Phase

Prior to commencing any form of procurement process, the local authority will need to have considered and resolved a number of key issues, including:

Checklist – what should be achieved during the pre-procurement process

What should be considered:

- What are the outcomes the project is seeking to achieve and how does the service fit within the wider landscape for the area (for example, in relation to physical activity or health & wellbeing)?
- What facilities will be included in the contract? This will include core leisure assets but are there also wider opportunities, for instance, linked to libraries and cultural assets? Does the contract need to include flexibility for future asset rationalisation?
- Which services are included? For example, is sports development included?
- Are any new build or refurbishments required as part of the overall delivery?
How will these be funded?
- Have stakeholders and partners been given the opportunity to input into the business case and the project scope?
Has political support been confirmed?
- Have legislative implications been considered, including the impact of the Localism Act (2011), the Public Services (Social Value) Act (2012), the Transfer of Undertaking (Protection of Employment) Regulations (2006) and the Local Government Pension Scheme Regulations (2013)?
- Has consideration been given to assessing equality to ensure that this is properly considered from the outset with a simple audit trail?
- Has the affordability limit been confirmed and tested, in line with the intended risk profile?
(this is key to ensuring a realistic project is offered to the market that is affordable and deliverable from a financial perspective)
- Has the preferred procurement process been identified?
- Have key commercial terms been identified/scoped (depending on procurement route) and risk allocations identified?
- Where relevant, has soft market testing been used to test key issues and ensure sufficient market interest exists?
(Wherever possible, market engagement should always form part of the pre-procurement process)
- Has sufficient resource and budget been allocated to facilitate successful completion of the procurement process and do the skills exist in-house to deliver, or is external support required?

THESE ARE SOME OF THE TOPICS COVERED IN THIS TOOLKIT

2.3 Many of these aspects may be covered in a formal options appraisal or an outline business case that precedes the procurement.

2.4 In order to make an informed decision about fundamental changes to the way services are delivered, it is essential that an Options Appraisal is undertaken. The benefits of undertaking an **Options Appraisal** include the following:

- It requires the local authority to clearly articulate the desired outcomes for the service, based on an understanding of the community need
- It provides an objective, transparent and rigorous assessment that can stand up to scrutiny and challenge
- It provides an understanding of the risks associated with different operating models
- It enables an informed decision to be made on the optimal best value solution to meet the individual needs of a particular local authority area.

02. Pre-Procurement Phase

2.5 Commissioning the most appropriate partners to help deliver the local authority's vision and outcomes for its service is key. Local authorities are increasingly looking to review the operation of their facilities or use alternative delivery models to ensure the most effective and efficient approach is in place to meet the outcomes the service is seeking to deliver.

2.6 To assist local authorities with this key decision, Sport England has developed a **Leisure Management Delivery Options Guidance document** as an easy to use guide to the most common management options or delivery vehicles available in the industry (to be published summer 2016).

2.7 The guidance has been compiled to inform local authorities of the options and their key characteristics, including typical advantages and disadvantages. It is intended as a starting point for consideration of the options which should be subject to a formal Options Appraisal but is not a step by step guide on how to undertake an Options Appraisal. The key characteristics, advantages and disadvantages, and legal and financial implications of each option will need to be explored in more detail and applied to specific local circumstances through an Options Appraisal before taking a decision on the most appropriate management model for any local authority area.

2.8 An Options Appraisal of different management and delivery vehicles needs to be carried out in the context of the wider priorities a local authority has and its overall approach to commissioning services. The concept of commissioning is explained in more detail below but essentially is about ensuring community needs are identified and are at the centre of the approach, priorities are set within the available resource and the most effective and efficient delivery mechanisms are selected to deliver the required outcomes. A local authority should not be considering its management/delivery options before it has defined its strategy, vision and required outcomes from the service. Once these have been defined, the most appropriate delivery model can be more accurately identified.

Practical Tip:

Carrying out an Options Appraisal can save money and resources in the long term.

2.9 For further information on the development of an outline business case, please see HM Treasury guidance on public sector business cases using the five case model – http://www.hm-treasury.gov.uk/d/greenbook_toolkitguide170707.pdf

2.10 Once all of the points in the above checklist have been considered, the following actions should be completed during the pre-procurement phase:

Pre-Procurement Steps

- Step 1: Developing local outcomes and deriving specific local, measurable targets
- Step 2: Developing key documentation
- Step 3: Procurement route selection, contract route selection & setting the timetable (the procurement strategy)
- Step 4: Considering budgets and affordability (procurement and project)
- Step 5: Setting up project management structures
- Step 6: Developing a data room

The remainder of this chapter covers these six steps.

02. Pre-Procurement Phase

Step 1: Developing local outcomes

2.11 As discussed earlier in this section, prior to embarking on any procurement process local authorities need to have identified that an outsourced delivery vehicle is the most appropriate route to deliver required outcomes in their local areas.

2.12 Sport England's Management Delivery Options Guidance document referenced above is a good starting point for authorities and their partners when considering this key issue. The following paragraphs have been taken from the guidance document to provide an overview of commissioning and how local authorities can use it to understand their strategic needs, develop a vision, identify the most appropriate vehicle, commission it and maximise efficiency and impact on an on-going basis.

2.13 Local authorities are now more commissioners of services than deliverers. The key areas for commissioning are for health and well-being, adult social care and services for children and young people.

2.14 Those responsible for commissioning the sport and physical activity service will want to consider the requirements of these commissioners and how they may inform the positioning and future shape of the service.

2.15 Commissioning is the strategic process of identifying needs and allocating available resources to best meet these needs, through the most effective and efficient supplier of services in a way that achieves the required outcomes.

2.16 It is not:

- The same as procurement, which is the process of securing or buying services; or
- The same as contracting, which is the means by which that process is made legally binding.

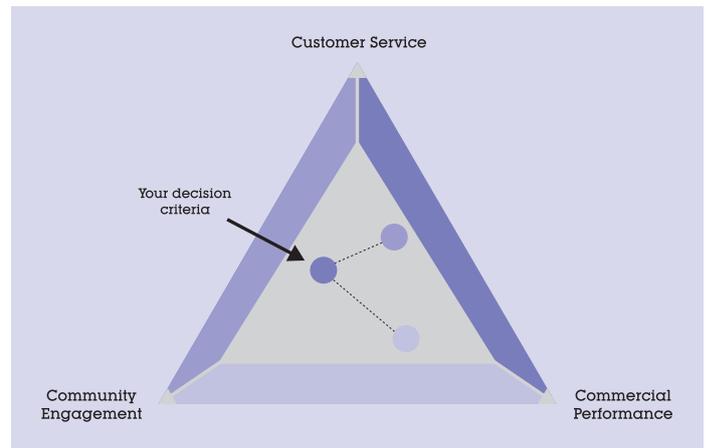
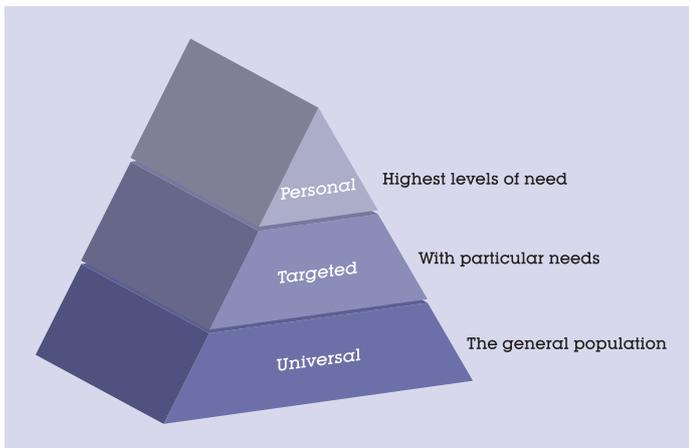
2.17 The aim is to ensure that local authorities follow an iterative process of understanding need, strategic planning, and delivering and monitoring of services to ensure local outcomes are being met - with the outcomes for service users and communities at the centre of the process. This is summarised in the diagram below.

2.18 Local authority sport and physical activity services can apply this commissioning approach to the development of the service. It will help establish how the service contributes to the local authority's wider outcomes for the area (e.g. improving health and wellbeing, delivering better outcomes for older people, improving young people's life chances), and define what the community needs are and what the priority audiences for the service are.

2.19 **Applying a commissioning approach will encourage and require the commissioners of the service to address the difficult but essential question of "who is our service for?"**



02. Pre-Procurement Phase



2.20 Local authorities have finite levels of resources, and being clear how these resources are focussed to achieve the best possible outcomes for the area is key. Strategically planning how it wants to deploy its resource against different audiences needs will help local authorities consider the priorities and the implications for how the service is designed and delivered. For example, the diagram above provides a framework, often used by commissioners of health and social care, for thinking about community needs in relation to personal, targeted and universal services.

2.21 In this example the needs of the general population can be provided for by the universal service available to all users. Those audiences with more specific and greater need in the middle and at the top of the triangle are likely to require different service interventions that have the potential to make a significant impact on improving outcomes for the individual and the wider community.

2.22 From a sustainability perspective, local authorities will want to consider how any direct subsidy is focused for example at the 'personal' and 'targeted' audiences, with the ideal scenario being that financial surpluses from a universal offer are used to support the specific interventions.

2.23 Each local authority's priorities are likely to be different. Considering where the local authority's priorities are positioned on the decision triangle above will have a major impact on the most appropriate delivery option(s).

2.24 Each local authority should consider where it wants to position itself and identify where its priorities sit within the spectrum of 'customer service', 'commercial performance' and 'community engagement'. The local authority's targeted position within the triangle will help inform the decision criteria that should be utilised through the options appraisal process to identify the most suitable option(s).

2.25 Once the local authority has developed an understanding of the wider outcomes for the area, the needs of the community, the priority audiences and decision criteria for the service it will be in a stronger position to consider the types of delivery options that will be best place to achieve its desired outcomes.

2.26 The Sport England Leisure Management Delivery Options guidance document provides an overview of the potential delivery options available - the key features, implications and risks associated with each option.

2.27 Following a robust options appraisal process, the authority will be in a position to select delivery partners. This is likely to involve working with a range of partner organisations across the public, voluntary, private and third sectors and may involve a procurement process to identify the partners who are best placed to help deliver outcomes the service is seeking to achieve.

2.28 In order to maximise the benefits derived from the service and facilities, it is essential that a **concise list of local outcomes are agreed**, which can then be translated into specific, measurable targets.

2.29 The Government's strategy "Sporting Future: A New Strategy for an Active Nation", December 2015, recognises the importance of local health and social outcomes and defines why the Government will invest in sport in the future. The following five key outcomes have been identified:

- Physical health/wellbeing
- Mental health/wellbeing
- Individual development
- Social and community development
- Economic development.

02. Pre-Procurement Phase

2.30 The Government acknowledges that within these overarching key outcomes each local authority is likely to have different priorities. Outcomes for local areas will vary according to local needs and priorities. They could include, for example, some or all of the following areas (as discussed further in the template Services Specifications included at Appendix E and Appendix F of this toolkit):

- Improving health and wellbeing and reducing health inequalities
- Providing local economic benefit
- Ensuring local people have the skills to prosper
- Supporting safe and inclusive neighbourhoods
- Promoting community cohesion
- Educating, protecting and providing opportunities for young people
- Supporting and caring for vulnerable adults and older people
- Providing high quality services
- Sustainability/ environmental improvements.

2.31 Continually monitoring delivery to ensure that the desired impacts are being achieved is key. This should be an iterative process as information gathered at this stage will influence the local authority's future strategic planning.

2.32 Gaining political support through Member involvement in all stages of the commissioning process is important, particularly when formulating the authority's vision and strategy and identifying its decision criteria.

2.33 Sport England has developed a number of tools to assist local authorities when they are working through the commissioning process. The Local Government Delivery Framework illustrates how Sport England can help and is summarised below and overleaf.

2.34 Sport England's Local Government Delivery Framework, encourages local authorities to position sport as a key contributor to a local area's strategic priorities and demonstrate sport is a sound investment. It provides advice on four key questions which local authorities have told us are key challenges for them and these are summarised below.

Why invest in sport?	Advice on how to demonstrate sport's value to reduce health inequalities, act as a spur to economic growth, and a catalyst to engage communities. Demonstrating this is crucial to enable local authorities to make the case for investment in community sport, particularly at a time of increasing budgetary pressures.
How do I strategically plan and commission investment?	Advice on how to assess local needs, develop an outcomes-based vision and strategy for sport in the local area and identify who the best partners are to help deliver this.
How do I maximise efficiency?	To maximise efficiency, local authorities should measure, benchmark and assess their performance to ensure that current practice and performance is continually being challenged and improved.
How do I create impact?	Achieving impact requires strong leadership with a clear vision for sport and effective management of resources to get more people active resulting in reduced health inequalities, more engaged communities and economic growth. Working in partnership with key local stakeholders is key to creating and sustaining impact.

2.35 One of the tools Sport England has produced to assist local authorities is the Economic Value of Sport model. This can be used by all local authorities to demonstrate how sport benefits their economy. It produces area based estimates on sports' contribution to the local economy in the form of business output (GVA) and sport related jobs plus wider benefits like the economic value of sport related volunteering and health benefits from people taking part in sport. The model also allows local authorities to refine some of the results by using local information they may have available. In addition, local authorities can begin to assess the impact of sport investments too, for example, what additional economic value is created as a result of an increase in participation in the local area and therefore the impact of a single leisure centre opening or closing on the local community. Guidance is provided on how to navigate the model and the best use of this evidence as part of making the case for retaining or securing additional investment in sport.

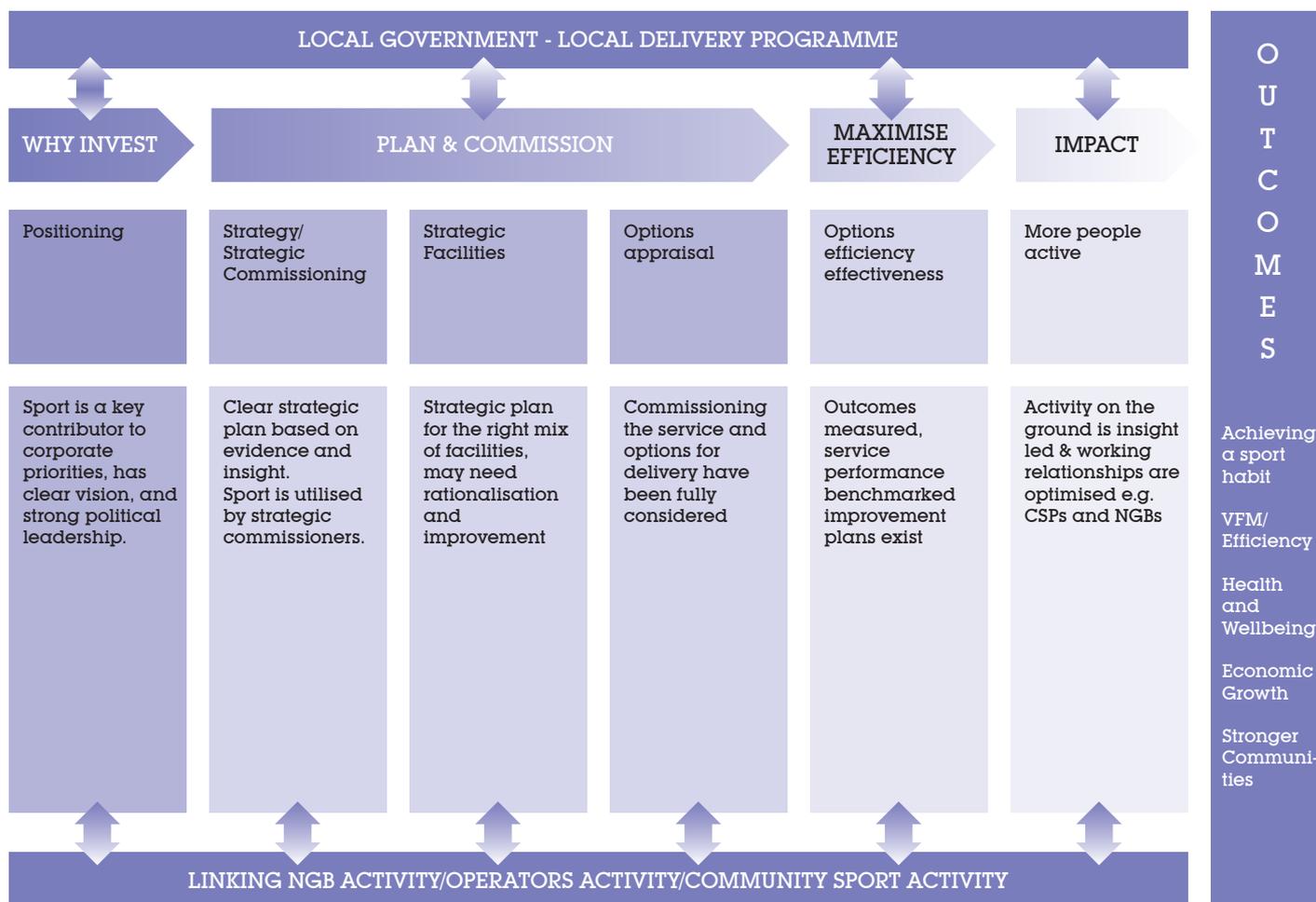
02. Pre-Procurement Phase

2.36 In addition, Public Health England's Everybody Active, Everyday sets out the case for change, the evidence base for implementation and the options for action to explore the contribution that sport can make to decreasing inactivity and helping people to achieve the Chief Medical Officers' guidelines on the levels of physical activity needed to provide population level changes in health and well-being and reducing the cost of treating major diseases that can be attributed to people being inactive. The following four key domains for action at national and local level have been identified:

- **Active society:** creating a social movement
- **Moving professionals:** activating networks of expertise
- **Active lives:** creating the right environments
- **Moving at scale:** scaling up interventions that make us active. <https://www.gov.uk/government/publications/everybody-active-every-day-a-framework-to-embed-physical-activity-into-daily-life>

2.37 More information on the framework and the tools available to assist local authorities can be found on Sport England's web site pages on Partnering Local Government <http://www.sportengland.org/our-work/local-work/partnering-local-government/delivery-framework/>.

Figure 2.1 – The Local Government Delivery Framework



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2.38 There are a range of documents available regarding strategic commissioning in the sports sector which provide local authorities with advice on how their service can be both 'fit for commissioning' and in a position to commission other partners to deliver their outcomes.

- Meeting the needs of Commissioners: a resource for sport and physical activity professionals <http://www.sportengland.org/our-work/partnering-local-government/case-studies/ccloa-strategic-commissioning-sport-and-physical-activity/>
- Understanding commissioning: a practical guide for the culture and sport sector - http://www.local.gov.uk/web/guest/culture-tourism-and-sport/-/journal_content/56/10180/3510882/ARTICLE#sthash.kIBOlw7c.dpuf; and
- Engaging in commissioning - A practical resource pack for the culture and sport sector - http://www.local.gov.uk/web/guest/search/-/journal_content/56/10180/3665542/ARTICLE#sthash.MrMwlrVM.dpuf; and
- Improving strategic commissioning in the culture, tourism and sport sector - http://www.local.gov.uk/web/guest/culture-tourism-and-sport/-/journal_content/56/10180/3511096/ARTICLE.

2.39 The National Obesity Observatory's Standard Evaluation Framework for Physical Interventions is another useful reference tool setting out a guide to the measurement of outcomes of physical activity interventions http://www.noo.org.uk/uploads/doc/vid_16722_SEF_PA.pdf.

2.40 This procurement toolkit is intended to provide guidance for local authorities on how to use the procurement process to identify the partner(s) who are best placed to help deliver the desired outcomes and also how to ensure that the delivery of the service and achievement of the outcomes are continually monitored on an on-going basis to ensure the required outcomes are embedded in future service provision and that the desired impacts are being achieved.

2.41 A route for enabling this is through an outcome based Services Specification and Payment and Performance Monitoring System (see comments on such documents in 'developing key documentation' later in this chapter, and template documents included within **Appendix A & Appendix B**, and at **Appendix E & Appendix F**).

Guidelines for developing outcome focused contracts

2.42 In line with the focus on developing local outcomes and priorities, there has been a shift towards the delivery of outcome based contracts in public procurement. This represents a significant movement away from traditional specifications and requires the development of a new form of documentation and contractual relationship.

2.43 As with any new approach, there remain a number of challenges around implementation. The following paragraphs provide over-arching guidance for local authorities considering such an approach. The required outcomes need to be clearly defined at the outset of the process so that performance against, and contribution towards, each outcome can be measured.

2.44 The first point to bear in mind is that the procurement documentation should be developed around the key outcomes for the project and an outcome focused approach should be emphasised throughout. The outcomes developed as part of the strategic pre-procurement work should form the basis of the 'performance' aspects of the Services Specification, alongside baseline facility management and service delivery requirements.

2.45 The development of a clearly defined Services Specification is key, structured to emphasise the distinction between service outcomes and facility outputs. The Services Specification sets out the required outcomes and the principles around how success should be measured and should be clearly linked to a defined monitoring structure.

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Practical Tip:

Template Services Specifications are included at Appendix E & Appendix F of this toolkit. These can be used as a base and initial starting point for local authorities.

2.46 Innovation from contractors, both up-front and throughout the contract period, is encouraged. The contractor should be able to achieve the desired outcomes using their own preferred methods and to adapt these as the contract develops in order to achieve the best results. They will, however, still need to work in partnership with the local authority in order to validate the methods being used and developed and to ensure efforts are dovetailed with other aspects of development in a particular area.

2.47 An outcome against which performance is measured must be clearly defined, measurable, understood and agreed upon by all parties. Local authorities therefore need to be clear on what is defined as an outcome and what the key components are for this to be achieved (pre-procurement market engagement can assist with this process).

2.48 Both parties need to be clear on how success is measured and over what timeframe. It is recommended that both parties use the model of working from a baseline so that targets can be set based on agreed increments from the baseline. If, for example, an outcome relates to increased levels of participation by a specific group, the contractor will be assessed against the achievement of target levels of increased participation within an agreed timeframe. It will often be necessary to use data from year one of a contract as the baseline on which future targets are set.

2.49 One outcome could have a series of target objectives set for it. If, for example, the required outcome relates to health and wellbeing and a contribution to reducing obesity, a series of target objectives may be agreed covering delivery of weight management classes or measured increases in participation levels. Similarly, an outcome could be a contribution towards reducing local unemployment levels, for which a series of target objectives could include employing a certain number of local residents or running a certain number of apprenticeships with an agreed percentage of apprentices being offered full time employment. Achievement against each individual target objective can then be measured and assessed. The Government Strategy "Sporting Future: A New Strategy for

an Active Nation", December 2015, references a number of KPIs that will be used to measure achievement of their five key outcomes. Similarly, local authorities should develop a series of relevant target objectives/ indicators and performance measures to deliver their specific local outcomes.

2.50 The development of a clear performance monitoring system is considered key. The system should be agreed during the procurement process as part of the contractual documentation so that all parties agree the specific levels to be achieved and/or financial adjustments to be made or default notice mechanisms to be applied if such levels are not achieved. Likewise, performance 'bonuses' can be used to either reward over-achievement in key areas, or to offset financial adjustments incurred in other areas, thus providing an incentive for the contractor to focus on the key requirements of the local authority.

Practical Tip:

Template performance monitoring systems are included in the template DBOM Contract and LOC that can be used as a base and initial starting point for local authorities.

2.51 "Payment by results" contracts are being increasingly used within the industry directly linking payment to a contractor with delivery of an outcome. There are a range of options available to make payments for results. The most straightforward model is a system of fixed payments per positive outcome. This is regardless of external factors and is based on a demonstrable contribution towards outcomes. Alternatively payments could rise in line with an increase in the number of outcomes achieved up to a defined ceiling or interim payments could be considered for outputs that each contribute to the overall outcome. However, where third party income is retained, as in leisure contracts, this needs to be taken into account in the performance monitoring system.

2.52 As noted, template documents are provided as part of this procurement toolkit, which outline two examples of approaches to outcome focused delivery and reporting and payment for services delivered and targets achieved (the outcomes based Services Specification and Payment and Performance Monitoring System referred to above). However, other models are available and local authorities are encouraged to consider the approach best suited to their circumstances.

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Step 2: Developing key documentation

2.53 Part of the preparation phase will need to include development of all of the key documents for the project, particularly given the new requirements of Regulation 53 (see section 2.2 above). Depending on the applicable procurement procedure, these may include:

- 1) OJEU Notice/PIN/tender advert** (see chapter 3)
- 2) Information Memorandum** (see chapter 3)
- 3) Pre-qualification questionnaire and evaluation criteria** (see chapter 3)
- 4) Tender documents (format will depend on the procurement route being adopted)**
(see chapter 4: template contracts included at Appendix A and Appendix B)
- 5) Evaluation criteria and weightings** (see chapter 4)
- 6) Facilities Requirements and Technical Specification** (see chapter 4: template form 4 at Appendix D)
- 7) Services Specification & KPIs** (see chapter 4: template forms at Appendix E and F)
- 8) Payment and Performance Monitoring System** (see chapter 4: template forms included at Appendix A and E)
- 9) Contract risk matrix** (see chapter 4)
- 10) Legal contract and associated schedules** (see chapter 4: template form included at Appendix H).

2.54 These key documents are discussed in more detail in separate chapters of this toolkit.

2.55 Consideration must be given to the key documentation at an early stage.

Practical Tip:

Template forms of documents 6 to 10 are included in this toolkit, as listed above

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Case Study – outcome focused contract - as part of their recent procurement process for a new leisure management contract Central Bedfordshire Council engaged with a number of key partners within the Council early on in the process to ensure that the leisure management contract delivers the whole Council's outcomes not just leisure.



The sport and leisure team held a series of workshops and follow up meetings with several Council departments including Economic Regeneration, Public Health, Social Services both Adult and Child, Community Physical Activity, Bedfordshire Sport, Community Safety, Sustainability (Carbon Reduction) and senior politicians. These discussions sought to understand what the different departments would like the leisure contract to deliver on their behalf, for example, local apprenticeships and GP referrals. This led to the development of required outcomes for the leisure contract that were reflected in an outcomes scorecard within the Services Specification issued as part of the procurement process and signed up to within the contractual agreement for the new leisure management contract. This process raised an awareness within the Council of the wider outcomes that the leisure contract can assist in achieving and ensured that the contract sought to deliver against all the Council's key priorities not just the leisure objectives.

Following a 12 month implementation the Council has recently undertaken a review of their outcomes scorecard and has again met with the different departments to set targets for the next 12 months. A key lesson learnt was that the initial target outcomes set needed to be more measurable so that improvements and contributions could be more clearly demonstrated. It is important to use the first year to gather information and set clear baseline positions for future targets to be assessed against.

The Council has since refined its outcomes scorecard so that there are a smaller number of clearly defined and measurable targets that contribute to a wide number of local authority outcomes. For example, rather than a requirement to develop a Green Transport Plan that was agreed during the first Contract Year the Contractor now has 12 months to demonstrate it is making an impact by implementing at least three areas of the agreed plan.

Of particular note is the strong relationship with the Council's Public Health department that has been developed. The outcomes scorecard includes a number of specific health related outcomes and the leisure team and Contractor have worked with Public Health to consider how these outcomes should be assessed. In order to demonstrate a contribution to weight reduction and muscle growth in members of the community for example the Contractor has installed a system called 'bodytrax' that gives a medical breakdown of the body before and after a programme has been delivered.

This case study illustrates the benefits of working with partner agencies and bodies to develop meaningful target indicators and performance measures that can demonstrate the contribution that leisure facilities and services can make to wider community outcomes. It is a positive example of different departments within the Council working together to contribute to its overall strategic outcomes through an outcome driven procurement process and outcome focused contract.

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Step 3:

Contract selection, procurement route selection & timetables for procurement
Issues covered in this section:

- a) What type of contract will be used?
- b) What procurement route should be adopted?
- c) What are the timescales for procurement?
- d) Any other approaches to consider?

α) Procurement contract approach

2.56 Primarily, consideration will need to be given to the preferred contract approach, particularly where new or refurbished facilities are included. This will determine or inform the decision in terms of the most appropriate procurement route for the Project.

2.57 The options include:

- Leisure Operating Contract (namely, leisure services only)
- Leisure Operating Contract with Minor Works (containing provisions for investment or minor refurbishment works)
- DBOM Contract (Design, Build, Operate and Maintain Contract)
- Separation of operating contract and construction elements, including:
 - Traditional Build Contract
 - Design and Build Contract (1 Stage)
 - Design and Build Contract (2 Stage)

2.58 It is worth noting that where capital works are included, separate consideration will need to be given to how such works are funded, albeit they will be delivered by the appointed consortium or contractor. All of the options noted above can be flexed to cover either private sector funding or provision of capital via the local authority and this will impact on the risk allocations and payment regimes in particular.

An explanation of the different contract approaches is included in Table 2.1

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Table 2.1: Contract approaches

Contract Approach	When each approach should be considered	Draft contract included in the Toolkit?
Leisure Operating Contract	Where the focus is on operation of facilities and provision of services, the Leisure Operating Contract is the most appropriate route. The Contract would focus on the provision of services to meet the local authority's service specification and this toolkit includes a template contract for leisure operations only - please see Appendix B)	Yes - Appendix B
Leisure Operator Contract with Minor Works	In the scenario where the planned works or investment is relatively minor, it may be more appropriate to simply include these additional aspects in the procurement of a leisure operator, with associated wording in the Leisure Management Contract to cover provisions for capital investment and minor works, such as refurbishments. Similar to the DBOM structure, the operator will bring forward their own professional team to deliver the works.	Yes - Appendix B can be amended to reflect this
Design, Build, Operate and Maintain (DBOM) Contract	Where major capital works are to be included in a contract (for instance the building of a new facility) along with operational requirements, the suggested approach involves the local authority procuring a consortium (building contractor and operator) that will take the lead and take on the risk in the design, construction and the operation of the new facility. A template DBOM Contract has been prepared as part of this toolkit - Appendix A. It is a so called 'one stop shop' where the local authority issues an output specification covering the 'facilities requirements' and 'technical requirements' - standards of construction, the requirements for the facilities (pool, gym etc.) - and services specification (e.g. opening hours, programming, cleaning, quality accreditation etc.). Consortia bid for the contract, which is normally a long term contract of 15 plus years, and between them, deliver an optimum solution (in terms of design, construction and operation) balancing capital costs and revenue costs	Yes - Appendix A
Traditional Build Contract	In the traditional design then build construction project, the local authority enters into contracts with a design professional (typically an architect) to design the facility. The architect may employ other "sub-consultants" such as engineers to assist in the development of the design stages. When the design is complete and approved by the local authority, tender documentation is prepared by the design professional and bids are solicited from building contractors. The local authority then enters into a separate contract with a building contractor for a fixed price to construct the facility. This process therefore requires two EU compliant procurements – firstly for the design team and secondly for the construction team. In this approach, there may be practical risks around the build-ability of the design and the local authority will need to input a high level of resources into the design process. There may also be issues that the design is not the most efficient to construct. This can be mitigated by engaging a building contractor early to provide input into the design before it is "completed" by the relevant design consultants. However, this requires early selection of a building contractor before a fixed price for the construction works can be agreed. Under this process the local authority retains responsibility for any delay in providing design information from its professional consultants to the building contractor. Even where designs are "complete" before the engagement of a building contractor, there is usually the need for continued detailing of design and approval of elements (particularly mechanical and electrical installations) from specialist contractors. There is a risk that this could allow 'cost creep' as the designs are finalised. Using this approach allows the local authority to develop its own design. However, the disadvantages include the costs and resource implications of three procurements (design team, building contractor and operator), timescales, impact on the VAT recovery on the local authority's special exemption de-minimus limit and the local authority retaining design risk.	No

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Table 2.1: Contract approaches continued

Contract Approach	When each approach should be considered	Draft contract included in the Toolkit?
Traditional Build Contract (continued)	<p>There is also the risk relating to the interface arrangements between the building contractor and leisure operator. Under a DBOM Contract the main contractor is responsible for all of the consortia whereas under this approach the local authority may be left 'in between' a building contractor and leisure operator in disagreement.</p> <p>Under this type of procurement, a separate exercise is usually still required to procure a leisure operator, although it does offer flexibility in relation to operation being delivered by an existing delivery vehicle such as a local trust.</p>	No
Design and Build Contracts	<p>In a design and build contract, the local authority enters into a single contract with a building contractor who takes ultimate responsibility for both the design and construction of the facility. In the first instance, the local authority will employ a professional team to develop the design and Employer Requirements to a specific design stage and then tender for a building contractor to undertake the works. Under this method of procurement, there is the opportunity to use a one or two stage tender process.</p> <p>A one stage process is where the building contractor provides a price based upon the Employers Requirements (normally RIBA Stage 3 Developed Design) which is based upon the cost of construction, profit and preliminary costs.</p> <p>The two stage process firstly selects bidders to provide their preliminary costs and profit (based upon RIBA Stage 2 Concept Design) and the best priced bids are taken to a second stage where the bidders are asked to price for the construction based upon a further developed design (Stage 3) which has their input on build-ability etc. The latter option provides more cost certainty.</p> <p>Following the appointment of the building contractor, the professional team may be novated across to the building contractor from the local authority. The building contractor may also employ architects or engineers.</p> <p>Design and build contracts provide a single-point of responsibility for the local authority for the building works. However, there will still be the interface risks with the leisure operator as described above.</p> <p>The design-build process, unlike the traditional process, increases the likelihood that the facility will be constructed within the local authority's budget. The building contractor is able to conduct value engineering and 'constructability' analysis from the moment they are engaged in the process which can reduce the cost of the project.</p> <p>Design and build projects are often completed sooner than traditional build only projects. A building contractor can start construction before the final design is completed. The building contractor can provide early project scheduling, and can order long-lead time items before the design is completed. In the traditional build only contracts, the design generally must be completed before construction tenders are let.</p> <p>In a design-build contract, the local authority cannot rely on the architect to act as his or her representative during the construction process (following novation) and will need to retain the services of a construction project manager.</p> <p>Under this type of procurement, a separate exercise is usually still required to procure a leisure operator, although it does offer flexibility in relation to operation being delivered by an existing delivery vehicle. Where a new facility is being provided that is not simply a replacement centre, consideration should always be given to the most appropriate delivery vehicle going forward, which may require a tendering exercise.</p>	No

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b) Procurement route options

2.59 As discussed in the previous section, the various contractual routes available to a local authority are dependent upon whether the contract will:

- include, or is predominantly for, the delivery of operational services in which case a Leisure Operating Contract (“LOC”), or a Leisure Operating Contract with Minor Works (“LOCMW”) will be the most suitable route. Appendix B contains a template that can be used; or
- there may be a combination of both construction works and operational requirements which would allow the use of a Design, Build, Operate and Maintain (“DBOM”) Contract. Appendix A contains a template that can be used; or
- include the design and construction of a leisure facility only, in which case a Traditional Build Contract (“TBC”), or a Design and Build Contract (“DBC”) may be utilised.

Leisure Operating Services

2.60 The first of these options will essentially constitute a “public services contract” for the purposes of the 2015 Regulations, assuming always that in the case of a LOCMW Contract, the “minor works” are ancillary to the provision of the Leisure Operating Services and the value of those minor works is reflective of this. In this case, the main object of the contract will remain the provision of Leisure Operating Services.

2.61 Under the 2006 Regulations, leisure services were deemed to be Part B services. As a result, if the value of such services exceeded the relevant EU financial threshold of £172,514 then contracting authorities were obliged to advertise such contracts (if it was deemed that they were of cross border interest) and award the same in compliance with the EU Treaty principles of transparency and equal treatment.

2.62 The 2015 Regulations have removed the classification of services contracts as either Part A or Part B. Instead all service contracts are subject to the full procurement regime where they meet the applicable threshold, unless they are expressly excluded under those Regulations. However for services listed within Schedule 3 of the 2015 Regulations, a “light touch” regime will apply. The financial threshold for contracts listed within Schedule 3 is currently £589,148. Below this figure, any procurement of a Schedule 3 service would merely be subject to the local authority’s internal procurement procedures.

2.63 Schedule 3 of the 2015 Regulations lists a wide range of services based on their CPV codes. Under the description of “administrative social, education, healthcare and cultural services” there are a number of leisure related codes including (but not limited to):

- 92000000 1 – Recreational, cultural and sporting services
- 92600000 7 – Sporting services
- 92610000 0 – Sports facilities operation services
- 92600000 3 – Sport-related services

Any such services can therefore be procured pursuant to the light touch regime, which is set out within Regulations 74 – 77 of the 2015 Regulations. These regulations include a relatively small number of mandatory requirements in relation to the conduct of a light touch procurement procedure. These include:

- the publication of a Contract Notice or a PIN notice and publication of a Contract Award Notice following the conclusion of the procurement exercise;
- conducting the procurement procedure in accordance with the EU Treaty principles of transparency and equal treatment and should conform with the information given in the Contract Notice or PIN with regards to any conditions for participation, time limits relevant to the procurement exercise and the award procedure to be applied;
- a requirement that any time limits imposed by the contracting authority must be reasonable and proportionate given the nature of the contract being procured.

However, please note that if the local authority is looking to procure a service concession then the provisions of paragraphs 2.85 to 2.96 below shall apply.

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Design, Build Operate and Maintain Contract/Traditional Build

2.64 Where a local authority is looking to procure the build and operation of a new leisure facility using a DBOM Contract or a Traditional Build only route (and where the value of the contract falls above the current EU thresholds) then the different procurement routes available to a local authority include:

- open
- restricted
- competitive procedure with negotiation
- works concession contract (discussed below at paragraph 2.81 under “Concessions”)
- competitive dialogue
- innovation partnerships procedure

Those procedures marked in green are most likely to be appropriate for the kind of procurements envisaged under this toolkit, namely the DBOM and Traditional Build only projects (excluding the procedure outlined above for Leisure Operator Contracts). As suggested below, the European Commission has stated that going forward it expects the competitive procedure with negotiation to become more commonly used than the competitive dialogue procedure and thus the latter’s usage may become limited to genuinely complex or innovative projects going forward. For this reason we have marked it in amber. As the innovation partnerships procedure is intended for research and development projects mainly, where a solution does not already exist in the market, we do not consider it applicable to the types of procurements considered further under this document (and subsequently has been marked in red). These procurement routes (with the exception of the innovation partnerships procedure) are discussed in more detail from paragraph 2.68 onwards.

2.65 One of the first issues to consider is how the contract will be categorised, particularly where both Works and Services are included in a single contract (for example, under a DBOM approach). The key factor is to assess the primary purpose of the contract and/or the comparative value of the works and services, which then forms the basis for deciding on correct categorisation. The local authority’s legal advisors should be used to ensure correct categorisation up-front otherwise there is considerable risk of procurement challenge and practical risks associated with not receiving sufficient market interest. The current (2015) EU financial thresholds for local authority contracts are:

- £164,176¹ for public supplies and public service contracts (for Leisure Operating Contracts this figure can be adjusted to £589,148 under the light touch regime); and
- £4,104,394 for public works contracts.

2.66 It is important to note that most public contracts are governed by the EU Treaty principles of non-discrimination, transparency and equality of treatment for both contracts which are subject to the 2015 Regulations and those which fall outside of the 2015 Regulations, but are deemed to have a cross-border interest. A local authority must still therefore consider whether there is likely to be cross-border interest in any public contract opportunity which falls outside of the scope of the 2015 Regulations and if so, the EU Treaty principles will mean that there should still be some form of open advertising of the opportunity (so as to comply with the principle of transparency) and equal treatment and non-discrimination in the procedure to be applied to the award of the contract. This applies to “below threshold contracts” and pre-April 2016, a service concession. A local authority/public body will also need to comply with its own internal contracting standing orders and standing financial instructions.

2.67 Local authorities have a number of potential routes for contracts of this nature. Each has its own procedures and timescales. The local authority will need to consider the appropriate route based on:

- the level of complexity of the contract terms,
- whether it needs to be able to negotiate any key terms with contractors,
- the number of likely bidders, and
- the resources available to it to manage the procurement.

The local authority should also strongly consider soft market testing on the scope of the opportunity and key issues with likely bidders to inform the subsequent procurement process.

¹Correct as at May 2016

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However, for DBOM or traditional build contracts, the procurement route options available are:

- a) Open procedure
- b) Restricted procedure
- c) Competitive Procedure with Negotiation
- d) Competitive dialogue
- e) Public Concessions

Please note that for the purposes of this toolkit we have not included the innovation partnerships procedure as it is not directly relevant to the provision of leisure services within this context.

The open procedure (please see diagram at Annex 1)

2.68 The open procedure is suitable where the contract is straight forward with limited requirement for specific skills and/or technical capacity and where there are a limited number of potential contractors. It allows for a combined pre-qualification and tender assessment and can be a quicker procurement route than the restricted procedure. The local authority will send its invitation to tender, including its contract documents, to all respondents expressing an interest. However if there is likely to be a high number of respondents this route may be inappropriate. Tenders can only be clarified following receipt by the local authority but changes to the tender and any negotiation with the bidder on the contract documents are not permitted.

2.69 'Clarification' in this context would be if the local authority, upon reading part of a bid submission, was not clear on what the contractor was proposing. In that case the local authority could clarify their position. They would not however be able to negotiate a different or more favourable position under the bid submission. Clarification essentially stems from reading something and not understanding the intent of the party.

2.70 Finally it is worth mentioning that for both the open procedure and the competitive dialogue procedure, the procurement can only commence by issuing a contract notice within the Official Journal of the European Union. The option of using a PIN as a means of calling for competition (see paragraph 2.73 below) is not available under both these procedures.

The restricted procedure (please see diagram at Annex 1)

2.71 Under this procedure, interested parties can submit an expression of interest in response to the OJEU contract notice. The local authority will then carry out a shortlisting exercise using a pre-qualification questionnaire (the mandatory evaluation criteria including the bidders' legal capacity, economic and financial standing and technical capability). Those bidders most closely meeting the local authority's selection criteria will be invited to tender.

2.72 Negotiation with bidders is not permitted; therefore, this process should only be used where the local authority is able to specify its requirements, particularly as the procedure requires that the contract documents are issued with the invitation to tender ("clarification" is however permitted as per the open procedure (see paragraph 2.68 above)). In relation to the market, this would mean being able to specify areas such as scope of services, risk sharing, payment terms, monitoring requirements etc.

2.73 In terms of formally calling for competition under this procedure (and the procedure set out below, namely the "competitive procedure with negotiation") there is an element of choice available depending on the categorisation of contracting authority. For central government, the call for competition is made through the usual despatch and publication of a contract notice (although a standard PIN can still be used to give early warning to the market of an impending procurement exercise). For local authorities using this procedure, there is the option of either using a PIN, or a contract notice as a means of call for competition. Using a PIN in this manner has a number of benefits, namely:

- Local authorities can batch their procurements annually should they wish to do so and advertise them under one PIN;
- The PIN will remain valid for a 12 month period during which time any bidder can express their interest in participating in one or more procurement process once it is formally commenced through the despatch by the contracting authority of an "invitation to confirm interest"; and
- The use of a PIN under these circumstances allows the contracting authority to shorten the deadline for receipt of initial tenders to a minimum of 10 days (subject to the principles of proportionality).

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2.74 Given this additional flexibility, going forward the onus will be on the market to monitor not only contract notices, but also PIN notices issued by local authorities, to ensure that suppliers don't "miss the boat" in terms of expressing an interest in any specific procurement exercise.

Competitive Procedure with Negotiation (please see diagram at Annex 1)

2.75 The competitive procedure with negotiation has been introduced under the most recent Regulations (the old negotiated procedure with a call for competition is now defunct). The grounds for using this new procedure have been harmonised with those that apply to the use of the competitive dialogue procedure, allowing contracting authorities to initially choose between either of the two procedures should it be looking to procure a complex contract where effective negotiation with bidders will be necessary and/or beneficial.

2.76 Keeping in line with the underlying theme of greater flexibility, the negotiation stage allows for a number of options, essentially allowing each contracting authority to tailor its procurement in order to meet its specific needs. Primarily, a contracting authority may accept initial tenders without any negotiation if it has reserved the right to do so within the contract notice (or the invitation to confirm interest if it has used a PIN as a call for competition). Alternatively, the negotiation can be run in successive stages, allowing dialogue and/or amendment to all elements of the tenders, with the exception of the award criteria or the "minimum requirements" of the contracting authority. Following submission of final tenders, no negotiation, or indeed clarification of the tender submission is permitted.

2.77 The European Commission has stated that going forward it expects the competitive procedure with negotiation to become more commonly used than the Competitive Dialogue procedure. Given that the criteria for using both procedures are now essentially the same, local authorities will need to consider carefully on a case-by-case basis, the merits of proceeding with either option, given the genuine complexities connected with their proposed procurement.

2.78 The competitive procedure with negotiation is likely to be the fail safe procedure if an authority is uncertain as to whether negotiations are needed. In this case, the option to either accept initial tenders or proceed with a degree of negotiation is likely to be an attractive one. Often the need to dialogue does not come to light until initial tenders are received, an issue which often leads to considerable difficulties for local authorities who have initially proceeded with the restricted procedure only to find that issues have been identified which need further discussion or amendment to the contractual terms. This procedure allows for such issues to be resolved through negotiation following which parties essentially revert back to the restricted procedure, to the extent that no negotiation is permitted following submission of final tenders.

2.79 An additional flexibility incorporated into this procedure which distinguishes it from the competitive dialogue procedure is the option to award the contract either on the basis of the most economically advantageous tender (or MEAT) or lowest price which again is reflective of the potential to use this procedure for relatively simple procurements, which can be secured on the basis of lowest price only, but where an element of negotiation is required before concluding the contract.

2.80 Given the European Commission's view, it is likely that the competitive dialogue procedure will be applied to genuinely complex projects where substantial dialogue will be required and furthermore, where due to the complexity of the solution, there is likely to be a requirement for an element of negotiation at preferred bidder stage. Under the 2006 Regulations, under the competitive dialogue procedure parties were permitted to "clarify aspects of the tender" or "confirm commitments" prior to contract conclusion, however under the 2015 Regulations, the term "negotiation" at preferred bidder stage is expressly used. Such negotiation may be carried out in order to "confirm financial commitments or other terms contained in the tender" provided that this "does not have the effect of materially modifying essential aspects of the tender or of the public procurement". This clearly distinguishes the competitive dialogue procedure from the competitive procedure with negotiation where, with the latter procedure, preferred bidder negotiations are expressly prohibited.

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The competitive dialogue procedure (please see diagram at Annex 1)

2.81 Going forward, this procedure should only be used for complex contracts where the local authority does not have defined service requirements or is not able to clearly identify its legal and/or financial requirements. It is particularly useful where bespoke solutions are being sought from bidders, for example in relation to new facilities being developed or changes to the scope of the services. This procedure is most commonly used for high value and innovative contracts.

2.82 The key feature of the competitive dialogue process is that it allows an authority to enter into dialogue with bidders to develop solutions to meet its needs. Dialogue usually consists of meetings with each bidder to focus on the different aspects of the procurement which relate to the price and risk of the bidder's solution. It can be resource demanding and drawn out if not managed effectively and requires bidders' understanding of the Regulations.

2.83 Appropriate project management can overcome concerns with competitive dialogue and encourage innovative solutions to complex problems, such as where there is significant stock rationalisation or a new build/refurbishment.

2.84 Where competitive dialogue is the most appropriate route, the opportunity to streamline the process should be seriously considered, for example in relation to having less dialogue stages or restricting dialogue to key issues only. The use of the templates in this toolkit should facilitate a focus on key project-specific issues and avoid unnecessary dialogue on areas where a standard market position exists. A suggested list of key areas to discuss during a stream-lined dialogue is included within the Appendices to this toolkit.

Concessions (and the Concessions Contracts Regulations 2016)
(please see diagram at Annex 1)

2.85 Previously (until 18 April 2016) the letting of a service concession contract was outside the scope of procurement regulations in the UK and therefore any local authority was not required to follow one of the procurement routes noted above – it was however within the scope of general EU Treaty principles, so some form of competition should have been initiated to ensure fair, open and transparent treatment within the relevant market. The essence of a services concession is that the contractor is being offered the opportunity to exploit the rights associated with the concession – i.e. the opportunity associated with management of the leisure facilities, and that the risks associated with this are also being transferred to the contractor. The opportunity to procure outside of the Regulations provided greater flexibility to the local authority, but nevertheless the principles of non-discrimination, transparency and equality of treatment should have been adhered to in any procurement process. Also, there was always a significant risk a contract could be seen as procurement of a services contract, rather than a concession, particularly if the local authority absorbed an element of risk in relation to project delivery and/or wished to link payments to outcomes and delivery of particular services.

2.86 Until April 2016, Public Works Concessions were governed by the 2006 Regulations and were subject to a limited regime which required an advertisement in the OJEU and a minimum 52 day period within which firms could respond. Beyond this, there were no specific rules relating to the procedure to be used.

2.87 In order to harmonise the treatment of concessions contracts throughout the EU, a Concessions Directive was published on 28 March 2014 and was implemented into UK law on 18 April 2016. The Concession Contracts Regulations 2016 have now been published (**“the CC Regulations”**). **They cover both works and service concessions and relate only to those concessions which have a value equal to or above EUR 5,186,000.**

2.88 Under the CC Regulations, concessions can only be awarded for a limited duration, but there is no stipulated maximum. If however the concession is to last for more than five years, then the maximum duration must not exceed the time that a tenderer could reasonably be expected to take to recoup their investment and any return on their invested capital.

2.89 There is no set procedure to be followed when awarding a concession under the CC Regulations, however bidders should, in accordance with the EU Treaty principles, be treated equally and without discrimination and in a transparent and proportionate manner.

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2.90 Contracting authorities must publish a concession notice in the OJEU. They may set qualification standards based on professional and technical ability and financial and economic standing. These qualifications must be stated in the concession notice and must be non-discriminatory and proportionate to the subject matter of the concession. If qualifications are set, contracting authorities may then select from those who qualify a limited number to participate in the awards process. The CC Regulations do not specify a minimum number, but the contracting authority must ensure that the number selected is sufficient to ensure genuine competition.

2.91 The minimum time limit which can be set for receipt of applications or tenders is 30 days from the date on which the concession notice is published. When setting the deadline, the contracting authority should take into account the complexity of the concession and the expected time needed. Objective criteria must be used to identify the application or tender providing an 'overall economic advantage'. The criteria must be linked to the subject matter of the concession and take into account the principles of equal treatment, non-discrimination and proportionality. The criteria must be listed in descending order of importance and disclosed in advance to all of the tenderers. Following the award of a concession, the contracting authority must 'as soon as possible' inform all of the tenderers of award decisions. If the tenderer is unsuccessful, they have a right to request information, and the contracting authority must respond with detail on the characteristics and advantages of the successful tender within 15 days of receipt of the written request. As noted above.

Application to Leisure Contracts

2.92 The procurement of a DBOM arrangement could constitute a works concession contract for the purposes of the CC Regulations. A works concession contract is defined as a contract "for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit the works that are the subject matter of the contract or in that right together with payment". The requirements for the contract to be categorised as a concession is that:

(a) the award of the contract involves the transfer to the concessionaire of an operating risk in exploiting the works encompassing demand or supply risk or both. (In this case, the concessionaire is deemed to have assumed operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments or the costs incurred in operating the works which are the subject matter of the concession contract); and

(b) the part of the risk transferred to the concessionaire involves real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire is not merely nominal or negligible.

This will require early consideration by the local authority in terms of the level of risk it will be looking to pass to the private sector and whether any loss of profit is subsidised by the public sector. The payment of an agreed management fee is unlikely to affect the categorisation of the contract as a works concession, unless that management fee is to be uplifted in line with any risk realised by the leisure operator. If as part of the pre-procurement process, the local authority considers that the contract does constitute a works concession then it will be required to comply with the requirements of paragraphs 2.85 to 2.91 above.

2.93 In terms of service concessions, these are defined under the CC Regulations as a contract "for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment". The fundamental requirements for the contract to be categorised as a services concession are also as set out under paragraph 2.92 (a) and (b) above.

2.94 However, as with the 2015 Regulations, Schedule 3 of the CC Regulations list a number of CPV codes to which a similar "light touch" regime may be applied. Those CPV codes replicate those found within the 2015 Regulations and therefore will cover those forms of Leisure Operating Contracts listed above. However, in the case of the CC Regulations, the provisions do not apply a higher financial threshold to the application of the light regime under these specific regulations (as the 2015 Regulations do with the application of a higher threshold of £589,148).

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2.95 The key elements of the light touch regime for a services concession include:

- publication of a prior information notice;
- the issuing of a notification to each tenderer communicating its award decision with a requirement not to enter into the contract until the expiry of a 10 day standstill period; and
- the application of effective remedies for any unsuccessful tenderer which may wish to bring proceedings against a local authority for any procurement breach.

Valuing a Concession Contract

2.96 As suggested earlier, the Concession Contracts Regulations 2016 will only apply to contracts with a value over EUR 5,186,000. When estimating this value the local authority will need to take into account the likely total turnover to be generated over the duration of the contract and any consideration paid for the works and services that are the subject of the concession (i.e. any payment for minor refurbishment works or leisure management fees) and any supplies incidental to such works and services. In most cases however, calculating the total future turnover precisely will prove difficult due to the fact that the very nature of a concession implies the existence of risk. Any estimated value may therefore need to reflect possible variations to the turnover which may occur due to, for example, a change in the number of users (which may fluctuate seasonally or any likely changes in the asset's general availability (i.e. programmed maintenance or planned refurbishments). The local authority should however look to provide the most accurate estimate possible using an objective method which should be communicated to the tenderers within the procurement documentation.

Variants

2.97 For all of the above procedures, where the possibility of alternative delivery options exist, there is an opportunity to use 'variant bids' to compare the merits of different options, for example in relation to rationalisation options, different approaches to maintenance risk or contract lengths. Variant bids must however meet the contracting authority's minimum requirements as set out in the tender documentation (for example, in the Services Specification). If they do not, they must be disregarded. From a practical perspective, variant bids should not be used as a substitute for up-front analysis as part of a comprehensive business case.

Procurement Options

2.98 Figure 2.2 set out later in this chapter identifies some of the key questions to be considered in selecting the preferred procurement route and contract approach. In considering this, local authorities also need to take into account guidance issued by central Government in relation to local authority procurement, which suggests a presumption against using competitive dialogue and reinforces the opportunities offered via soft market testing prior to engaging in a procurement process – for example, using soft market testing to examine market positions that can then inform the contractual position of the local authority.

Practical Tip:

Please see Annex 1 which sets out flow diagrams further detailing the open, restricted, competitive dialogue and competitive procedure with negotiations and the relevant time period which should be factored into each such procedure.

c) Timescales for procurement

2.99 Table 2.2 overleaf identifies some indicative timescales for each of the procurement options, based on successful schemes delivered in the past few years. There are a number of factors that can impact directly on a timetable and should be considered when identifying key deadlines, including:

- Requirement for Cabinet and/or full Council reporting and timescales associated with report deadlines
- Level of resource availability to undertake evaluation and provide feedback on documentation
- Requirement for stakeholder engagement and feedback

02. Pre-Procurement Phase

- Holiday periods, particularly Christmas and summer holidays, where resource for both the local authority and bidder may be limited
- External sign-offs required – for example, if dual use facilities are included, is formal approval required from school governors, or if superior landlord consent is required for sites where the local authority is not the freehold owner of the land
- Planning process – if planning permission is likely to be required, has sufficient time been allowed for application and determination and has pre-application advice been sought to inform the project and its deliverability.

2.100 Also, the timing of any advert will be important in relation to maximising interest and competition – it is useful to test this with the market as part of the pre-procurement work, to avoid clashes with other major projects which may reduce the ability of the market to respond.

Table 2.2: Timescales associated with the procurement routes*

		Operating Contract	DBOM Contract	Traditional Design then Build	Design & Build Contract
Leisure Operating Contract (excluding pre-procurement considerations)		6-12 months	N/A	N/A	N/A
Open procedure (excluding pre-procurement considerations)		6 months	N/A	9-12 months	6-9 months
Restricted procedure (excluding pre-procurement considerations)		6-9 months	N/A – very difficult to deliver a DBOM via restricted process	12-14 months (can be quicker, particularly where there is market engagement pre-procurement and standard contracts are ready)	9-12 months
Competitive Procedure with Negotiation: (excluding pre-procurement considerations)	Local Authority accepts initial tenders	6-9 months	12-15 months plus planning application/ submission time periods	12-14 months	9-12 months
	Local Authority continues with negotiation	9-12 months	15-18 months plus planning application/ submission time periods	12-15 months	9-15 months
Competitive Dialogue (excluding pre-procurement considerations)		12-15 months	18 months, plus planning application/ submission time periods	N/A	N/A

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

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2.101 In setting a realistic timetable, it is therefore recommended that local authorities allow between 6–9 months for the procurement phase under the restricted and competitive procedure with negotiation (and longer if initial tenders are not acceptable under the latter procedure), plus time in preparation and time for any pre-procurement market testing. A period of between 12–15 months should be allowed under the more complex, competitive dialogue procedure, again excluding pre-procurement preparations. Planning is often a critical aspect that is overlooked and can add considerable delay to a project, particularly where a development is contentious or contrary to planning policy. Early engagement with planners should be a key aspect of pre-procurement work, to minimise uncertainty and identify key issues for resolution.

2.102 Should insufficient time be allocated, there are clear risks in relation to achievement of project objectives, loss of bidders due to insufficient time to respond and potential compromising of value for money.

2.103 Should an updated facility strategy or management options appraisal study be required to underpin the decision making pre-procurement, then an additional 3-6 months should be added to the timeline.

Practical Tip:

In order to ensure that any procurement timetable is realistic, it is important to consider whether any consent is required on the project, other than the usual internal authority approvals, before progressing with the procurement. For example:

- If the local authority does not own the land, is superior landlord consent required before any lease is granted and/or any sharing of occupation (pursuant to a licence to occupy) occurs?
- If consent is needed, how will the local authority obtain the superior landlord consent? If the contract is not consistent with the terms of any headlease (for example, in relation to maintenance, defects, insurance requirements), the local authority will need to ensure that the freehold owner understands the procurement process proposed and will consent to the proposed approach.
- If any grants have been made by external organisations or national governing bodies, will consent be needed from these organisations prior to contract completion? How will this consent be obtained, and will it impact on the procurement timetable?
- If there are restrictions noted on the title(s) of the land involved in the project, have steps been taken to ensure that any requirements can be satisfied?
- Is all of the land involved in the project registered? If not, will the grant of a lease pursuant to the contract trigger first registration? Can the local authority be progressing any necessary registrations now?

d) Framework agreements

2.104 An alternative approach to a project-specific procurement via an OJEU advert is to procure some elements via existing framework agreements. Whilst this is generally not relevant from an operating perspective (there are only a small number of examples where certain local authorities have set up operator frameworks in their area), it is potentially helpful from a construction perspective. The next few paragraphs are therefore drafted in the context of a design & build approach, possibly run in parallel with a separate leisure operator procurement.

Design & Consultant team appointment

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

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

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

2.107 In addition, some local authorities may have their own consultant frameworks in place, which provide an alternative to the GPS route, and a number of regional frameworks also exist (see below for details).

2.105 If the local authority is not satisfied that a framework has teams with the required experience on it, then consideration will need to be given to running a bespoke OJEU tender process.

2.108 In using the GPS framework, there are two options available – to select a preferred supplier directly on the basis of them best meeting the project requirements or to run a mini-competition for all suppliers on that particular framework (there is no option to have a mini-competition for only certain suppliers on the framework). Given that there are usually a number of potentially qualified parties on the framework, a mini-competition is normally recommended for selecting a design consultant team – there is a clear process for this dictated by the GPS.

Construction appointment

2.109 Recent guidance from Sport England in relation to procurement of facility projects recommends a single stage design and build process, with the design developed to RIBA stage 3 Developed Design, at which point the works are tendered. This approach fits with the analysis of design & build vs traditional procurement noted earlier in this chapter and fits with the use of the GPS framework for early appointment of the design and consultant team.

2.110 In relation to appointing the constructor, again there are options available either via an existing framework or via an OJEU tender process. A significant number of construction frameworks exist, some of which are national and some regional, including:

- ProCure21+ - an NHS framework open to any NHS organisation or any non-NHS organisation collaborating with an NHS organisation for the provision of a facility that has a health component. This framework is suitable for major works schemes
- SCAPE – this is a national construction framework with a single framework provider on it
- Regional frameworks, such as:
 - Construction Framework SW
 - West Midlands Contractor Framework
 - Constructing West Midlands Framework
 - YorBuild – Yorkshire, Humberside and NE Lincs
 - NW Construction Hub
 - Smarte East Alliance
 - IESE – SE plus London
 - SCAPE – East Midlands
 - NE Improvement and Efficiency Partnership
 - East London Solutions Procurement Group.

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

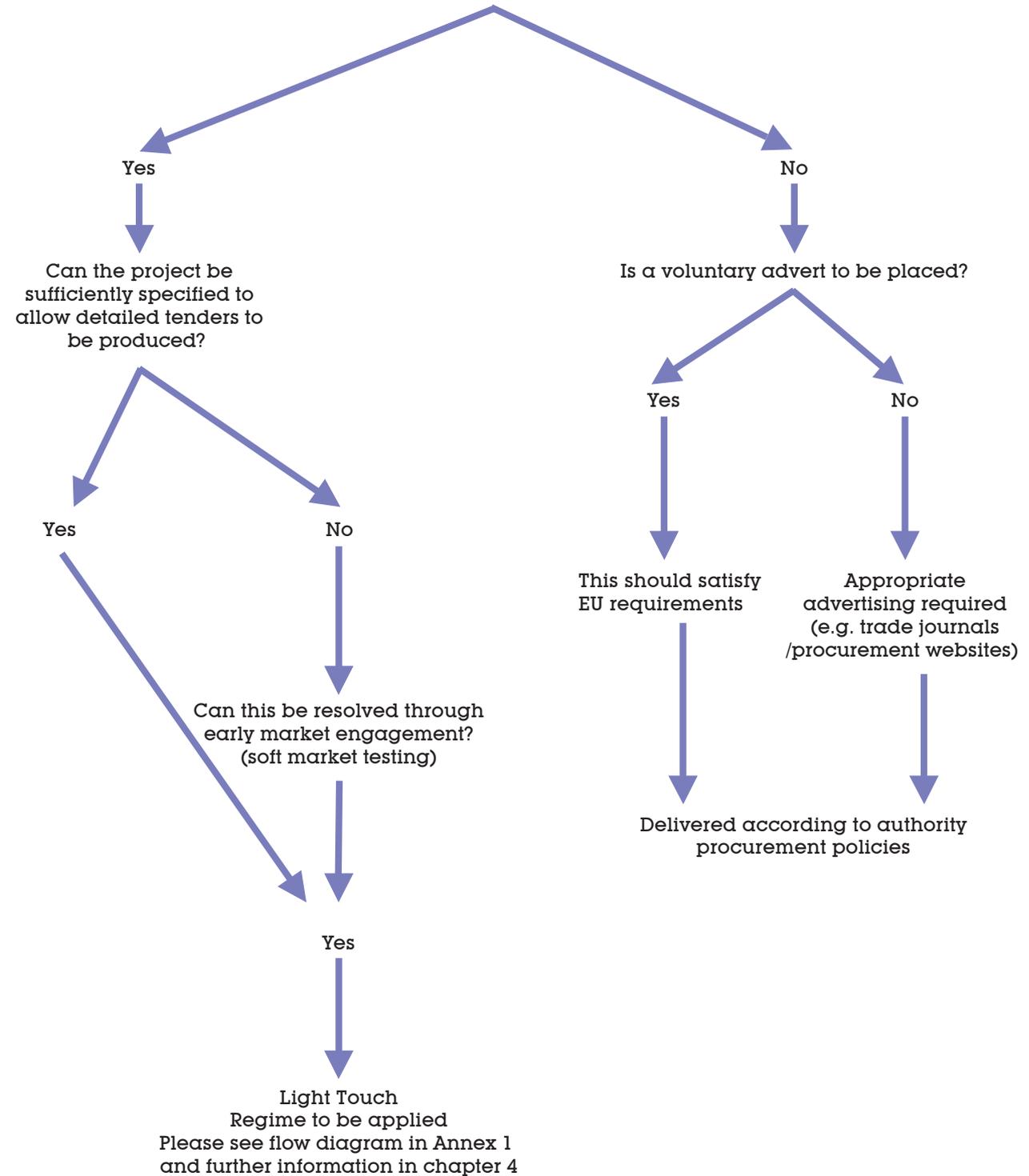
2.112 Figures 2.2 – 2.4 overleaf identify a number of considerations in relation to selecting the preferred procurement route. Figure 2.2 deals with leisure operator only contracts, figure 2.3 construction only, whilst 2.4 is for a combined operation and construction project.

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

02. Pre-Procurement Phase

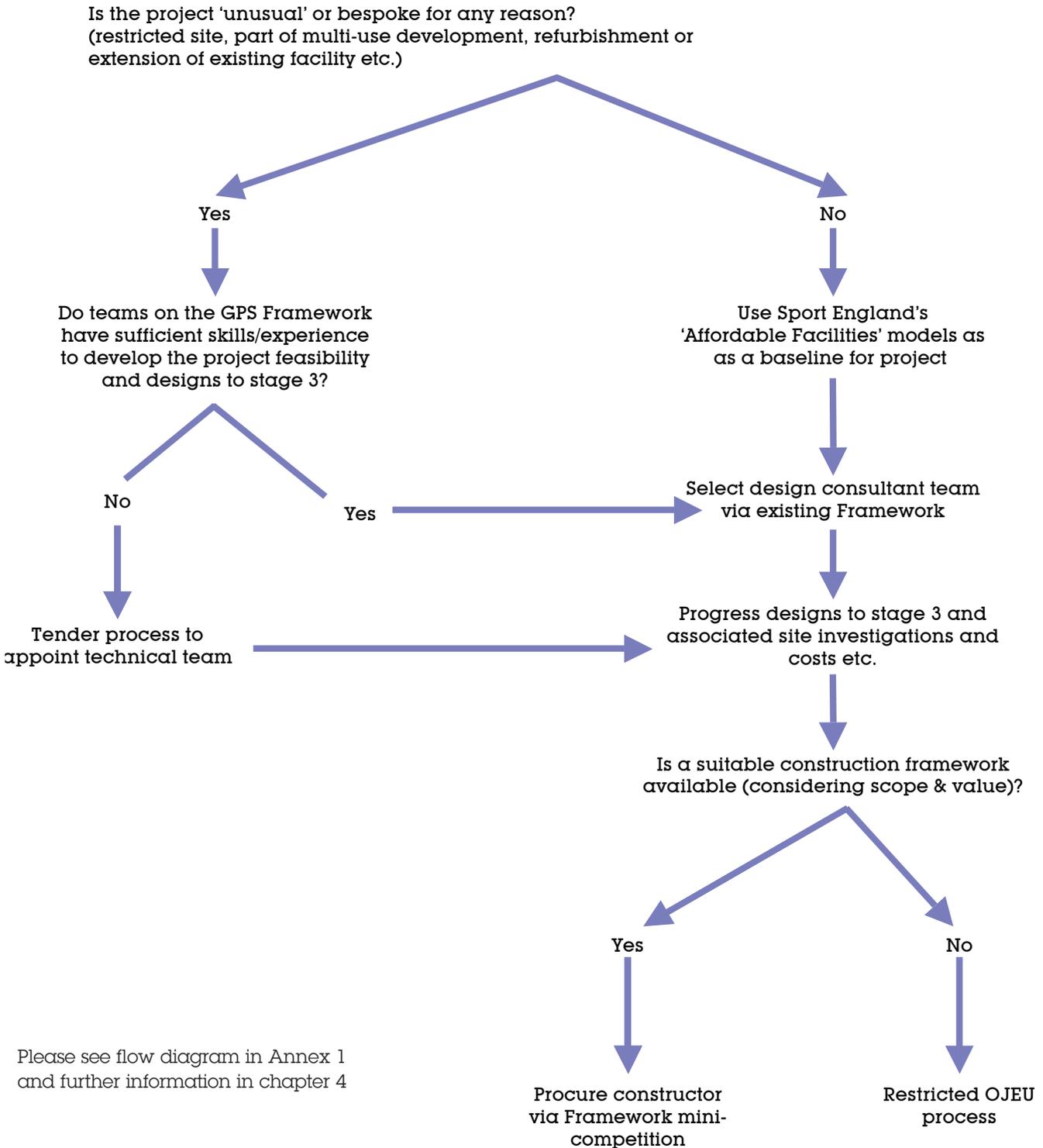
Figure 2.2. Procurement route selection – leisure operator procurement only

Is an OJEU advert required?



02. Pre-Procurement Phase

Figure 2.3. Procurement route selection – construction procurement only



02. Pre-Procurement Phase

Step 4: Considering budgets & affordability

Budgets & affordability for the procurement process (project team members)

2.114 There are a number of roles to be fulfilled in delivering a successful procurement, including:

- Project management and reporting
- Leisure advice
- Technical advice (architect, cost consultant, other technical disciplines)
- Financial advice
- Legal advice.

2.115 The advisor roles will include input to documentation, input to bidder clarifications and dialogue, and evaluation of submissions.

2.116 In addition, specialist areas in which additional advice may be required include **insurance, property** and **pensions**.

2.117 Each local authority will need to consider the availability of in-house resources and whether appropriate expertise is available, or whether external support should be considered to ensure the project is delivered in line with best practice. It is imperative that a dedicated project manager (internal or external) is available to lead the project. If external support is required, it is recommended that specific task lists are developed against which quotations can be sought, in order to minimise expenditure on external advisor fees and ensure all aspects of the process are covered.

2.118 Feedback from local authorities and operators that have been through this process strongly recommends the use of external advisors as critical friends at key milestones, particularly up-front in terms of developing the procurement and contractual documentation and evaluation criteria and during any clarification or negotiation phase, depending on the procurement process used.

2.119 The **project manager** should ideally have an understanding of both the procurement process and the specific market issues for leisure, which can then be supplemented by more detailed expertise from in-house personnel (for example procurement specialists) or external advisors.

2.120 As a broad guide, the project management role for a leisure outsourcing project will require in the region of 2-3 days per week of dedicated resource, whilst for a DBOM project this is likely to be 4-5 days per week given the additional technical roles and input to be managed.

2.121 Input from other local authority personnel will be focused around key points in the procurement process and table 2.3 identifies key stages where input will be required from different departments. This is in addition to on-going project management and support from external advisors. In general terms, there is up-front input to develop the documentation and populate the data room, followed by specific input during dialogue and/or clarification and evaluation of tenders.

2.122 In some instances, the level of in-house resource and expertise is limited, so consideration will need to be given to additional external support requirements.

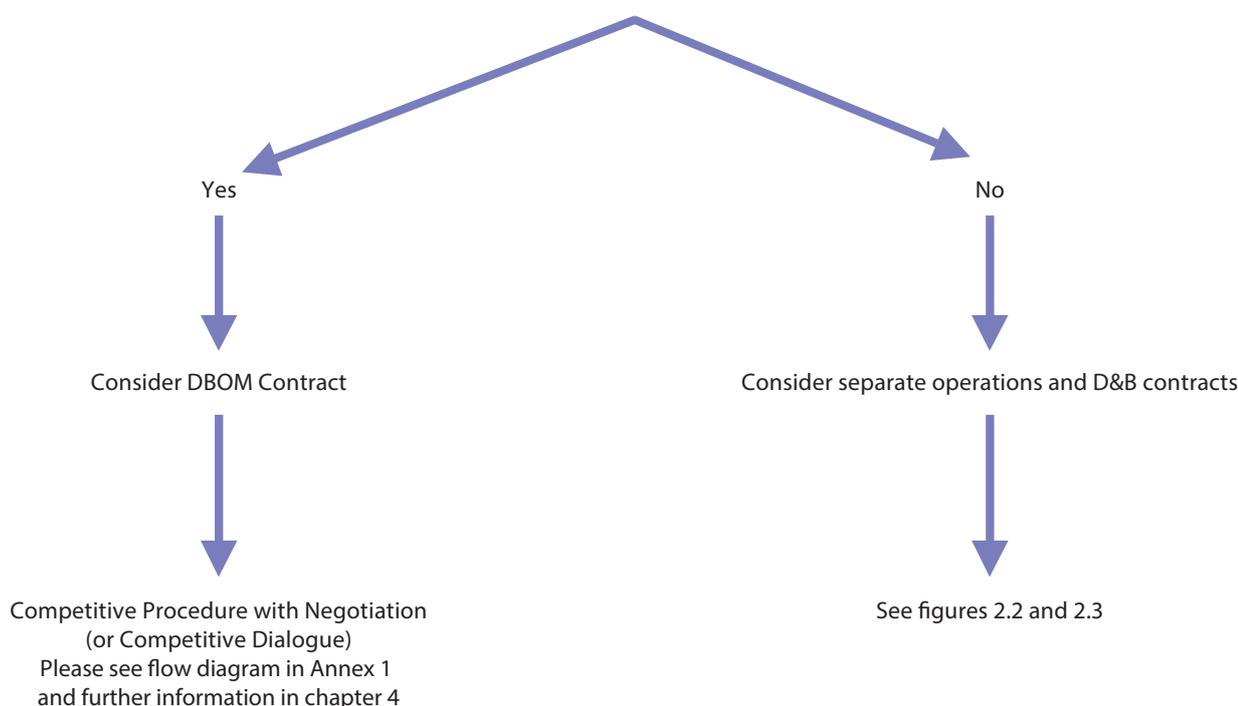
2.123 Table 2.3 does not cover the Project Board and Project Team, which will be directly involved in all aspects of the project.

02. Pre-Procurement Phase

Figure 2.4. Procurement route selection – leisure operator and construction procurement

Does the project meet one of the following criteria:

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



02. Pre-Procurement Phase

Budgets & affordability for the project

2.124 As part of the tender documentation, it is often useful to specify a realistic affordability limit against which bids will be considered and evaluated. This provides interested parties with a clear understanding of the financial parameters within which their solutions should be developed and allows all parties to be clear on any potential balancing between affordability and service delivery. The competitive pressures of the process should still ensure bidders maximise the financial position in their tenders.

2.125 The business case for the project should include the financial model that has been used to test the affordability limit, but if there is no business case then consideration should be given to developing a summary model that identifies the future budgets for the project and compares them to the resources required to deliver the anticipated services – in this regard, any obvious mismatch between affordability and deliverability can be identified prior to commencing procurement, to ensure a viable project is offered to the market.

2.126 In relation to capital investment, consideration will need to be given to which party is best placed to provide the required investment. Public sector capital is often, but not always, more cost effective and provides greater flexibility (without the need to align contract periods with debt repayment periods), but there are advantages to private sector investment or at least use of the buying powers/commercial approaches to development that private partners can bring.

2.127 Public sector capital could include capital receipts from the closure of existing centres, external capital funding secured and/or prudential borrowing through anticipated revenue savings. A new option also being considered is the use of private equity at preferential prudential borrowing rates underwritten by the local authority.

2.128 Testing the financial viability of a project and thus setting a realistic affordability framework (both revenue and capital) is critical to overall deliverability and market interest.

02. Pre-Procurement Phase

Table 2.3. Overview of local authority input required

	Pre-procurement	PQQ Stage	Tender Stage & Evaluation	Preferred Bidder/ Contract Award
Councillors	Approval of process and key outcomes required. Input to Services Specification.	Delegated authority is usually agreed for shortlisting during the tender stages, although there may be Councillor representation on the Project Board and regular progress reporting to Cabinet.		Approval of recommendation for preferred bidder. Approval of contract award.
Leisure/Sports Development	Provision of information for & on-going maintenance of the data room. Drafting of Services Specification and Payment and Performance Monitoring System (PMS). Input to facility requirements and design brief. Input to PQQ drafting.	Review of PQQ responses, particularly service delivery aspects.	Input to negotiation/ clarification process and evaluation process, covering leisure-specific areas, e.g. service delivery proposals, sports development plans and local authority outcomes.	Finalisation of service method statements and reporting frameworks (KPIs and outcome scorecard in particular).
Technical - QS/ Architect and Property	Provision of information for data room. Input to Services Specification, particularly maintenance aspects and facility performance standards. Development of technical requirements and design brief (if relevant).	Review of PQQ responses, particularly technical aspects.	Input to negotiation/ clarification process and evaluation process, covering property-specific areas, e.g. design and construction proposals, capital costs and maintenance plans.	Finalisation of technical requirements, maintenance plans and input to lease details.
Finance	Provision of information for data room. Approval of capital/revenue affordability positions. Input to PMS drafting.	Review of PQQ responses, particularly financial aspects.	Input to negotiation/ clarification process and evaluation process, covering finance-specific areas, e.g. future revenue affordability.	Finalisation of base financial model and payment framework. On-going review of project affordability.
Legal/ procurement	Drafting of OJEU advert. Compliance review of documentation and approval of process. Development of contract and schedules.	Review of PQQ responses.	Input to negotiation/ clarification process and evaluation process, covering legal-specific areas, e.g. contract mark-up.	Finalisation of contract and schedules. Confirmation of leases/licences

Practical Tip:

Legal advice may overlap with some of the other areas referred to within this table. For example, as well as needing legal input in relation to the contract, OJEU advert and schedules, legal advice in relation to property matters, employment and pension matters will be needed at all stages.

02. Pre-Procurement Phase

Table 2.3. Overview of local authority input required continued

	Pre-procurement	PQQ Stage	Tender Stage & Evaluation	Preferred Bidder/ Contract Award
Property/ Estates	Development of contract, lease and schedules. Potentially preparing title documents and ensuring any superior landlord consent is obtained		Input to negotiation/clarification process and evaluation process, covering legal-specific areas, e.g. contract mark-up. Input into property due diligence.	Finalisation of contract and schedules. Confirmation of leases/licences.
Personnel/HR	Provision of information for data room. Approval of approach to TUPE and pensions.		Input to evaluation process, covering personnel-specific areas, e.g. approach to TUPE and pensions.	Ad-hoc input during handover process (if relevant).
Insurance	Agreement of preferred insurance structures/requirements.		Evaluation of insurance proposals.	Agreement of detailed insurance requirements and schedules.
Health & Safety	Input to development of Services Specification and relevant PQQ aspects.		Evaluation of health & safety method statement.	
Sustainability (environmental/energy)	Input to development of Specification and relevant PQQ aspects.		Evaluation of sustainability proposals/method statements.	

02. Pre-Procurement Phase

Step 5: Setting up project management structures

2.129 Timely decision-making is a critical part of the process and early consideration needs to be given to a number of practical questions, including:

- What level of delegated authority has been approved in relation to the shortlisting of bidders?
- What stage(s) require a report to Cabinet and/or full Council, and what is the process for gaining approval to enter into the contract?
- Who is responsible for approving changes to the project?
- Who is responsible for project management and liaison with any external advisors?
- Who should be on the project board and project team?
- Who else in the local authority will need to be involved – for example, in relation to provision of data room information and input into evaluation processes (examples include finance, HR and property colleagues)?

Practical Tip:

Involving colleagues from all relevant departments at an early stage is vital. Local authorities should ensure that departments are working together so that documents issued are consistent and work on a site specific basis.

2.130 As a minimum, a Senior Responsible Owner (SRO) should be appointed for all projects, who has overall responsibility and accountability for successful delivery of the project and achievement of the outcomes.

2.131 From a project management perspective, there are a number of project management methodologies available and each authority will have its own preference. However, of critical importance in all cases is an appropriate audit trail of decisions and a risk register that is regularly updated.

2.132 If a local authority is following a Prince 2 approach, the Project Initiation Document (PID) will be particularly useful as a base on which to start the project. A comprehensive PID will cover:

- **What is the project aiming to achieve?** (setting out desired outcomes, project deliverables, scope, constraints)
- **Why it is important to achieve it?** (a summary of the Business Case for the project)
- **Who will be involved and what are their responsibilities?** (project structure and identification of key personnel)
- **How and when will it happen?** (project plan, communication plan, quality plan).

2.133 The communication plan may include community engagement, for example in relation to providing updates on the procurement and pertinent issues such as future programming and pricing. Certain processes have also included community feedback on facility designs or facility mixes, however, this will require careful management if confidentiality of bidder proposals is to be maintained and may therefore be better undertaken as part of developing the business case for the project, rather than during the procurement process.

2.134 In addition, many local authorities will require an Equality Impact Assessment to be completed, assessing the likely effects of the project on people in relation to disability, gender and racial equality.

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

02. Pre-Procurement Phase

Step 6: Developing a data room

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

2.137 Care should be taken to ensure that only relevant and sorted information is included in the data room in a timely manner to allow bidders sufficient time to reflect the information in their bid submissions. Bidders' time is best used analysing the pertinent information rather than sifting through large volumes of information that is not directly relevant.

2.138 Developing and maintaining an effective data room can be time intensive and appropriate dedicated resource should be identified early on as part of considering budgets and setting up project management structures.

2.139 If possible, the data room should be electronic, allowing remote access to by bidders and members of the project team. This also helps to facilitate a clear and transparent filing system. There are numerous systems available to provide online data rooms and in many cases external legal advisors will have their own systems that the local authority can utilise.

Data room contents

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

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

02. Pre-Procurement Phase

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

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

Practical Tip:

If the local authority is wishing bidders to price on the assumption that a new facility will form part of the contract post contract signature, is there sufficient information available to bidders to ensure that all tenders are based on the same assumptions? There should be sufficient information provided in the data room for all bidders to understand the facility mix, and so that they can price accordingly. This should include designs, construction plans, specifications, project timetables, planning documents and surveys.

2.142 Not all of these surveys will be required for every project, therefore the local authority will need to consider at an early stage what information will be provided to enable bidders to develop proposals without the need for significant caveats to be included. It should also be noted that in certain areas the suppliers (e.g. utilities) will only provide information to the local authority, rather than responding to various requests from bidders.

Building condition surveys

2.143 Where the project includes major refurbishment or the transfer of maintenance responsibility in relation to an existing facility it is recommended that the local authority commissions a building condition survey that should be made available for all bidders to use as part of their priced bid submissions.

2.144 The deed of appointment of consultants relating to the carrying out of surveys and the provision of a report on the findings in relation to the leisure facility should be carefully considered to ensure that the information reported is warranted and fully assignable to the successful bidder where appropriate. It is recommended that the deed of appointment include a requirement that the client may assign by way of absolute legal assignment any of its rights and obligations under the appointment provided that it gives notice in writing of such assignment or transfer as soon as possible thereafter.

2.145 As a minimum, the specification or brief to consultant surveyors should include the following:

- Scope of the survey
- Introduction and background
- General instruction
- Survey and valuation requirements
- Reporting and output requirements
- Liaison and conduct of the survey
- Appointment and duty of care
- The tendering process.

02. Pre-Procurement Phase

Practical Tip:

(Subject to comments in the next section of this toolkit) if the local authority is expecting bidders to complete title due diligence at bid stage, have Land Registry compliant red line plans been drawn up, are replies to CPSEs available, have the searches listed in Schedule 13 of the Leisure Operating Contract been provided and can all title documents be sent to bidders? If so, these should be included in the data room.

As noted in this toolkit (please see chapter 4), we would advise that full title due diligence is not a requirement at bid stage, due to the disproportionate costs incurred by bidders, but if the local authority does wish title due diligence to be completed prior to tenders being submitted, all title documents and property documents will need to be made available to bidders at the outset of the procurement process. These can take some time to prepare, and forward planning is necessary. Furthermore, if land is not registered, an epitome of title will need to be provided to bidders and/or first registration should be considered.

2.146 It is recommended that the scope of the survey is clearly set out, requiring a full report and appraisal of the building fabric, finishing, structure, mechanical installations, electrical installations, swimming pools and their associated plant and equipment (where relevant) together with the external works within the curtilage at each leisure facility. The report should give the anticipated life of the major elements of the structure, building fabric, plant and equipment. This should include anticipated component renewals to inform lifecycle base modelling up to [15] years. A detailed analysis is required of the solutions to remedy defects and their probable costs. A programme of cyclical, planned maintenance and refurbishment is required with costs.

2.147 For each leisure facility, the condition survey should include the following:

- Full measured survey of buildings and curtilage, pipe size and orientation, underground utilities
- Full existing ground level survey within curtilage
- Measured plans; site plans, floor plans, elevations, service layouts, drainage layouts, all rights of way
- CCTV survey and test report of drainage utilities
- Survey of existing electricity, gas and water service supplies
- Report on additional supply capacity
- Full internal condition survey of buildings, mechanical and electrical plant and equipment
- Full external condition survey of buildings, mechanical and electrical plant and equipment
- Equipment condition and inventory
- External condition survey within curtilage
- Structural survey
- Radon survey
- Full accessibility audit
- Inspection and testing report on all plant and equipment
- Schedule of component renewal and costs
- Examination of existing information
- Preliminary assessment of standard of technical performance against the original design and modern performance criteria for equipment, fabric, structure and plant.

02. Pre-Procurement Phase

Incumbent contractors

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

2.149 As a minimum, the following information should be obtained:

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

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

2.151 Many older contracts do not include provision of information requirements in relation to contract handover, so early discussion with the incumbent contractor will often be necessary to confirm willingness to supply the information and timescales for receipt.

2.152 Further to this, any new contract should include clear handover provisions to ensure similar information is available at the end of the contract to facilitate any re-tendering exercise required.

2.153 The next chapter of this document sets out the first stage of procurement – pre-qualification.

02. Pre-Procurement Phase

Key risks to consider

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

Project management notes

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

Checklist before continuing

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

03. Pre-Qualification Phase

Introduction

3.1 Having confirmed the appropriate procurement route and developed the project management arrangements, the pre-qualification phase is an important stage in ensuring a good level of market interest and allowing the local authority to select an appropriate range of bidders for the tender stages.

3.2 The pre-qualification phase normally consists of the following elements:

Pre-qualification Steps

- **Step 1:** Advertising the project either via OJEU or other means
- **Step 2:** Release of pre-qualification questionnaire & information memorandum
- **Step 3:** Bidders open day (can take place prior to OJEU advert, for example via advertising in a Prior Information Notice)
- **Step 4:** Evaluation of pre-qualification submissions & selection of bidders to be invited to tender

3.3 The remainder of this chapter looks at each element in turn.

03. Pre-Qualification Phase

Step 1: Advertising the project

3.4 Early market engagement can help raise market awareness generally and as we have discussed earlier on in the document, is expressly encouraged both by central government and now covered under the Regulations, in terms of how such engagement should be lawfully conducted. As part of that market engagement process, the local authority will have established whether there are a sufficient number of interested parties to secure a genuine competition and will have given potential bidders the opportunity to liaise with the contracting authority and formulate a bespoke solution.

3.5 It is recommended that soft market testing is undertaken to gauge the level of interest in the market and to seek early leisure operator market opinion in relation to the intended procurement route, timescales and budget.

3.6 Whilst this is an important step in engaging with the market and benefiting from expert opinion in relation to key issues and helps confirm the proposed procurement strategy, this process should not represent a time consuming and costly exercise for bidders. Alongside a brief overview of the background and key project priorities a maximum of 5-10 key questions should be set out on which brief responses are requested.

3.7 Key questions should focus on the proposed scope, budget, timetable, length of term, procurement and contractual approach, planning and bidder interest. Requests for lengthy and detailed responses and commercially unrealistic information such as investment proposals should be avoided at this stage.

3.8 Depending on whether the procurement falls above, or below the financial thresholds described in chapter 2 above and which procurement route the local authority opts to follow, the local authority will need to either place some form of notice within the Official Journal (either a contract notice or a PIN if used as a means for calling for competition) and/or place suitable tender adverts in the trade press and on procurement websites (if falling outside of the scope of the Regulations but still deemed to have a cross-border interest). In certain instances, a PIN may also be placed the intention of giving the market early notice of the local authority's intention to potentially award a contract (not in this case necessarily being used as a mechanism for calling for competition).

3.9 The placement of a PIN under the latter circumstances is not required under the legislation, but can be used to speed up the actual procurement process by reducing the timescales associated with the Regulations.

3.10 There is a prescribed format for the notices to be submitted to the Official Journal of the European Union (“OJEU”) under the Regulations, which the local authority's procurement team will need to familiarise themselves with. The current forms (of May 2016) are available at; <http://simap.ted.europa.eu/web/simap/standard-forms-four-public-procurement>.

3.11 Careful consideration should be given to the drafting of the OJEU advert/tender advert, in particular to ensure that the scope of the advert is sufficient to cover all possible aspects of the project. The scope of the advert needs to be sufficient to cover the full scope of the proposed procurement exercise. Specifically the local authority should consider whether it will need any change or variation to the scope of works or services in future service delivery. It is recommended that (with the exception of simple procurements where the requirements are clearly defined) a workshop is used to identify both possible solutions and the corresponding scope of required services. This can then be used to ensure the scope of the advertisement for the project is drafted accordingly. Legal advice will be required as part of this process, as an inaccurate advertisement can present a significant risk of procurement challenge or require a procurement process to be re-started.

3.12 Local Authorities should also note that, under the 2006 Regulations there was not a requirement for the placement of an OJEU notice for Part B services, which covered leisure services, (although the building of leisure facilities, if over the above financial threshold for a public works contract, was still subject to the full scope of the 2006 Regulations). The distinction between Part A and Part B services has however now been abolished and any notice published going forward will be in compliance with the Light Touch Regime under Regulations 74–77.

03. Pre-Qualification Phase

3.13 Furthermore, local authorities should also note that alongside the requirement to publish a form of notice at OJEU or national level (as the case may be), under the Regulations there is now also a requirement to advertise both contracts which are subject to the Regulations and contracts which fall below the EU thresholds within “Contracts Finder”. The detailed requirements are set out below.

Contracts Finder Requirements

3.14 Local authorities are generally referred to the Crown Commercial Service’s “*Guidance on the new transparency requirements for publishing on Contracts Finder*” published on 25th February 2015 and which sets out the publication requirements in relation to both above and below threshold contracts.

3.15 In relation to **above threshold contracts**, the Regulations require contracting authorities to publish information on Contracts Finder **in addition** to the publishing of contract notices and contract award notices within the OJEU. The minimum information to be submitted to Contracts Finder is listed within Regulation 106 and includes (but is not limited to) (i) the address from which the procurement documents can be obtained; (ii) the time by which interested parties must respond (iii) how and to whom any such response should be made and (iv) any other requirements for participation within the procurement process. Any such notice should be published within Contracts Finder within 48 hours of receiving the confirmation of receipt of the related contract notice, as received from the OJEU.

3.16 There is also a requirement to issue further information within Contracts Finder no later than 90 days after the contract award date. The minimum information to be included at this stage is set out within Regulation 106 and includes (but is not limited to) (i) the name of the contractor (ii) the date on which the contract was entered into and (iii) the value of the contract. In any event, local authorities should note that they are not permitted to issue such information on Contracts Finder less than 48 hours after confirmation from the OJEU that they have received the relevant contract award notice.

3.17 Similarly in respect of framework agreements, there is an obligation to publish information on Contracts Finder when you are advertising for the establishment of the framework arrangement and when you award contracts under that arrangement (although there is no requirement to publish a contract award notice within the OJEU at that stage).

3.18 In respect of **below threshold contracts**, there is a requirement for local authorities to publish information on Contracts Finder in relation to all contracts for works, supplies and services where the net value of the contract is £25,000 or more. Specifically for local authorities, the exception to this is where the value of the contract is above the EU threshold but where it is an excluded contract under Regulation 10 or where it currently falls outside of the Regulations (such as a services concession). Furthermore, where a contracting authority is satisfied that it is lawful not to advertise an opportunity at all, for example, because it has internal policies such as standing orders which do not require competition, the requirement to advertise on Contracts Finder does not apply to that contract. However, if the local authority opts voluntarily to advertise such a contract (even though there no such requirement to do so under it standing orders) then it must also advertise such opportunity within Contracts Finder.

3.19 The requirements, in terms of the information to be published are similar to that required if procuring an above threshold contract (see paragraph 3.15 and 3.6 above and also Regulation 110). However such information should be published within Contracts Finder within 24 hours of advertising such opportunity pursuant to paragraph 3.18 above. Furthermore, there is also a similar requirement to publish information about the award of the relevant contract on Contracts Finder within “a reasonable time” of awarding such contract (see Regulation 112).

03. Pre-Qualification Phase

Step 2: Release of pre-qualification questionnaire & information memorandum

3.20 Bidders expressing an interest in a project advertised in the OJEU or via tender websites/trade journals are normally issued with a Pre-Qualification Questionnaire (PQQ) and Information Memorandum (also referred to as a Descriptive Document) that provides details of the project, procurement route, key dates, background data and other relevant information unless the local authority has opted to apply the open procedure.

3.21 The contents of a comprehensive Information Memorandum are outlined below and should provide interested parties with a clear overview of the project that enables them to make an informed decision on whether to complete the PQQ.

3.22 The Information Memorandum should cover the following topics:

- Overview of the project and key objectives
- Background to the local authority
- Outline of existing provision
- Scope of the procurement
- Outline of the procurement process
- Timetable for the process
- Overview of the project team and management structures.

3.23 The PQQ allows the local authority to establish whether potential contractors have the technical capacity and ability, economic and financial standing and legal status to deliver the project under those procedures which permit a pre-qualification stage. The PQQ is used to shortlist bidders to invite to tender under those procedures by applying the selection criteria.

3.24 It is worth noting that the PQQ should not be seen as an opportunity for a 'mini' tender and there are clearly prescribed areas on which a PQQ should focus, as set out specifically within the Regulations.

3.25

The Regulations provide an exhaustive list of the selection criteria which can be used to exclude a bidder (the mandatory and discretionary grounds for exclusion are covered under Regulation 57). Where none of those exclusion criteria apply, the bidder may still be rejected at this stage if the specified standards for economic and financial standing, and technical capacity and professional ability, are not achieved. At this stage of the procurement process, the bidder's track record in similar contracts is usually also considered under the criteria of technical capability.

3.26 Local authorities should note that the Crown Commercial Service has this year published statutory guidance on the use and application of a PQQ for both above and below threshold procurements (see "*Public Contracts Regulations 2015: New Requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector Contracts*").

03. Pre-Qualification Phase

3.27 Essentially, for below EU-threshold procurements, a contracting authority may not include a pre-qualification stage in any procurement (irrespective of whether it is a works, services or supplies procurement) where the value of any such procurement is below the EU threshold for goods and services (currently set at £164,176 for local authority procurements).

3.28 In terms of the Light Touch Regime, the threshold applicable to the elimination of the use of PQQs is also set at the lower EU threshold in the main procurement rules for goods and services (as set out above). In practical terms, this means that PQQ's used as part of a pre-qualification stage for procurements below this value are strictly not permitted. However the guidance does confirm that for such contracts, local authorities may ask a number of "suitability assessment questions" which may include (i) applying the pass/fail mandatory and discretionary grounds for exclusion (ii) undertaking financial checks and (iii) obtaining certain assurances in terms of the credibility of delivery of the contract.

3.29 In terms of contracts above the stipulated financial threshold, local authorities are required to use the CCS statutory PQQ for the provision of goods and services (this PQQ is appended to the statutory guidance referred to under paragraph 3.26 above). Contracting authorities may continue to use the industry standard PAS91 for works contracts that are above the EU threshold for goods and services.

3.30 In terms of deviations from the CCS statutory PQQ, the guidance states as follows *"From 26th February 2015, contracting authorities should select from the bank of core and additional module questions contained in the PQQ and not deviate from the wording in these questions. There will be a limited number of circumstances where an authority may need to deviate from the wording in these questions; however, authorities need to be able to justify the reasons for variations if asked". The Crown Commercial Service will be undertaking a series of "spot checks" as part of the Mystery Shopper Scheme in the coming months to monitor and check compliance to these standard questions. In addition, from 1st September 2015, any deviations in the wording from the bank of core and additional module questions are to be reported to the Crown Commercial Service (for information only), within 30 days of the PQQ being made available to candidates on Contract Finder"...."with a brief rationale that explains the reason for the deviation(s). The Crown Commercial Service recommends that this should be signed off by the Commercial Director, Head of Procurement or equivalent".*

03. Pre-Qualification Phase

General Principles under the PQQ

3.31 The contracting authority should allow bidders to self-certify that they are not subject to any of the mandatory/discretionary grounds for exclusion. Such provision of documentary evidence at PQQ stage is to be facilitated by the completion of a standardised document, the European Single Procurement Document (“**ESPD**”). The ESPD was published in the Official Journal on 6th January 2016 and came into force in the UK on 26th January. It is intended to simplify the process of pre-qualification by permitting economic operators to self-declare that various grounds for mandatory or discretionary exclusion do not apply, or that they meet the relevant grounds for selection and/or shortlisting to invitation to tender stage. The actual evidence which sits behind the self-declaration is only to be provided by the economic operator when required by the contracting authority, which may be when the contracting authority is looking to limit the number of economic operator’s invited to tender, or when selecting a winning tenderer. The Regulations also confirm that suppliers may re-use a previous ESPD in subsequent procurements, provided that they confirm that the information continues to be correct. Furthermore, although from 18th October 2018, the ESPD must be provided by suppliers exclusively in electronic form, until such time suppliers may either provide the ESPD in hard copy printed form, or send scan their response in and send the same electronically. Contracting authorities should note that as a result of its introduction, they are now required to recognise the ESPD as proof of fulfilment of the conditions for participation. However, as at the date of preparation of this toolkit, the Crown Commercial Service (CCS) is in the process of preparing further guidance in order to clarify how their previous PQQ guidance and standard Pre-Qualification Questionnaire will align with the ESPD. A further Procurement Policy Note and accompanying guidance from the CCS is expected to follow very shortly.

3.32 All members of any consortium will be required to provide the information required in all sections of the PQQ as part of a single composite response. The grounds for discretionary and mandatory exclusion, as set out within the Regulations, should always be applied to all members of the consortium (although this is not compulsory for sub-contractors).

3.33 Any questions selected should be relevant and proportionate to the complexity of the proposed contract (and in any event will be subject to the reporting requirements under paragraph 3.29 above).

3.34 Finally, in terms of scoring, the statutory guidance confirms “*The contracting authority must ensure that full details including scoring for each question, weightings and any “pass mark” or minimum threshold for selection are made known to the suppliers’ at the same time that the PQQ/selection questions are issued. In addition, if certain questions are sufficiently critical that an unsatisfactory answer may lead to exclusion, irrespective of the score on the rest of the PQQ, this should be made clear to suppliers*”. The CSS guidance does however not include a standardised scoring methodology therefore local authorities will be required to develop and disclose their own methodologies reflecting the priorities of their specific procurements.

3.35 The evaluation of the PQQ will often require input from authority personnel in a number of areas, including:

- Finance
- HR/personnel
- Environmental
- Health & safety
- Operational.

Practical Tip:

Again, this emphasises the importance of involving the different departments within the local authority at an early stage.

3.36 Local authority departments will need to be engaged early in the process and resources allocated at appropriate times to support this work.

3.37 It is advised that the scoring methodology and any weightings are published as part of the PQQ documentation (as well as the OJEU notice), ensuring full transparency of information.

Continued

03. Pre-Qualification Phase

Step 3: Bidders Open Day

3.38 In addition to the Information Memorandum, OJEU notice and PQQ, it is recommended that the local authority considers hosting a bidder open day, with the aim of providing further information on the project, background to the local authority and allowing bidders to visit the facilities/development site(s). The bidder open day can provide a valuable opportunity for the local authority to demonstrate that they are serious about the project and that bidders can confidently invest time and resource in their submissions.

3.39 Open days are governed by the general principles of equality, non-discrimination and equal treatment (see Regulation 40). Local authorities should therefore bear those principles in mind when holding their open days. They are an opportunity to provide the necessary background to the project or the services which a contracting authority wishes to procure. The same principles would apply to individual meetings offered as part of the open day i.e. if specific information is disclosed during that meeting then the same information should be disclosed to the remaining bidders, whether through their individual meetings or subsequently by email or post. The intention is to provide as much information as possible to all bidders so as to facilitate the production of informed bids whilst ensuring that no one bidder is put at an advantage or disadvantage. The key to this is a properly structured and regulated process with no opportunity for bidders to pursue individuals for information.

3.40 Practical arrangements will form part of the project manager's tasks, and consideration will need to be given to the following issues as a minimum:

- Has a timetable for the day been confirmed, taking into account travel times for interested parties?
- Has the venue been booked and arrangements confirmed in relation to catering, AV equipment, seating etc?
- Have presentations been prepared and background material printed?
- Have key speakers/project personnel confirmed availability?
- Have bidders been asked to confirm attendance and provide any special requirements?
- Have bidders been informed of any limitation on the number of attendees?
- If site visits are included, has transport been booked?
- Are arrangements in place to keep an appropriate audit trail?

3.41 The bidder open day is an important opportunity for the project team to maximise interest and ensure the best possible level of competition, so time should be invested in planning this accordingly.

03. Pre-Qualification Phase

Step 4: Evaluation of pre-qualification submissions & selection of bidders to be invited to tender

3.42 As noted above, it is advised that the selection criteria, scoring methodology and any weightings are published as part of the PQQ documentation (as well as the OJEU notice), ensuring full transparency of information.

3.43 According to EU Legislation, at least five parties should be shortlisted under a restricted procedure (assuming there are five suitable bidders), and at least three under a competitive dialogue or competitive procedure with negotiation route.

3.44 The OJEU notice can be used to state a maximum number of bidders to be shortlisted, thus allowing the local authority to limit the number of bidders in the next stage. However, if the local authority does not receive the minimum number of bids as stipulated then it can still proceed with lesser number of bidders.

Key risks to consider

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

Project management notes

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

Checklist before continuing

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

04. Tender Phases

Introduction

4.1 Following short-listing of those parties considered to have most closely met the selection criteria, the next stages of the process are considerably **more project specific and dependant on the selected procurement process**.

4.2 This chapter outlines the tender stages under the most likely procurement options, namely the restricted procedure, the open procedure, the competitive procedure with negotiation, the competitive dialogue procedure, the light touch regime for operational contracts and concessions and considers the following processes in the procurement:

Tender phase

- Step 1: Determine the risk profile
- Step 2: What documents should be issued and what should be requested of bidders
- Step 3: Ensure that documents are project specific
- Step 4: Confirm how bids will be evaluated

4.3 It is worth noting that under the competitive procedure with negotiation and the competitive dialogue process, there is no requirement to retain all of the stages mentioned below – indeed, in many circumstances serious consideration should be given to having no more than two stages, otherwise costs and time are increased for both the procuring authority and bidders. Continued recognition should be given of the bid costs incurred by the bidders, and where possible, early de-selection should be used to minimise bid costs for unsuccessful bidders and to avoid bidders loading costs on successful bids.

4.4 The majority of this section focuses on providing detailed guidance around the key documentation and evaluation requirements for the restricted, competitive with negotiation and competitive dialogue procedures. Guidance setting out how this should be appropriately applied to the open procedure, concessions and the light touch regime for operational contracts has also been included. Flow chart diagrams summarising the process for each of these procurement options have been included at Annex 1 to this toolkit.

04. Tender Phases

Table 4.1: stages to consider in the tender phase

Prior to issuing any tender documents, it is advisable for the local authority to consider the following steps:			
Procurement options			
	Restricted procedure	Competitive Dialogue	Competitive procedure with negotiation
Step 1: Determine the risk profile	<p>A common consideration that will underpin the tender documents in all cases will be the local authority's approach to risk and risk sharing. It is therefore vital to identify at this stage a clear risk matrix for the project and where those risks are intended to lie.</p> <p>Figure 4.1 provides an indicative risk matrix with a suggestion of the appropriate party to accept the risks noted. The template documents reflect this risk matrix.</p> <p>Figure 4.1 notes a number of risks that are recommended to stay with the local authority, rather than being transferred to the contractor – the approach taken has been to allocate risk according to the party best placed to manage it, thus maximising value for money, however some authorities may wish to take a different approach depending on their circumstances.</p> <p>Further background outlining why the risk matrix and template contracts have been published with this suggested risk allocation is provided within figure 4.1 and from paragraph 4.10 onwards.</p>		
Step 2: What documents should be issued (including key legal documents) and what should be requested of bidders	Invitation to Tender Stage	Invitation to Submit Outline Solutions (ISOS) Invitation to Submit Detailed Solutions (ISDS) Invitation to Submit Final Tender (ITSFT)	Invitation to Submit Initial Tender (ISIT) Invitation to Submit Detailed Solutions (ISDS) [Optional] Invitation to Submit Final Tender (ITSFT) [Optional]
Step 3: Ensure that documents are project specific	<p>Once the local authority has decided which legal documents will be issued at each procurement stage, the documents should be reviewed to ensure that that are project specific and meet the needs of the local authority on a project by project basis</p>		
Step 4: Confirm how bids will be evaluated	<p>Each of the procurement routes requires evaluation of bid submissions and selection of shortlisted parties to progress to the next stage or selection of a preferred bidder. A clear outline of how bids are to be evaluated should be made available to bidders during the tender process.</p>		

04. Tender Phases

Step 1: Determining the risk profile for the project

4.5 A common consideration that will underpin the tender documents in all cases will be the local authority's approach to risk and risk sharing. It is therefore vital to identify at this stage a clear risk matrix for the project and where those risks are intended to lie.

4.6 The indicative risk matrix below outlines:

- a) The risk profile in the template contracts (Appendix A and Appendix B); and
- b) Rationale for why this risk profile has been incorporated into the template documents, and why the market has adopted it.

4.7 The indicative risk matrix reflects market and industry accepted positions that have been discussed and challenged through consultation.

04. Tender Phases

Figure 4.1. Indicative risk matrix²

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
<p>Planning Risk (assuming the contract/project imposes construction obligations on the contractor)</p> <p>Outline</p> <p>Detailed</p>	✓		✓	<p>In order to maximise bidder interest, provide comfort over deliverability of the project and provide a framework within which submissions can be evaluated, it is recommended that the local authority seeks outline planning approval as a minimum. This process can be twin tracked with the initial stages of the procurement process (PQQ stage and ISOS stage) so that the timetable is not adversely affected.</p> <p><i>Clauses 13.3;18.3 (Consents and Planning Approval)</i> make the contractor responsible for obtaining and complying with any consents and approvals necessary for the works and/or services. However, there is an acknowledgement that there may be some consents/ approvals that only the authority can obtain/discharge, in which case, it is reasonable for the LOCAL authority to agree to an obligation to obtain/discharge such matters.</p> <p>At <i>Clause 18.3B of the DBOM Contract</i> drafting has been included to deal with the situation where there is a judicial review of a planning application for the works.</p>
<p>Design Risk (assuming the contract/project imposes construction obligations on the contractor)</p>			✓	<p><i>Clauses 10 (the Works) – 17 (CDM Regulations)</i> of the DBOM Contract contain industry standard provisions relating to construction obligations. They essentially set out that the contractor will be responsible for the design and construction of the works, and for making sure that the works are completed on time.</p>

²Within this matrix of the toolkit various clauses are discussed. These are given in italics. The initial clause reference is for the Leisure Operating Contract (LOC) and the second clause reference is for the DBOM Contract. If only one clause reference is given, this means that it is the same clause reference for both contracts, unless stated otherwise. The template DBOM and LOC contracts can be found at Appendix A and Appendix B of this toolkit.

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
				<p>If any contamination arises from an off-site source, then the contractor is responsible for dealing with it given it is the party in occupation of the site and so will have a right of action to claim its costs back from an adjoining landowner or could bring an action in the local authority's name (<i>Clause 18.2.5 (Site Matters) of the DBOM Contract</i>).</p> <p>In relation to the Leisure Operating Contract, as the contractor is not undertaking works obligations it is unlikely to be undertaking detailed investigation of the sites and it would be unreasonable to ask the contractor to take the risk of contamination at the sites (unless it is caused by the contractor). The risk therefore stays with the local authority (see <i>Clause 13.2 (Site Matters) of the Leisure Operating Contract</i>).</p> <p>However, the position remains as set out above in relation to contamination arising from an off-site source as the contractor is still the party in occupation of the site and so will have a right of action to claim its costs back from an adjoining landowner or could bring an action in the local authority's name (<i>Clause 13.2.5 (Site Matters) of the Leisure Operating Contract</i>).</p>
Commission and Construction Risks			✓	
				<p><i>Clause 19 (Monitoring and Inspection) of the DBOM Contract</i> allows the local authority various rights to monitor and inspect the works and <i>Clause 20 (Notification of Services Availability) of the DBOM Contract</i> deals with the suggested process of an Independent Certifier (appointed by both parties) signing off when the works (or parts of the works) are complete.</p> <p>If the works are delayed beyond the "Planned Services Availability Date" (i.e. the date that the contractor commits to completing the works by), then, in certain circumstances, the local authority may be entitled to claim liquidated damages from the contractor. Such liquidated damages should be a genuine pre-estimate of the local authority's loss in such circumstances, and could include items such as administrative costs and costs of providing alternative leisure facilities. Liquidated damages are dealt with at <i>Clause 21 (Delay and Supervening Unavailability) of the DBOM Contract</i>. The local authority will need to consider whether it would seek liquidated damages (and if so, at what level) in the event of a delay to the works.</p> <p>If any minor works are required under a Leisure Operating Contract (for instance, limited refurbishment works) then it is suggested that these are included as an additional schedule to the Leisure Operating Contract.</p>
Initial Services				<p>Both the DBOM Contract and Leisure Operating Contract allow for the local authority requiring "Initial Services" before full services commence (see <i>Clause 9 (Initial Services)</i>). This could be useful where, for instance, initial services are to be provided at a facility before it is refurbished, and then full services will be provided after the refurbishment works.</p> <p>The local authority will need to consider whether initial services are needed for the nature of its project and if so, what level of services will be necessary and what the consequences will be of the contractor not providing such services to the required standard. This may require additional drafting in the Services Specification and Payment and Performance Monitoring System to reflect the initial services requirements.</p>

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Title		✓		
	<p>Both the DBOM Contract and Leisure Operating Contract contain an authority title warranty in the format developed in schools projects (see <i>Clause 6.4 (Authority Title Warranty)</i> and <i>Schedule 13 (Title Matters)</i>).</p> <p>This means that the local authority (and/or its legal advisors) will need to carry out title investigations at an early state in the procurement process and disclose the results of this to bidders so that bidders can rely on them. Whilst this may create an additional expense for the local authority at an early stage of the procurement, it is considered the most cost effective approach overall as it means that bidders will all be given the same information which they will need to take account of in their tender proposals and will avoid the risk of bidders not undertaking adequate title due diligence and potentially proposing unworkable solutions. Furthermore, as the local authority knows the site(s), it represents a fair risk profile.</p> <p>The local authority will need to factor in the time/costs of undertaking title investigations/ providing a title warranty.</p> <p>In terms of when the local authority requires bidders to complete their title due diligence, there are three primary routes that can be taken, although option 2 is considered the most balanced for both parties:</p> <ol style="list-style-type: none"> 1) Bidders are required to complete full title due diligence at bid stage. Whilst this not only result in the disproportionate costs being incurred by bidders, it also requires all of the documents listed in the <i>Schedule 13 (Title Matters)</i> of the contract to be disclosed to bidders in the data room, as well as red line plans for the sites. This can result in significant time and costs for the local authority, and if any searches are disclosed at bid stage – they may then need to be updated prior to completion, thus incurring additional costs for the local authority. 2) Bidders are required to complete high level title due diligence. This represents a fair middle ground for both bidders and the local authority: The local authority would need to provide plans of the sites and copies of the office titles, which the bidders would be expected to review - but it would be recognised that full title due diligence can be completed at preferred bidder stage. 3) Bidders are not required to carry out any title due diligence. As noted above, this could lead to bidders proposing unworkable solutions. 			

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
<p>Property Structure</p>				<p>In both forms of contract, a lease is ultimately used (see <i>Clause 8 (Nature of Land Interests)</i>) (though a licence is granted to the contractor during the works period of the DBOM Contract). The granting of a lease means the contractor will be “in occupation” of the facilities which may allow them to claim NNDR Relief. Provisions have been included to allow contracting out of the security of tenure provisions of the Landlord and Tenant Act 1954.</p> <p>A suggested form of “bare bones” lease for use with the DBOM Contract and Leisure Operating Contract has been included at schedule 29;17. The lease does not contain any substantive provisions (for instance in relation to repairs/maintenance/insurance etc). These provisions are dealt with in the main contract and the lease refers back to the main contract on such issues so as to avoid conflict between the documents.</p> <p>Depending on the successful bidder’s structure, underleases and sub-underleases may also need to be used.</p> <p>Authorities should investigate title of their sites at an early stage to determine whether they are able to grant leases (for instance, if an authority holds a site on a leasehold interest, they may need consent to grant an underlease to a contractor or may not be able to grant a lease at all). If it is not possible for an authority to grant leases of the sites then a licence should be used.</p>
<p>Operation and Service Risks</p> <p>Regulation/by-laws/ licensing procedures/ applications and approvals, including procedure change</p>				<p><i>Clauses 14; 22 (Principal Obligations) to 20; 28 (Use of the Facilities and Surplus Share) and Clauses 24; 32 (Operating Manual) to 27; 35 (Service Delivery Proposals)</i> set out industry standard provisions relating to the provision of services by the contractor. Essentially the contractor is responsible for providing the services in order to meet the services specification and comply with other relevant standards (for instance good industry practice, guidance and legislation) (see <i>Clause 14; 22 (Principal Obligations)</i>).</p> <p>These clauses also set out the maintenance and lifecycle responsibilities of the contractor and the rights that the local authority has if the facilities are not being repaired/maintained as agreed. For further details on the lifecycle provisions, please see below.</p> <p><i>Clauses 18; 26 (Performance Monitoring)</i> makes the contractor responsible for monitoring the provision of the services and also gives the local authority monitoring rights as well.</p>

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
<p>Specific Change in Law</p> <p>General Changes in law involving capital expenditure during service period not reasonably foreseen at contract signature</p>	<p>✓</p> <p>✓</p>			<p>This follows the positions promoted by the Government in PF2.</p> <p>Standard risk sharing provisions have been included in relation to “Specific Changes in Law”. The local authority takes the risk in relation to ‘General Changes in Law’ which incur capital expenditure to follow the recommended risk sharing position under PF2.</p>
<p>Compliance with external grant conditions (if applicable)</p>		<p>✓</p>		<p>For example, any Sport England grants received. Whilst compliance with such grant conditions will usually be a contractor risk, there may be some conditions that only the local authority can comply with. Bidders will need to review the conditions to ensure that they can be complied with and whether or not there are any cost implications.</p>
<p>Latent Defects</p> <ul style="list-style-type: none"> • Existing facilities • New Build • Refurbishment 	<p>✓</p>		<p>✓</p> <p>✓</p>	<p>Those elements refurbished/constructed by the contractor only</p>
	<p>This is dealt with under <i>Clause 13.7; 18.7 (Defects and Asbestos)</i> of the contracts. If there are any existing facilities, because the contractor was not responsible for building them, then it is considered appropriate for the local authority to take the risk of any defects or asbestos present in such existing facilities.</p> <p>This position is, however, subject to a few caveats:</p> <ul style="list-style-type: none"> • The contractor is responsible for any defects it causes; • If there are any condition surveys/asbestos surveys available, the contractor may be expected to take the risk of (i.e. and to price for dealing with) any defects/asbestos shown in the surveys; • If there are any such surveys available and if the surveyor will provide a collateral warranty to the contractor, then the contractor can also be expected to take the risk of any defects/asbestos not shown in the surveys (but which should have been shown had the survey been properly carried out). This is on the basis that the contractor should be able to pursue the negligent surveyor for costs it incurs in relation to such defects/asbestos under the collateral warranty it receives. This final limb is unlikely to be appropriate in the Leisure Operating Contract situation where the contractor should take into account any surveys in planning its lifecycle and maintenance responsibilities, but would not necessarily be expected to pursue a negligent surveyor for any deficiencies in the surveys; and • In the DBOM Contract, the contractor is responsible for any defects in the new facilities it constructs. <p>The local authority will need to consider the range and nature of any existing facilities and whether it already has (or will obtain) condition and/or asbestos surveys in relation to them (and also whether warranties from such surveyors will be available for the successful bidder). Authorities will need to factor in the time and costs involved in obtaining any such surveys.</p>			

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Third Party Use and Income Refresh of facilities (lifecycle) <ul style="list-style-type: none"> • New Build • Existing Local and national disputes Utilities costs (for service provider)	 ✓	 ✓	 ✓	<p>A more detailed overview of the issues associated with lifecycle costs is noted later in this chapter.</p> <p>Typically a Relief Event.</p> <p>A utilities benchmarking mechanism is included in the template contracts (schedule 18 in Appendix A and Appendix B) to provide a framework within which a contractor can price for utilities. The standard position is that the contractor takes responsibility for consumption risk, with the local authority taking risk associated with fluctuations in tariff. This is intended to avoid 'risk pricing' making schemes unaffordable. When setting the time periods for utility benchmarking, recognition needs to be given to the purchasing timelines of the contractor in relation to utilities.</p> <p>*A net income benchmarking mechanism is provided as Schedule [18] within the template DBOM/LOC Contracts, identifying a sharing of risk/reward in relation to significant under/over financial performance. However, the net income benchmarking process is unlikely to be relevant in all circumstances and will rarely be required for operating contracts up to 10 years in duration.</p> <p>The template Net Income Benchmarking schedule included within the DBOM Contract also includes a Special Benchmarking Process and a Competing Facility Benchmarking Process. The benchmarking processes as set out in the schedule may not be relevant in certain scenarios and therefore the local authority should carefully consider which benchmarking process(es) to include on a project specific basis.</p> <p>The Special Benchmarking Process and all associated definitions should only be included where a specific key user such as a club or National Governing Body has a rental agreement in place for dedicated use of certain zones within the facility (or a high percentage of utilisation) and it is felt that the income associated with that club and/or National Governing Body represents a significant part of the total income for the facility that would be difficult to replace. The Competing Facility Benchmarking Process and all associated definitions should be included to cover the circumstances where the local authority may decide to sponsor some competing facilities within an agreed radius of the facilities being outsourced so that in making any decision to sponsor, the local authority considers the impact that decision might have on revenue of the facilities and the financial model. When both parties are aware of a potential future risk they will need to take into account such a risk and avoid any unnecessary risk pricing adjustments. This will need to be discussed as the drafting states that a potential future facility which is known about or ought to have been known about is not to be treated as a Competing Facility. The parties will need to address this and consider how the risk should be addressed.</p>

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Climate Change Levy			✓	
	The local authority will need to consider the latest position on the Carbon Reduction Commitment scheme and determine, in conjunction with its advisors, which party is best placed to take the risk of the scheme. The base position assumes that the contractor is responsible for these aspects (see <i>Clauses 10.3.2 (DBOM) 29.3 (Leisure Operating Contract)</i>).			
Change in rate of VAT on the management fee borne by the local authority	✓			
Change in rate of VAT on costs borne by the contractor			✓	
Change in scope of VAT*		✓		
Change in eligibility for business rate relief*		✓		Typically the contractor will take the risk of its structure gaining a particular relief (and it properly applying for such relief), but the local authority will take the risk of the amount of relief changing due to changes in law/its discretionary rate relief policy.
	A suggested position on NNDR has been drafted in the DBOM Contract and Leisure Operating Contract as follows: <ul style="list-style-type: none"> • Authority to take the risk of a change in law relating to NNDR (assuming the bidder's position does not change) which removes these benefits • Authority to take the risk associated with a change in NNDR policy (for instance in relation to change of policy over use of discretionary rate relief) (assuming the bidder's position does not change) • Contractor to take the risk of "NNDR Failure" – e.g. where they fail to apply correctly for the relief • Contractor to take the risk of the relevant authority deciding that their structure is not appropriate for the reliefs they said they could achieve in their bid unless authority has confirmed that relief is available previously. 			
Insurance Premium Increases <ul style="list-style-type: none"> • Buildings • Other 	✓		✓	In many cases, it is better value for money for the local authority to insure the buildings rather than the contractor. This can be tested during procurement. This proposed risk sharing relates to a project where the local authority maintains buildings insurance. In a DBOM Contract if a project insurance structure is adopted then the physical damages policy in relation to the buildings and the BII cover would be subject to the standard insurance benchmarking arrangements, in which case it would be a shared risk.

*Where trust type structure is included in SPV

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Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
				<p>The provisions in the DBOM Contract at <i>Clause 61 (Insurance) and Schedule 14 (Insurances)</i> are drafted on the basis of the contractor maintaining all the necessary insurances for the project. Authorities will need to take insurance advice on the most appropriate insurance structure for their project.</p> <p>The provisions in the Leisure Operating Contract at <i>Clause 52 (Contractor Insurances) and 53 (Authority Insurances)</i> are drafted on the basis that the local authority retains the physical damages (buildings) insurance as experience indicates that this may be the more likely approach in leisure operating contracts.</p> <p>If the local authority decides to retain the buildings insurance, then consequential amendments may need to be considered in light of the insurances that the contractor will then retain. For instance, bidders will need to take insurance advice as to whether their insurances (in particular Business Interruption cover, in the absence of the contractor taking out the physical damages buildings insurance) will cover any Performance Adjustments or loss of revenue. Also, <i>Clause 51;60 (Indemnities, Guarantees and Contractual Claims)</i> would need to be reviewed by the bidders' insurance advisors to confirm that the wording of the indemnities will still be covered by the bidders' public liability cover.</p> <p><i>Clauses 62 (Reinstatement and Change of Requirement after Insured Event) and 63 (Risks that become Uninsurable)</i> of the DBOM Contract contain standard provisions regarding the reinstatement of facilities after insured damage, and the impact of insurance becoming unavailable. The equivalent provisions in the Leisure Operating Contract (<i>Clauses 54 and 55</i>) have been amended to reflect the presumption that the local authority is retaining the buildings insurance, giving the local authority more control over the reinstatement process</p>
Asset Value Risk <ul style="list-style-type: none"> Residual value of equipment Residual value of Facilities 	✓		✓	
Equipment and Obsolescence Risks Upgrades required by the local authority	✓			
Payment				<p>The payment provisions are set out at <i>Clauses 36 (Payment during the Works Period) (DBOM Contract only) and 28; 37 (Payment/Payment During the Services Period)</i>.</p> <p>The contracts are drafted on the assumptions that schemes may be surplus (resulting in the contractor paying a management fee to the local authority) or a deficit scheme (whereby the local authority pays the contractor an agreed management fee).</p> <p>It is anticipated that payments for the works under the DBOM Contract will be made on monthly valuation of work. The Authority may wish to pay for Works against the achievement of 'Milestones' (such Milestones having been certified by an Independent Certifier). Payment for the services will be made monthly in arrears.</p> <p><i>Clause 1.4 (Indexation)</i> and associated definitions suggest the use of CPI as the suggested index, in line with government requirements. Authorities will need to consider whether they would prefer to use RPI as the index for the project instead. Authorities should consider this point with their internal/external financial advisors.</p>

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Financing Risks				
Achieving income and profit levels identified in bid submission			✓	
Benefit of super – profit level		✓		A surplus share mechanism should be included to allow sharing of any additional surpluses between the local authority and the contractor. Assuming private sector funding. This will be different if funding is being provided by the local authority.
Inflation (capital cost outturn to tender)			✓	
Interest rate variability			✓	
Availability of capital allowances/tax exemptions			✓	
	<p><i>Clause 20.5; 28.5 and Schedule 19 (Surplus Share) allow for the potential sharing of any surpluses (between the local authority and the contractor) generated in the project. The local authority should consider whether it wishes to invite bidders to put forward proposals for sharing of surpluses and a template Surplus Share mechanism is set out in the relevant Schedule to the template DBOM and LOC Contracts (please see Appendix A and Appendix B).</i></p> <p><i>There is provision at Clauses 61; 69 (Financial Adjustments) to allow for the updating of the financial model for the project in certain circumstances. The drafting reflects the industry standard position in this area, but it is suggested that the local authority’s advisors review this clause to confirm that it is appropriate for the project in question.</i></p> <p><i>Clauses 72; 80 (Interest on Late Payment) provide for interest to be payable on sums due from one party to the other but which are paid late.</i></p> <p><i>Schedule 23 (Loss of Revenue) will list pre-agreed levels of revenue that the contractor can claim in certain scenarios. If the contractor does then make a claim for loss of revenue, the amount it can claim will be assessed by reference to the levels set out in this schedule, and will take into account any revenue actually received during the period in question. The intention behind this schedule is to give greater certainty to the parties over the levels of revenue that can be claimed and in effect it operates like a liquidated damage for both parties: it caps the local authority’s liability where the contractor is performing very well, but also gives the contractor a pre-agreed level of income even where the contractor is not actually achieving that. Bidders should be asked to complete this schedule as part of the procurement process so that the local authority and its advisors can assess and verify each bidder’s proposals.</i></p>			

Practical Tip:

Two versions of the Loss of Revenue schedule are set out in the DBOM Contract and LOC, with the version in Part B representing a simplified approach that can be adopted in certain circumstances. Please refer to the schedule and drafting notes for full details.

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Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Pensions <ul style="list-style-type: none"> • LGPS Deficit at Transfer Date • LGPS Deficit on Exit • Future increase in Contribution Rates • Future decrease in Contribution Rates 	<p>✓</p> <p>✓</p>	<p>✓</p> <p>✓</p>		<p>The contractor is likely to be responsible for contribution rates either at a set level or within a pre-agreed band.</p>
<p>Please see below for further background and rationale behind the risk allocation and contractual position outlined in the template documents.</p>				
Employment <ul style="list-style-type: none"> • Protection for redundancy costs at termination/expiry of contract when TUPE does not apply 	<p>✓</p>			<p>Assuming the expiry or termination of the contract is not as a result of Contractor Default, should TUPE not apply at the end of the contract (for example, should the local authority make the decision to close one/more facilities at the end of the contract), redundancy costs will be covered by the local authority. This drafting has been inserted as such an event is outside the contractor's control, and pricing for such a risk at tender stage would mean that the tender price submitted would not represent best value for the local authority. Furthermore, such redundancy protection is seen as market standard across the leisure sector. The contractor remains under a duty to use all reasonable endeavours to redeploy any persons.</p>
<p>The drafting in <i>Clauses 21;29 (TUPE and Employees) – 23;31 (Employees – General)</i> is based on the Local Partnerships drafting in these areas, as updated to allow for legislative changes and to include market standard pensions risk sharing provisions. Please see below for further background and rationale behind the risk allocation and contractual position outlined in the template documents.</p>				

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Termination scenarios				<p><i>Clauses 30; 39 – 44; 53</i> contain provisions dealing with when the contracts can be terminated and the consequences of such early termination.</p> <p>The usual termination scenarios have been included: authority voluntary termination, authority default termination, contractor default termination, termination on corrupt gifts and fraud, force majeure termination.</p> <p>In order for the parties to have certainty over what compensation will be payable in each termination scenario, what is recoverable in each instance has been detailed, and, if retendering is appropriate, a suggested retendering process has been included.</p> <p>Again, in order to give the parties certainty, the concept of the “Profit Payment” has been included which will be used to compensate the contractor (and sub-contractors if necessary) for a pre-agreed level of profit should the contract be terminated due to authority voluntary or authority default termination. Bidders should be asked to put forward their proposals over the level of profit they would seek to recover as part of their tender submission so that it can be assessed and evaluated.</p> <p>There is also allowance for possible recovery by the contractor of capital sums invested in the facilities to the extent they have not been paid for or recouped during the contract up to the point of termination. Authorities will need to assess on a case by case basis whether this limb of compensation is appropriate for their project.</p>
Supervening Events				<p>Various industry standard provisions are included dealing with events which might occur during the period of the contract which might impact on the provision of the works and/or services. These are set out in <i>Clauses 11; 16.5 (Compensation Events), 33; 42 (Termination on Force Majeure) and 46; 55 (Relief Events)</i>.</p> <p>Typically where the Authority is paying the management fee to the Contractor Performance Adjustments would continue to be levied during a Relief Event and a Force Majeure Event on the basis that the local authority would not be receiving a service that it was paying for.</p> <p>However, where the project is either zero subsidy or a surplus scheme, Performance Adjustments may not necessarily be appropriate. This is because the local authority would still be receiving the surplus annual payment/not having to pay a management fee and the contractor would suffer a loss of revenue.</p>

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Protections and security				<p>At <i>Clause 4 (Collateral Warranties [and Surveys] [and Guarantees])</i>, provision is included for the local authority to be provided with a collateral warranty from each of the parties within the contractor's consortium. The clause may need to be amended to reflect the successful contractor's structure, but it is recommended that collateral warranties are obtained from each relevant party.</p> <p>Drafting has also been included to require the contractor to provide a parent company guarantee (and a guarantee from its building contractor's parent company, in the case of the DBOM Contract) or a bond if appropriate. Again it is recommended that the local authority asks for such protections from bidders at the outset of the procurement so that they can be fully priced for as part of the bid process (if bidders are concerned that, for instance, the provision of a parent company guarantee (PCG) from their building contractor may increase the price of the works). Bidders can also be asked to price for such protections separately so that authorities can make a value for money assessment as to whether they would like such protections).</p> <p>There are scenarios where a PCG may be inappropriate or unavailable (for instance, because the bidder does not have a parent company), and therefore consideration should also be given to asking for a performance bond as an alternative.</p> <p><i>Clause 49; 58 (Authority Step-In)</i> allows the local authority to step-in to the contract (both the DBOM Contract and Leisure Operating Contract) and provide the Services itself if there is a serious health and safety risk, to discharge a statutory duty or because an emergency has arisen.</p> <p>At <i>Clause 51;60 (Indemnities, Guarantees and Contractual Claims)</i>, the contractor indemnifies the local authority against the standard areas of death or personal injury, damage to property and third party claims arising from the contractor's design, construction (DBOM Contract only), operation and maintenance (DBOM Contract and Leisure Operating Contract) of the facilities. A cap on liability for breach of statutory duty claims made against the local authority has been included to reflect the positions used in other sectors. Bidders could be asked to bid back their proposals for such a cap as part of the procurement process.</p> <p>At <i>Clause 59; 67 (Assignment and Sub-Contracting)</i>, there are restrictions on the contractor's ability to assign or sub-contract the contracts without the local authority's prior consent and only provided certain obligations are fulfilled. This gives the local authority comfort that it can be confident about the identity of the party it will be contracting with through the life of the contract. Clause 60; 68 (Change in Ownership) adds a further level of comfort so that changes in the ownership of the contractor can only be made to suitable third parties.</p> <p>At <i>Clauses 68;76 (Public Relations and Publicity)</i> and <i>69;77 (Advertisements)</i>, there are restrictions placed on the contractor about when they can communicate with the media, take photographs of the facilities and/or put up advertisements at the facilities. Generally the local authority will need to give consent for any such matters. The local authority may agree with the contractor to set out protocols for use in such circumstances allowing limited use of media communications etc without needing to repeatedly ask for consent.</p>

04. Tender Phases

Risk Category	Proposed Risk Allocation			Notes & a brief explanation of how the template contracts at Appendix A and Appendix B deal with the suggested risk allocation
	Authority	Shared	Contractor	
Data and Information	<p>Various standard provisions relating to the protection and use of information are contained within <i>Clauses 50; 59 (Freedom of Information and Confidentiality), 58; 66(Intellectual Property), 62; 70 (Audit Access), 70; 78 (Contractor's Records) and 71; 79 (Data Protection)</i>. There is provision at <i>Schedule 21 (Confidential Information)</i> for a list of commercially sensitive contractual provisions and material to be agreed and included. Authorities are suggested to ask bidders to put forward their proposals over the content of such schedule as part of the bidding process so that authorities and their advisors can assess the likely range of information that the bidders are looking to protect.</p> <p>Protection has also been included for the "Contractor IPR" in order to protect the business know-how and methodologies of bidders from use by competitors.</p>			
Disputes	<p><i>Clauses 56;64 (Dispute Resolution)</i> contain standard dispute resolution procedures allowing for consultation between the parties, then adjudication and finally recourse to the courts in order to resolve a dispute.</p>			
Liaison	<p><i>Clauses 45;54 (DBOM) (Liaison) and Schedule 10 (Liaison Procedure)</i> set out a standard liaison process to ensure regular liaison between the parties during the project.</p>			
Length of contract	<p>The draft contracts at <i>Clause 3 (Commencement and Duration)</i> contain provisions to include a fixed length of contract, along with a possible extension.</p> <ul style="list-style-type: none"> • DBOM Contract - Typically will last 15 years or longer • Leisure Operating Contract - Typically up to 10 years in length (plus a possible 5 year extension). <p>Authorities will need to consider their preferred length of contract (whilst also considering what term might be attractive to bidders) and also whether they would like the opportunity for a contract extension (and if so, for how long).</p>			
Partnering Agreement	<p>The aim of the documentation is to create a contract that encourages partnership working and a cooperative approach to improving service and customer focus. The Appendix within schedule 10 of the template DBOM and LOC contracts (at Appendix A and Appendix B) reflects this principle, and enshrining within the legal documents that the contractor and authority are working together to create a partnership to benefit the users of the facility. This can be amended by the local authority to reflect any specific local objectives or desired outcomes.</p>			
Boiler Plate Provisions	<p>Various standard terms and conditions have been included in relation to "Ordering of Goods and Services", "No Agency", "Entire Agreement", "Notices", "Severability", "Waiver", "Governing Law and Jurisdiction", "Sole Remedy", "No Double Recovery", "Counterparts" and "Capacity". It is not anticipated that these clauses would need to be amended.</p>			

04. Tender Phases

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

4.9 In relation to employment, pension and lifecycle risk allocations, please see the further notes below.

Employment and Pensions provisions

4.10 The drafting in *Clauses 21;29 (TUPE and Employees) – 23;31 (Employees – General)* is based on the Local Partnerships drafting in these areas, as updated to allow for legislative changes and to include market standard pensions risk sharing provisions.

4.11 The drafting in these clauses may need to be amended to deal with the factual circumstances of the transferring staff (if any) and authorities should consider the provisions with their advisors and HR teams in order to make sure that they are appropriate for the relevant workforce.

4.12 In order for bidders to be able to price accurately and for the local authority's advisors to be able to update these clauses as necessary, the local authority should establish at an early stage the nature and details of any transferring staff – for instance, how many are likely to transfer, where are they transferring from (authority or third party contractor), are they active members of or entitled to membership of the LGPS (i.e. eligible to join, but not actually active members)?

4.13 The pensions clauses give the contractor the option in relation to staff that are entitled to Local Government Pension Scheme ('LGPS') membership to either become an admitted body and allow the staff to join the LGPS or to provide a 'broadly comparable scheme'. A broadly comparable scheme should only be used in circumstances where its use will be acceptable in accordance with the new Fair Deal.

4.14 A key consideration in relation to pension arrangements is the allocation of funding risk when transferring employees are entitled to benefits in the LGPS. *Clauses 22;30 (Pensions)* and in particular *Clauses 22.2;30.2* represent a starting point and standard drafting to address the risk allocation between the local authority and the contractor/sub-contractor if the latter is to provide LGPS benefits for employees by becoming an "Admitted Body" in the LGPS.

4.15 Under statute, the basic position is that the contractor is solely liable to meet all funding costs in relation to providing LGPS benefits to any employees where this is required. However, given the cost of providing such benefits, the standard market position is that contractors will attempt to limit their exposure to such costs via a number of mechanisms.

4.16 In light of this commercial position, *Clauses 22.2; 30.2* reflect the general position that most authorities tend to reach with contractors on pensions risk allocation. Each mechanism is explained below, along with comments about the options available.

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Clauses 22.2.2; 30.2.2 – The Notional Fund

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

Clauses 22.2.3; 30.2.3 – Cap on Initial Contribution Rate

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

Clauses 22.2.4; 30.2.4 – Collar on Initial Contribution Rate

4.19 An authority could also impose a “collar” mechanism, whereby if the contribution rate reduces below a specified level (e.g. the Initial Contribution Rate), then the contractor must pay the difference (defined in *Clauses 22.2.4; 30.2.4* as the “Shortfall Amount”) to the local authority.

4.20 This will ensure that the contractor will not benefit from any reduction in contribution rates and will balance out the risk allocation as the local authority has to meet any “Excess Amount” required over and above the Initial Contribution Rate.

Clauses 22.2.5; 30.2.5 – Deficit on termination

4.21 It is likely that contractors will want to transfer liability for any funding deficit payment which might arise on termination of the Admission Agreement to the local authority. This will mean that if there is a funding deficit in relation to the benefits of the relevant employees when the Admission Agreement terminates, the contractor or sub-contractor will be liable to pay the amount (defined in *Clauses 22.2.5;30.2.5* as the “Exit Contribution”) but will be reimbursed by the local authority.

4.22 The effect of the “contribution cap” and “deficit reallocation” mechanisms is essentially to remove all unspecified funding risk for the contractor and reallocate it to the local authority. An authority will need to decide whether it is willing to accept this reallocation of liability in principle.

4.23 The current market position is that many authorities do accept this sort of risk reallocation subject to certain measures which are discussed below. Contractors usually use the argument that they should not be required to accept liability for fluctuating contributions or the risk of the contributions being insufficient to ensure that the assets in the Notional Fund meet the accrued pension liabilities at the end of the contract as they are not in control of investment or funding policy in the LGPS.

4.24 However, a counter argument that authorities may use is that contractors should be building contingencies for these costs into their financial models rather than seeking to reallocate the risk (though such contingencies would then be likely to be reflected in an increased management fee).

4.25 If the local authority is prepared to accept the risks as outlined above in principle, then it may take measures to ensure that the risk reallocation is more reasonable, as reflected in *Clauses 22.2.4;30.2.4* i.e. the “collar” on the Initial Contribution Rate and *Clauses 22.2.6;30.2.6* – Costs within the contractor’s control.

04. Tender Phases

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

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

Clauses 22.7; 30.7 – Contractor Scheme

4.27 In exceptional circumstances the contractor may provide a broadly comparable scheme to the LGPS, rather than be admitted to the LGPS.

4.28 Any contractor who provides a broadly comparable scheme instead of becoming an admitted body must ensure that broadly comparable scheme satisfies the requirements at clauses 22.7.1;30.7.2 and must undertake to carry out the obligations at clauses 22.7.2;30.7.2 which ensures that the scheme provides broadly comparable benefits as certified by the Government Actuary's Department.

4.29 Schedule 22 sets out the bulk transfer terms which apply where there is a bulk transfer from the LGPS to the contractor's broadly comparable scheme (and on any subsequent bulk transfers on termination or expiry). This Schedule has been drafted to reflect the current Fair Deal guidance by way of good practice and also takes into account historic HM Treasury guidance where this provides additional assistance.

4.30 It may be the case that where a contractor becomes an admitted body in the LGPS the provisions of clauses 22.6; 30.6, 22.7; 30.7, 22.8; 30.8 and Schedule 22 can be deleted.

Clauses 22.9; 30.9 – Discretionary Benefits

4.31 This clause is to ensure that the contractor is required to provide the same discretionary benefits to its employees as they would have received if they had still been employed by the local authority. If the contractor does not provide these same benefits, it must compensate the employee in a broadly comparable manner.

Clauses 22.13; 30.13 – Transfer to another Employer

4.32 This obliges the contractor to procure that where employees are TUPE transferred to a new employer, that new employer will comply with the contractual terms set out in clauses 22; 30.

Clauses 22.16; 30.16 – Compliance with section 257 and 258 Pensions Act 2004

4.33 These provisions of the Pensions Act 2004 impose obligations on the contractor after a TUPE transfer where there was an occupational pension scheme in place prior to the transfer and the transferring employee was an active member of the scheme, was eligible to be an active member, or would have been eligible if he had been employed for longer and is not an 'Eligible Employee'.

4.34 These obligations require the contractor to provide either a money purchase, defined benefit or hybrid occupational pension scheme, or a stakeholder scheme and make contributions which at least match those made by the employee, up to a maximum of 6% of the employee's remuneration, unless agreed otherwise with the employee.

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Lifecycle

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

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

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

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

4.39 The local authority has the right to see detailed records relating to lifecycle replacement.

4.40 The risk of lifecycle replacement (of all items) is therefore passed to the contractor. This means that the contractor is responsible for funding all lifecycle replacements as and when due (even if they have not budgeted to do so). Equally, if lifecycle spend comes in under budget, the contractor can keep the lifecycle “surplus”.

4.41 This approach brings benefits to contractors as they have flexibility to manage their own lifecycle funds and is less of an administrative burden for the local authority than alternative options (see Appendix C with alternative drafting options), but the down-side is that if the contractor became insolvent the lifecycle fund would remain with its assets (which is less likely to be the case with a joint lifecycle/separate lifecycle account (see below)).

4.42 However, there are many different lifecycle approaches that an authority may wish to take, depending on the nature of the facilities and their condition. Appendix C to the toolkit discusses the different options.

4.43 In the Leisure Operating Contract the lifecycle provisions are included at *Clause 15 (Condition of the [Facility/Facilities])*.

4.44 For this contract, consultation feedback has indicated that the most likely scenario is that it is unlikely to be appropriate and/or value for money for full latent defect risk to be passed to the successful bidder given the bidder would not have been responsible for building the facilities.

4.45 The suggested approach is therefore for the contractor to have responsibility for profiling when lifecycle items should be replaced, but then to alert the local authority to items which the local authority was responsible for as and when they were due (whether according to the lifecycle schedule or applying good industry practice). It is then for the local authority to determine whether to confirm that the contractor should proceed and replace such item (at the local authority's cost – such cost to be the cost set out in the lifecycle schedule if the item was planned for replacement at that time, or the cost assessed using the ‘Change Protocol’ (see below) if the item's renewal has been determined by the contractor applying good industry practice).

4.46 If the local authority does not want the item to be replaced, the local authority would instruct an ‘Authority Change’ to deal with it.

4.47 All maintenance responsibility is still with the contractor. The contractor has to provide the local authority with evidence that it has maintained an item that the local authority is responsible for funding the replacement of before the local authority is obliged to fund its replacement.

4.48 In both contracts there is no sharing of lifecycle surpluses, however, in light of the government's PF2 guidance, authorities may wish to include provisions allowing for such sharing. Suggested drafting to provide for this is included in Appendix C to this toolkit. On surplus schemes the view is it is for the Contractor to manage and any costs savings would be taken into account when calculating the surplus under the surplus sharing schedule.

04. Tender Phases

Step 2: What documents should be issued and what should be requested of bidders?

4.49 The next part of this chapter provides a more specific overview of the tender documents associated with the restricted, competitive with negotiation and competitive dialogue procurement routes, and a summary of the template documents available for use. Guidance setting out how this should be appropriately applied to the open procedure, concessions and the light touch regime for operational contracts has also been included.

Documents to be issued		
Restricted procedure	Competitive Dialogue	Competitive Procedure with Negotiation
Invitation to Tender	Invitation to Submit Outline Solutions (ISOS)	Invitation to Submit Initial Tenders (ISIT)
	Invitation to Submit Detailed Solutions (ISDS)	Invitation to Submit Detailed Solutions (ISDS) (optional)
	Invitation to Submit Final Tenders (ISFT)	Invitation to Submit Final Tenders (ISFT) (optional)

4.50 Along with the above documents, key legal and contractual documents will also need to be issued to bidders. Further information on what template documents are included in this toolkit is provided below.

Template documents included in this toolkit:

Appendix A – Template document: DBOM Contract (DBOM)

Appendix B – Template document: Leisure Operating Contract (LOC)

Appendix C – Drafting riders relating to the handover and operation of a new build or refurbished facility, alternative lifecycle and equipment drafting and a template Co-operation and Warranty Agreement between a Building Contractor and Leisure Operator

Appendix D – Template document: DBOM Facilities Requirements, Technical Specification and Zone Data Sheet

Appendix E – Template document: DBOM Services Specification

Appendix F – Template document: LOC Services Specification

Appendix G – Template document: DBOM and LOC appendices to the Benchmarking Schedule

Appendix H – Template document: Legal and contractual issues list

04. Tender Phases

Which contract to use?

4.51 As noted earlier in this chapter, the leisure management contract is clearly a critical document in the process and therefore two templates are provided as part of this toolkit:

- Appendix A - template management agreement for a Leisure Operating Contract
- Appendix B - template agreement for a DBOM Contract (design, build, operate and maintain).

4.52 The table below provides some guidance to consider when identifying which contract should be used on each project:

Type of contract:	Use:
Leisure Operating Contract (Appendix B)	The operating contract is intended for use by authorities who have existing facilities which they would like to be operated and maintained (including minor refurbishment works).
DBOM Contract (Appendix A)	This is designed for situations where: a) an authority wants to fund the building of new facilities which will then be operated and maintained by a leisure operator, and/or b) situations where there will be significant refurbishment works to existing facilities , which will then be operated and maintained by a leisure operator.
Leisure Operating Contract plus drafting rider (Appendix B plus rider from Appendix C)	A separate rider has been drafted and included in Appendix C for situations where either: a) there are existing facilities which the local authority would like to be operated and maintained, but the local authority has separately procured the building of a new facility which they would like to be included in the operating contract once it has been built; or b) a new facility is being built, and the local authority wishes this to be operated and maintained once it has been completed.

4.53 Separate key template schedules to the contracts are included in this toolkit including the **Services Specification**. There is a different form of each schedule depending on whether it is for use with the DBOM Contract or Leisure Operating Contract, and template Service Specifications can be found at Appendix E and Appendix F.

4.54 There is also an additional schedule for the DBOM Contract containing the **Facilities Requirements** and **Technical Specification** for the building works being undertaken. This can be found at Appendix D of this toolkit.

4.55 It is always worth checking that the contract and schedules appropriately dove-tail (in terms of defined terms and legal concepts, for instance) and that they do not conflict in any areas, given that they are often developed by different personnel within the project team.

Practical Tip:

A check should be done at tender stage (i.e. before documents are issued to bidders) to ensure that there is legal consistency between all documents. Failure to do this could result in inconsistencies between assumptions made by bidders. A further check should also be done before signature of the final form contract to ensure that all legal documents are consistent.

04. Tender Phases

Practical Tip:

It is vital that the main contract is consistent with the form of lease to be granted. For example, if the contract adopts the risk profile set out in the matrix at Figure 4.1, any lease issued during the procurement phase should not conflict with this. For example, a full repairing lease would not be consistent with the suggested risk matrix. The example headlease included in the contracts has been drafted to ensure that it works with the terms of the template contracts.

4.56 Both contracts are drafted on the basis of a main contractor who will then sub-contract relevant obligations (for instance works obligations to a building contractor or FM obligations to a FM contractor). The preferred bidder may use a different structure to this and so the relevant contract will need to be updated to reflect the structure of the preferred bidder, if necessary.

4.57 The contracts themselves are relatively detailed but reflect market and industry accepted positions that have been discussed and challenged through consultation. Therefore there should not be a need to consider and discuss all the provisions in detail during a procurement process (indeed, depending on the procurement process such discussion may not be permissible in any event). It is suggested that authorities and bidders instead focus on key project and bidder specific issues for discussion, for instance in a similar manner to that set out in the suggested legal and contractual issues list, and as noted below at Step 3.

Facilities Requirements and Technical Specification

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

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

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

Other Appendices and template schedules included in the toolkit:

- Facilities Requirements and Technical Specification (Appendix D)
- Services Specification & KPIs (Appendix E and Appendix F)
- Payment and Performance Monitoring System (PMS) (within Appendix A and Appendix B)
- Surplus Share mechanism (see comments within Figure 4.1 and template schedule are included within Appendix A and Appendix B)
- Benchmarking Schedule (see comments within Figure 4.1 and template schedule are included within Appendix A and Appendix B)
- Template Lease (see comments within Figure 4.1 and template schedule are included within Appendix A and Appendix B)

04. Tender Phases

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

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

Services Specification & KPIs

4.61 As part of this toolkit, example Services Specifications are provided at Appendix E and Appendix F which can be used as a base for developing project-specific documentation. There are other formats available in the market and Sport England does not wish to be prescriptive in relation to format. However, a comprehensive services specification will contain the following key aspects as a minimum:

- **Authority outcomes and objectives required, and specific targets against which performance of the contractor can be measured (this will ideally be linked to the local authority's required outcomes developed as part of the strategic pre-procurement work)**
- **Service delivery requirements – for example, relating to sports development, health & wellbeing plans, customer care, reporting, pricing, programming & opening hours**
- **Facility management requirements – for example, cleaning, maintenance, lighting, heating, staffing & equipment.**

4.62 A key element of the Services Specification is to clearly set out the local authority's Outcomes for the contract, using the guidance earlier in this chapter around developing local outcomes and outcome focused contracts. Research has shown the positive impact that sport can have on a broad range of social issues such as health, education, community safety and equality. The leisure sector now needs to measure and communicate those effects and to measure the impact of the leisure service against key aims and priorities to demonstrate its contribution to the local authority's broader agenda.

4.63 The local authority and contractor should work together to develop an Outcomes Scorecard. The balanced scorecard shall set out a series of key performance target indicators linked to the local authority's Outcomes and shall identify primary performance measures, score banding based on a RAG rating system, scores, supporting commentary and action plan points. Examples are provided as part of this toolkit within the appendices to the Services Specification (found within Appendix E and Appendix F). Whilst these cover a wide range of potential outcome areas that will need to be reduced to focus on the unique circumstances of the local authority and discussions with partners and commissioners that have taken place as part of developing the local authority's Outcomes and the relevant targets and score banding included, the format and approach may be useful as a template in terms of developing a scorecard that reflect an authority's own contract requirements.

4.64 Further research is on-going in relation to measuring social outcomes and social return on investment and health outcomes. The template documents will be updated on a regular basis to take into account emerging measures in these areas, but in the meantime authorities are encouraged to work with their local health provider, for example, to develop local targets where possible.

4.65 Of critical importance is that the Services Specification contains specific and measurable targets for all elements, which will facilitate effective monitoring and allow financial adjustments to be made for poor performance or bonuses to be achieved for over-performance. The targets should be reasonable and achievable, for example in relation to building performance the temperatures or lighting lux levels set out in the Services Specification should be achievable in the facilities and prior testing will facilitate accuracy of the documentation.

4.66 It is recommended that a set of Key Performance Indicators are agreed which can be reported on regularly by the contractor in relation to service and facility performance, utilisation and financial performance and provide the local authority with a clear indication of progress against targets. Examples are provided as part of this toolkit within the appendices to the Services Specification (and can be found within Appendix E and Appendix F). Whilst these will need to be tailored to the unique circumstances of the contract the format and approach may be useful in terms of developing KPIs that reflect an authority's own contract requirements.

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4.67 Where dual use facilities are covered by the contract, early consideration will need to be given to the split of responsibilities on the particular site, which should then be detailed in the Services Specification. Examples of key areas to be considered include utilities costs/provision, maintenance, cleaning, programming and opening hours.

Practical Tip:

The template Services Specification and Performance Monitoring Systems included in this toolkit recognise the benefit that Sport England's Quest and National Benchmarking Service can afford local authorities in providing valuable tools for independent assessment of the standards of performance and quality of the Service, particularly at a time when local authorities are becoming increasingly strapped for performance monitoring resources.

Payment and Performance Monitoring System (PMS)

- **A clear process for changes in the base price – for example, inflationary increases (utility benchmarking is dealt with separately via a specific schedule)**
- **A clear system for financial adjustments resulting from poor performance – the example provided uses 'performance points', which are weighted according to the seriousness of the performance failure**
- **An incentive mechanism to allow the contractor to benefit from enhanced performance against the key outcomes and objectives for the contract**
- **Clearly defined 'excusing causes' which provide the contractor with relief from financial adjustments in specific circumstances that the contractor cannot reasonably control (linked to achieving a 'fair' risk profile and encouraging value for money solutions).**

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

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

4.70 A good payment and performance monitoring system will cover:

4.71 The aim of the documentation is to create a contract that encourages partnership working and a cooperative approach to improving service and customer focus. The PMS should be adopted for both deficit and surplus schemes. The performance monitoring process should not be seen as a mechanism for generating income as any approach like this would be counterproductive to overall service quality, but the mechanisms need to be sufficiently robust and specific so that they are effective where genuine underperformance occurs and there is no or little evidence of commitment by the contractor to resolve problems and improve service provision.

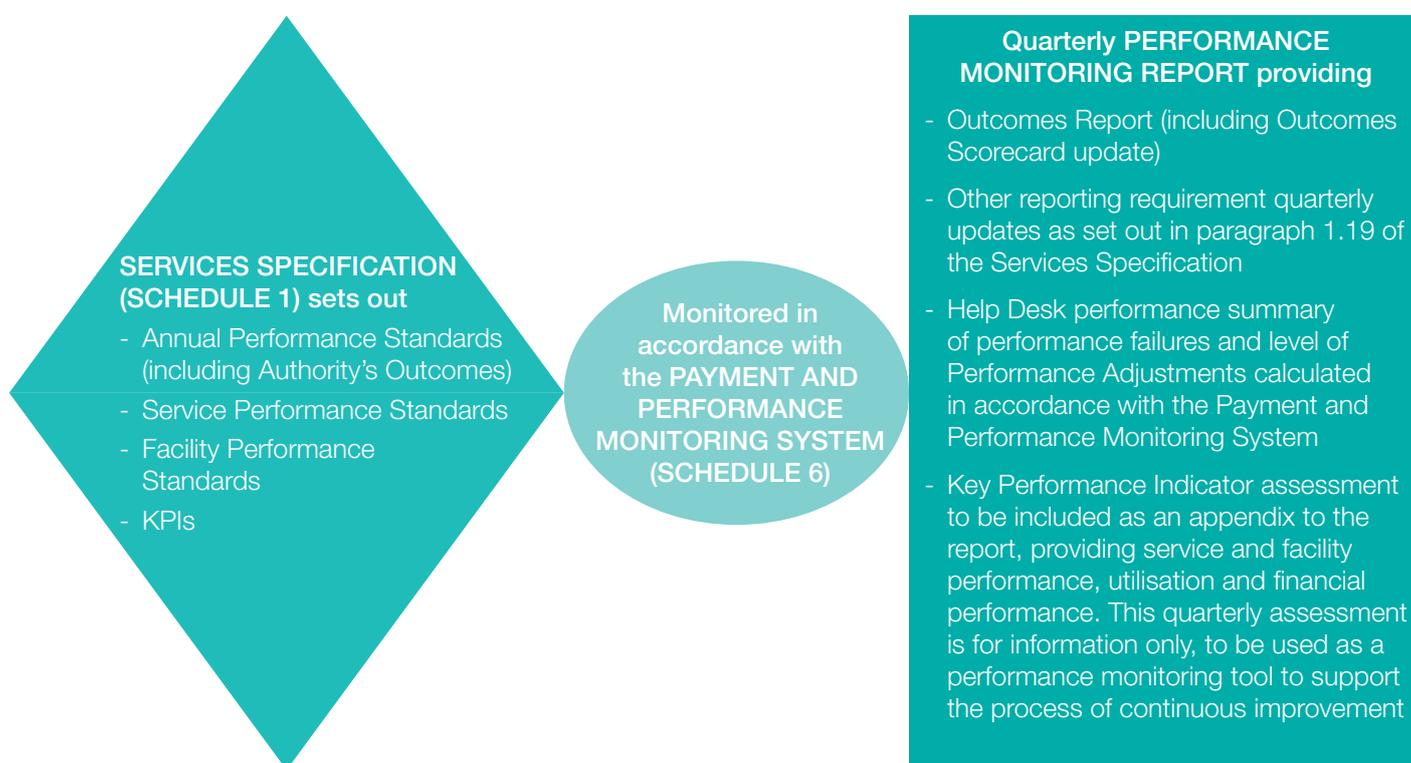
4.72 In relation to the value of adjustments, a balance must be achieved between a level of financial adjustment which is representative of the seriousness of the performance failure but which does not unnecessarily jeopardise the financial robustness of the contractor – often, putting the contractors profit margin plus a small amount of central costs at risk will be a sufficient incentive without impacting on business sustainability.

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4.73 The payment and performance monitoring system will need to be aligned to ensure that any amounts set out for adjustments in relation to poor performance are calculated in the context of being a reasonable and ascertainable loss incurred by the local authority, otherwise the mechanism may be open to challenge. Nevertheless, the opportunity to link performance failure points to termination triggers should be retained.

4.74 The diagram below (Figure 4.2) seeks to clarify the link between the Services Specification and Performance Monitoring System and the performance indicators and targets discussed above.

Figure 4.2. – Link between the specification, monitoring system and reporting requirements



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Restricted Procedure (please read alongside diagram in Annex 1)

Invitation to Tender (the ITT)

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

Volume I: Information Memorandum

(updated Information Memorandum to ensure bidders are reminded of the project and key objectives)

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

Volume II: Invitation to Tender

(sets out the detail of the tender process and bid requirements)

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

4.76 Appendices to the ITT should include, as a minimum, the

- **Services Specification**; and
- **Leisure Operating Contract** (including any benchmarking and surplus share arrangements and lease), including the Payment and Performance Monitoring System.

Practical Tip:

Templates for these documents are included at Appendix F and Appendix B of this toolkit. Appendix B contains template benchmarking and surplus share schedules as well as a template lease and example Payment and Performance Monitoring Systems

4.77 Focusing on Volume II and using the headings noted above, the following key information should be included:

- Intentions of the ITT
 - To provide detailed information on the requirements and arrangements for the submission of ITT responses
- Legal notices
 - Ensuring the local authority's legal position is set out and any risks mitigated, for example in relation to the right to amend the ITT; clarifying that costs and expenses will not be reimbursed; reminding bidders of the position in relation to Freedom of Information; placing the onus on bidders to satisfy themselves as to the sufficiency of information; general conditions covering confidentiality, canvassing, collusion and information disclosure; disclaimers
- ITT submission requirements
 - Overview of the submission requirements, including any mandatory variant bid submissions required (optional variant bids are not permitted under this route)
 - Information to be submitted in relation to quality
 - Information to be submitted in relation to price and financials
 - Information to be submitted in relation to legal structure (for example, any sub-contract arrangements intended)
 - Warranty requirements
 - Requirements in relation to updating previously submitted information, usually in relation to the PQQ submission

Practical Tip:

See paragraph 4.102 below – Appendix H of this toolkit contains a template legal and contractual issues list. A full mark-up of the contract should not be requested.

04. Tender Phases

Practical Tip:

If the bidder has indicated that they will be using a SPV structure, it may be advisable for the local authority to request additional information and specify any additional requirements to ensure that there is adequate protection should the SPV default. Please see Appendix H for more details.

- Process for responses & enquiries
 - Procedure and times for submission of ITT responses, for example hard copy tenders or via a procurement website/ number of copies/postage instructions
 - Contact details for any enquiries/questions

Practical Tip:

Having a clear clarification process will assist all bidders as it allows there to be clarity on matters, and it gives the local authority the opportunity to identify any issues arising with bidders. In order for the local authority to manage this process, there should be a clear deadline by which clarifications are to be received, with potentially a further period allowed if any additional clarifications arise from the local authority's initial responses.

Practical Tip:

The team involved in the project will need to be aware that responding to clarifications can be a lengthy process, and adequate time should be built into diaries and the procurement timetable to ensure that full responses can be provided to bidders.

- Evaluation framework and criteria
 - Basis of award should be set out – for example most economically advantageous tender
 - Headline percentages should be identified between Quality and Price/Financial aspects (see later in this chapter for further detail on this aspect)
 - Detailed evaluation criteria and weightings
 - Evaluation scoring scale
- Glossary of terms – it is useful to include a glossary of key terms to assist in bidder understanding of the project and requirements.

4.78 The document will normally also contain proformas for bidders to submit their tender price on and certificates for bidders to sign in relation to the offer being submitted and confirming no canvassing and no collusion in the preparation of their submission.

4.79 In order to facilitate evaluation, consideration should be given to providing bidders with templates for submission of key information, such as their operational projections or any capital costs, as this will aid evaluation and identification of any gaps in submissions. The use of proformas is discussed in more detail later in this chapter. A suggested list of information in relation to service delivery and capital developments is noted later in this chapter under the 'ISDS' stage of the competitive dialogue text – this level of detail should be appropriate for a restricted procedure where there may still be up to 5 or 6 bidders, however, authorities will need to balance bidder requirements with the likelihood of success otherwise bidders may withdraw due to overly onerous submission requirements.

4.80 Where mandatory variant bids are being considered, the documentation will need to be explicit in relation to how such bids will be evaluated and how a preferred bidder will be selected.

4.81 Following evaluation of the bids and selection of a preferred bidder, chapter 5 outlines the key stages and issues to consider in awarding and implementing the contract.

04. Tender Phases

The Open Procedure (please read alongside the diagram in Annex 1)

4.82 This procedure will essentially involve the submission of the same documents as the restricted procedure (as described above). However this procedure will also include a number of additional requirements, given that the open procedure combines both the pre-qualification and tender stage. The Crown Commercial Service recommends that the set of standardised questions included within their standard form pre-qualification questionnaire (see paragraph 3.26 above) should be used to test that suppliers meet the minimum levels of suitability when using the open procedure. Not all of the questions may be required for the procurement in question and therefore local authorities should only use those that are relevant and proportionate to the contract in question. The mandatory and discretionary exclusion questions should however always be included.

4.83 Local authorities must also ensure that full details, including the scoring of each questions, weightings, any pass or fail mark, or minimum thresholds for selection are made known to the bidders within the ITT under this procedure. This will need to be set out separately from the “evaluation framework and criteria” which will apply to the tender submission (see paragraph 4.77 above). In addition, if certain questions are sufficiently critical that an unsatisfactory answer may lead to exclusion without any consideration given to the tender response, then this should be made clear to the bidders within the tender documentation.

04. Tender Phases

Competitive Procedure with Negotiation (please read alongside diagram in Annex 1)

Invitation to Submit Initial Tender (the ISIT)

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

Volume I: Information Memorandum

(updated Information Memorandum to ensure bidders are reminded of the project and key objectives)

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

Volume II: Invitation to Submit Initial Tender

(sets out the detail of the tender process and bid requirements)

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

4.84 Appendices to the ISIT should include, as a minimum, the

- **Services Specification**; and
- **Leisure Operating Contract or DBOM Contract** (including any surplus share arrangements and lease), including the Payment and Performance Monitoring System.

Practical Tip:

Templates for these documents are included at Appendix F and Appendix B of this toolkit. Appendix B contains template benchmarking and surplus share schedules as well as a template lease and example Payment and Performance Monitoring Systems

4.85 Focusing on Volume II and using the headings noted above, the following key information should be included:

- Intentions of the ISIT
 - To provide detailed information on the requirements and arrangements for the submission of ISIT responses
- Legal notices
 - Ensuring the local authority's legal position is set out and any risks mitigated, for example in relation to the right to amend the ISIT; clarifying that costs and expenses will not be reimbursed; reminding bidders of the position in relation to Freedom of Information; placing the onus on bidders to satisfy themselves as to the sufficiency of information; general conditions covering confidentiality, canvassing, collusion and information disclosure; disclaimers
- ISIT submission requirements
 - Overview of the submission requirements, including any mandatory variant bid submissions required (optional variant bids are not permitted under this route)
 - Information to be submitted in relation to quality
 - Information to be submitted in relation to price and financials
 - Information to be submitted in relation to legal structure (for example, any sub-contract arrangements intended)
 - Warranty requirements
 - Requirements in relation to updating previously submitted information, usually in relation to the PQQ submission

04. Tender Phases

Practical Tip:

See paragraph 4.102 below – Appendix H of this toolkit contains a template legal and contractual issues list. If a local authority wishes detailed comments on the legal documents to be submitted, they can consider requesting bidders to submit a commentary table outlining any changes they would seek to make to the contract and/or schedules. This removes the need for a full legal mark-up which can assist the local authority, and bidders, keep their costs to a minimum – and it also ensures that matters are raised at an appropriate time, and can allow for dialogue/negotiation to ensure bids represent best value for local authorities.

Practical Tip:

If the bidder has indicated that they will be using an SPV structure, it may be advisable for the local authority to request additional information and specify any additional requirements to ensure that there is adequate protection should the SPV default. Please see Appendix H for more details.

- Process for responses & enquiries
 - Procedure and times for submission of ISIT responses, for example hard copy tenders or via a procurement website or number of copies and postage instructions
 - Contact details for any enquiries/questions

Practical Tip:

Having a clear clarification process will assist all bidders as it allows there to be clarity on matters, and it gives the local authority the opportunity to identify any issues arising with bidders. In order for the local authority to manage this process, there should be a clear deadline by which clarifications are to be received, with potentially a further period allowed if any additional clarifications arise from the local authority's initial responses.

Practical Tip:

The team involved in the project will need to be aware that responding to clarifications can be a lengthy process, and adequate time should be built into diaries and the procurement timetable to ensure that full responses can be provided to bidders.

- Evaluation framework and criteria
 - Basis of award should be set out – for example most economically advantageous tender
 - Headline percentages should be identified between Quality and Price/Financial aspects (see later in this chapter for further detail on this aspect)
 - Detailed evaluation criteria and weightings
 - Evaluation scoring scale
- Glossary of terms – it is useful to include a glossary of key terms to assist in bidder understanding of the project and requirements.

04. Tender Phases

4.86 The document will normally also contain proformas for bidders to submit their tender price on and certificates for bidders to sign in relation to the offer being submitted and confirming no canvassing and no collusion in the preparation of their submission.

4.87 In order to facilitate evaluation, consideration should be given to providing bidders with templates for submission of key information, such as their operational projections or any capital costs, as this will aid evaluation and identification of any gaps in submissions. The use of proformas is discussed in more detail later in this chapter. A suggested list of information in relation to service delivery and capital developments is noted later in this chapter under the 'ISDS' stage of the competitive dialogue text – this level of detail should be appropriate for a competitive procedure with negotiation where there may still be up to 5 or 6 bidders, however, authorities will need to balance bidder requirements with the likelihood of success otherwise bidders may withdraw due to overly onerous submission requirements.

4.88 Where mandatory variant bids are being considered, the documentation will need to be explicit in relation to how such bids will be evaluated and how a preferred bidder will be selected.

4.89 Local authorities should note that under this procedure (as with the restricted procedure), it may accept an Initial Bid (after evaluation) with no subsequent dialogue or negotiation, if it has reserved the right to do so under its Contract Notice or Prior Information Notice (if the latter is used as a call for competition). If however, following evaluation of the Initial Bids, the local authority considers that a stage of negotiation is required with each of the bidders, then it may enter into detailed negotiations in relation to any elements of each tender submission.

4.90 In the event that the Local Authority opts to proceed with a stage of negotiation then it may do so until it is ready to conclude the procedure and request final tenders. In this case the Authority may send out a further Invitation to Submit Final Bids (ISFT) pursuant to Regulation 29 (21). For further guidance in terms of what the final ISFT may include, please see paragraphs 4.109 onwards below.

04. Tender Phases

Competitive Dialogue (please read alongside the diagram in Annex 1)

Invitation to Submit Outline Solutions (ISOS)

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

Volume I: Information Memorandum

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

Volume II: Invitation to Submit Outline Solutions

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

4.92 Focusing on volume II, the contents should include:

- Intentions of the ISOS
 - To provide detailed information on the requirements and arrangements for the submission of ISOS responses
- Legal notices
 - Ensuring the local authority's legal position is set out and any risks mitigated, for example in relation to the right to amend the ISOS; clarifying that costs and expenses will not be reimbursed; reminding bidders of the position in relation to Freedom of Information; placing the onus on bidders to satisfy themselves as to the sufficiency of information; general conditions covering confidentiality, canvassing, collusion and information disclosure; disclaimers
- ISOS submission requirements
 - Overview of the submission requirements
 - ISOS questions to which bidders are asked to respond (normally with page limits for responses)
 - Requirements in relation to updating previously submitted information, usually in relation to the PQQ submission
- Process for responses & enquiries
 - Procedure and times for submission of ISOS responses, for example hard copy tenders or via a procurement website, number of copies and postage instructions
 - Procedure and booking arrangements for dialogue meetings – dates, times, locations and agendas etc.
 - Contact details for any enquiries or questions
- Evaluation framework and criteria
 - Basis of award should be set out – 'best price-quality ratio' is the only option for competitive dialogue
 - Headline percentages should be identified between Quality and Price/Financial aspects (see later in this chapter for further detail on this aspect) for the whole of the process including any Detailed Solutions stage and Final Tender stage
 - Detailed evaluation criteria and weightings for the ISOS questions
 - Evaluation scoring scale for the ISOS questions
- Glossary of terms – it is useful to include a glossary of key terms to assist in bidder understanding of the project and requirements.

04. Tender Phases

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

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

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

- **Commercial issues**

- Approach to key contractual aspects and risks (e.g. lifecycle responsibilities, repairs & maintenance, TUPE and pensions etc.)
- Approach to maximising commercial returns/minimising subsidy requirements from the site(s)
- Any capital development schemes envisaged, with the aim of meeting the local authority's stated outcomes or maximising commercial returns/minimising subsidy requirements
- Approach to ensuring delivery of the facilities within the stated timescales (e.g. identification of key milestones in relation to construction, operation and phasing and provision of an indicative Gantt chart).

- **Service issues**

- Approach to key aspects of service delivery (e.g. sports development/reporting/maximising participation)
- Approach to setting programmes and pricing policies
- Approach to partnership working
- Key methods for achieving the local authority's outcomes (as stated in the Services Specification) (examples at Appendix E and Appendix F).
- Approach to working on dual-use sites in order to maximise community use whilst meeting the needs of the school.

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

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

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

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

Invitation to Submit Detailed Solutions (ISDS)

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

4.101 The ISDS stage requires bidders to make a detailed and fully priced response including (where applicable) their design and build proposals and operational method statements and to mark-up or respond to the Leisure Operating Contract and associated schedules issued, to include (where relevant) the Facilities Requirements and Technical Specification, Services Specification, Payment and Performance Monitoring System, Surplus Share and Benchmarking.

04. Tender Phases

Practical Tip:

Template documents, including the schedules listed above, can all be found in the appendices to this toolkit. If a local authority wishes detailed comments on the legal documents to be submitted, they can consider requesting bidders to submit a commentary table outlining any changes they would seek to make to the contract and/or schedules. This removes the need for a full legal mark-up which can assist the local authority, and bidders, keep their costs to a minimum – and it also ensures that matters are raised at an appropriate time, and can allow for dialogue/negotiation to ensure bids represent best value for local authorities.

4.102 As an alternative to providing a mark-up or commentary of the key contractual documents, one approach which can assist with streamlining the procurement/dialogue process is to use a “Legal and Contractual Issues List” which limits the areas of the draft contractual documents which may be dialogued upon and which requires bidders to respond/bid-back on certain key areas of the contract (but not to provide a full mark-up of the contractual documents).

Practical Tip:

A template legal and contractual issues list is included as Appendix H to this toolkit.

Practical Tip:

If a bidder has proposed an SPV structure, it is advisable at this stage to request further details of this contractual arrangement to ensure that there is sufficient protection to the local authority if the SPV defaults. One option is to request that at ISDS stage, the bidder submits example sub-contracts or heads of terms so that the local authority can evaluate how liabilities will flow under the proposed contractual structure, and to allow the local authority to evaluate the risks/strengths of the bid in full.

4.103 It is important to note that the ISDS stage is a completely new phase of the procurement process and as such none of the evaluation scores should be carried over from the ISOS. However, the principles agreed to at ISOS stage should be adhered to.

4.104 The ISDS documentation should follow a similar format to that for ISOS stage, with two volumes and a Volume I that is simply an updated Information Memorandum. Volume II can follow a similar format to ISOS, which aids understanding through consistency of format, but key issues to focus on at ISDS stage include:

- **Evaluation criteria and weightings** – detailed criteria and weightings need to be published, including associated scoring scales
- **Submission requirements** – levels of detail expected, format for mark-ups, templates to be completed
- **Dialogue arrangements** – further dialogue will be needed to allow bidders to refine their proposals and submit detailed solutions which meet the local authority’s requirements. Therefore, a clear programme of dialogue and topics should be set out in the ISDS documentation
- **Affordability** – given that ISDS submissions require a fully priced response, it is important that clear affordability positions are set out in the documentation, which will assist bidders in understanding the local authority’s position and the balance between cost and service.

04. Tender Phases

4.105 With regard to submission requirements at ISDS stage, a fully priced response will be required and service delivery proposals should be accompanied by detailed method statements for all key aspects of service delivery. The local authority may wish to consider limiting the number of pages or words for each response or method statement. Mark-ups or responses to key documents (Leisure Operating Contract/DBOM Contract and associated schedules issued, to include the Facilities Requirements and Technical Specification, Services Specification, Payment and Performance Monitoring System, Surplus Share and Benchmarking) will allow a detailed assessment of the legal and commercial position being adopted, which can then be scored accordingly. Service method statements required could include some or all of the following:

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

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

- 1:100 architectural layout drawings including floor plans and elevations, plus a location plan and a 1:500 site plan of the capital development proposals including building(s) footprint, designated areas for future development, security, landscaping, disabled provisions, signposting, parking areas, infrastructure improvements, off-site improvements, access and transport routes etc.
- Design philosophy statement including how the requirements of DDA provision etc will be met
- Total calculations on gross area, net area and zone allocation
- Evidence of compliance with Sport England Design Guidance Notes and deviation therefrom
- Method statement for design and construction
- Procurement strategy for proposed projects identifying procurement route and supply chain management
- A detailed Gantt chart programme for all the project's design, construction and commissioning phases, indicating critical paths
- A statement setting out the proposed design process to be followed and approach to planning, including a planning statement on the likelihood of securing planning permission
- Sustainable construction proposals, a statement on the environmental impact of the components and materials used in the construction of the new or refurbished facilities and proposals on minimisation of the environmental impact
- Proposals for compliance with Building Regulations Codes of Practice
- Energy efficiency statements both in respect of design and subsequent operation and maintenance
- A report on consultation with statutory authorities and undertakers on design proposals as necessary including any assumptions and associated risks as a result of information outstanding at the time of bid submission
- Elemental capital cost build up for the capital developments following BCIS format or similar
- Clear costings for fees, contingency sums, planning, risks, assumptions, inflation and other on-costs
- Detailed lifecycle and maintenance costs
- A methodology for satisfying the requirements of Construction Design Management Regulations
- A full mark-up of the relevant Facilities Requirements and Technical Specification.

4.107 This remains a considerable amount of information to support any capital developments, which reinforces the need to carefully consider the number of bidders shortlisted from ISOS.

04. Tender Phases

4.108 Following evaluation of ISDS submissions, ideally two bidders will be invited to progress to the next stage of the procurement process.

Invitation to Submit Final Tenders (ISFT)

4.109 Having shortlisted at ISDS stage to two bidders, a period of further dialogue may be required to refine bidders solutions and ensure that all issues pertaining to price and risk have been explored and acceptable positions adopted. Once this position is reached, the local authority can close dialogue and invite final tenders. Dialogue must be formally closed before final tenders are invited.

4.110 The Invitation to Submit Final Tenders should be similar to the Volume II ISDS document, setting out updated information and confirming in particular the submission requirements and evaluation criteria.

4.111 With regard to submission requirements, these are likely to be similar to those at ISDS stage, although greater technical detail may be requested to inform evaluation of capital development proposals, such as mechanical and electrical drawings or engineers drawings.

4.112 To aid both parties it is recommended that the ITSFT clearly sets out the approach to be taken in terms of the level of detail to be re-submitted. Where there has been no change to a service delivery method statement for example, the bidder should provide confirmation that the ISDS version is to be evaluated. Any updated method statements should be provided that clearly identify any changes from the previous ISDS submission.

4.113 Further detail on the evaluation process is provided later in this chapter, whilst chapter 6 focuses on the implementation stage.

Enabling comparison of bids - use of template response forms

4.114 As has been referenced a number of times in this chapter, the use of template response forms can be a useful tool in aiding evaluation of bid submissions, particularly in relation to financial information. Examples include:

- **Tender price schedule**
- **Operational projections template**
- **Capital cost template.**

4.115 By providing bidders with templates on which to submit their responses, it becomes more transparent to the local authority what costs are included or excluded, how price changes over the 10-15 years of a contract and what assumptions have been made in relation to detailed operational business planning. It can also facilitate benchmark analysis of bid submissions, for example in relation to calculating income per visit, staff costs as a percentage of income, members per fitness station, visits per sq.m. and so on.

4.116 The exact format of the templates will depend on the nature of the project, but ideally should be developed in a way that allows the submissions from the ultimate preferred bidder to form part of the final contract schedules in terms of the base financial model and the basis on which future indexation is calculated and performance monitored.

04. Tender Phases

Step 3: What to do before issuing the template documents

4.117 The documents should be updated to reflect any project specific matters and examples of such matters are outlined below:

- Does the local authority have any joint use agreements that will impact on the contract?
Will the contractor be a party to the joint use agreements?
Have the positions been confirmed to the bidders?
Will these impact on pricing?
- Has any external funding (for example, from any national governing bodies) been offered?
Does the contract need to refer to these?
Have the details been passed to the bidders?
Do the funding agreements impose additional KPI's that should be incorporated into the contract and/or priced for?
- If a new facility is due to open during the term of the contract, has the drafting rider included in Appendix C been inserted into the draft contract?
This could be included at Clause 9 if there are no Initial Services
- If a new facility is being built, and an existing facility is to close, are there any project specific handover requirements? Have these been referred to in the contract?
- Has the local authority decided whether to use a financial adjustment based payment and performance management system or a default notice system? Schedule 6 in both the draft DBOM and LOC contracts contains both an example of a financial adjustments PMS as well as a default notice PMS. If a default notice PMS is selected, consequential drafting changes will need to be made to the DBOM and LOC templates (Appendix A and Appendix B).

Practical Tip:

Local authorities can review the two template schedules to determine which approach suits their needs best taking into account whether or not the project is likely to be a deficit or surplus management fee scheme.

- Have the local authority's various legal teams met to ensure that all documents are consistent? For example, is the local authority's property team content with the commercial position outlined in the draft contract with regard to maintenance, repair and insurance?
- Have the local authority's insurance advisors reviewed the draft contract to ensure that the proposed approach to insurance is acceptable?

04. Tender Phases

Step 4: Confirm how bids will be evaluated

Approach to evaluation and selection

4.118 Each of the procurement routes discussed in detail above and the open procedure, concessions and light touch regime for operational contracts requires evaluation of bid submissions and selection of shortlisted parties to progress to the next stage or selection of a preferred bidder. It is therefore important to consider the various aspects associated with evaluation and selection, including:

- Development of evaluation criteria
- Bid evaluation team selection
- Clarification questions and clarification meetings
- Scoring table
- Score moderation meeting
- Evaluation report
- Providing feedback to bidders.

4.119 A detailed and clear evaluation is critical to the overall success of the project, therefore sufficient time should always be set aside for this, taking into account the need for clarification meetings, moderation meetings and reporting.

4.120 It is recommended that the evaluation criteria are developed and tested to ensure that the evaluation model is weighted towards the achievement of key outcomes as opposed to simply facility management.

4.121 Subject to the procurement route being followed, dialogue can then be focused around the required outcomes and how the contractor intends to contribute to their achievement.

Evaluation criteria and weightings

Type of procurement	Evaluation approach
Restricted	MEAT or Lowest Price/Highest Surplus
Competitive Procedure with Negotiation	MEAT or Lowest Price/Highest Surplus
Competitive Dialogue Procedure	MEAT only

4.122 The evaluation criteria should reflect the priorities of the project and will need to be tested to ensure that the outcome of the evaluation will accurately reflect these priorities within the context of the weightings applied to each area.

4.123 There are normally two or three overarching categories as illustrated in table 4.2 – the categories will depend on whether technical/construction requirements are included in the project. The table shows an overview for a competitive dialogue process, with the associated stages. However, for a restricted process there would clearly only be one column of percentage weightings and no technical/design element.

Table 4.2. Overarching evaluation criteria

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

04. Tender Phases

4.124 Local authorities should note that the overall weighting given to evaluation criteria can change depending on which stages of the procurement process you are at, however any changes to the overall award criteria is not permitted.

4.125 Of note in table 4.2 is that ranges have been provided for the later stages of the process, which allows the local authority to retain some flexibility to tailor the evaluation as the scope/focus of the project becomes clearer. However, please note that specific weightings should always be published in advance of each stage.

4.126 Sometimes an additional overarching category is added – ‘Added Value’ – which can be useful in assessing the bid submissions against specific local criteria which do not easily form part of either core services delivery or commercial criteria.

4.127 It is important to carefully consider the split of weightings between price and quality (services/design) in the overall context of the key priorities for the local authority and the key outcomes for the contract. A 60:40 or 50:50 price: quality balance is typically recommended, recognising the importance of delivery of outcomes with associated wider benefits.

4.128 Below each headline evaluation area, there will be a series of more specific evaluation criteria, which should also be disclosed as part of the procurement documentation. An example set of criteria for operational/services aspects is noted in table 4.3. Please note that if too many criteria are included, then the overall importance of each one will be diluted.

Table 4.3. Operational/services evaluation criteria examples

Main Criteria (Level 1)	Sub Criteria(Level 2)	Weighting
Operational-services	Pricing Structures	
	Opening Hours	
	Programming	
	Health and Safety Management & Security	
	Equipment	
	Staffing/TUPE arrangements	
	Catering and Vending	
	Cleaning	
	Environmental and Energy Management	
	Maintenance	
	Quality Management	
	Reporting	
	Customer Care & Marketing	
	Sports Development/Health & Wellbeing Plans	
	Achievement of Authority Outcomes	

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

Pricing Structures	Does the proposed pricing structure reflect the demographic profile of users? Does the Bidder demonstrate innovation in its pricing? Has the Bidder identified their approach to Concessionary Pricing and the benefits of this approach to the local authority?
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04. Tender Phases

4.130 This allows bidders to be clear on the key aspects in each area and to focus their bid submission accordingly.

4.131 Examples from a technical and construction perspective are identified in table 4.4.

Table 4.4. Technical/construction evaluation criteria examples

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

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

4.133 In relation to commercial criteria, including price, table 4.5 identifies a range of potential criteria that could be evaluated against this aspect.

Table 4.5. Commercial evaluation criteria examples

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

4.134 In the example shown in table 4.5, the actual tender price is one of a small number of commercial criteria, rather than being assessed separately. There is still a clear opportunity to weight price according to its overall importance, but this approach offers flexibility to balance this with ensuring the overall submission is considered deliverable and sustainable and that the legal positions adopted are reasonable. The inclusion of a deliverability/sustainability assessment criteria is recommended to provide long term protection for the local authority and reduce the risk of entering into a contract with a focus on short term financial benefit that is difficult to sustain.

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

04. Tender Phases

4.136 In relation to assessing price, there are generally three options available:

- Set a specific affordability limit and then score bidders according to a published scale against this limit – for example, if the affordability limit is £250,000 pa, then a bidder may score 5 out of 10 for achieving this position. For every additional saving of £50,000 pa offered below this level, then they could score an additional point, such that a submission with £0 management fee/subsidy would score a maximum 10 out of 10 for price. It is important to allow room for bidders to exceed expectations. For example, it is recommended to avoid allocating full marks to any bidder that meets the affordability limit as this can make it difficult to differentiate between several affordable bids
- Score the lowest price (or highest surplus) maximum marks and then reduce the score given to other bidders according to their price compared to the lowest price (or highest surplus):
 - The lowest priced bid consistent with the most economically advantageous offer which best meets the local authority's requirements is awarded 100% of the evaluation score for price/affordability. All other tenders are scored a lesser amount on their financial offer on the principle of deducting a percentage point from the maximum value for each unit of value their tender is in excess of the lowest achievable bid. The units of value to be used could equate to one percentage point deduction for a specified amount that the bid is in excess of the lowest accepted bid (e.g. 1% for every £5,000)
 - The price evaluation is based upon the "standard differential" method. This assumes that the lowest acceptable bid (excluding abnormally low bids) will attract full marks. The other bids will then be ranked comparatively to that lowest acceptable bid. Bidders will be awarded all of the available marks less the percentage by which their submission is more expensive than the lowest (e.g. if the lowest acceptable bid is £100,000 and the next lowest bid £110,000 that bid would score 90% of the available marks)
- Price scores are allocated based on the extent to which the bidder's price falls above or below the average price.
 - A bidder that submitted a price that was equal to the average price would be awarded a score of 50 out of 100 (of the 0-100 price score). For every pound that a bidder's price is above or below the average price its' price evaluation score will be increased or reduced accordingly
 - [35%] will be awarded to the lowest average tender price (ie the lowest average annual subsidy required or the greatest average annual payment offered to the Authority), with 0% 'awarded' to the affordability limit, for example, £[insert figure] per annum. Other bidders will be scored depending on where their tender price sits in relation to [35] equal bandings between the affordability limit and the lowest average tender price.

4.137 It is important to note that while the 'mean' variation approach to price evaluation set out in option three above can be used for restricted procurement processes where the local authority will be evaluating against a number of bids, it is not recommended that this approach is used in a competitive dialogue process where there could only be two bids at Final Tender.

4.138 In scenarios where the contractor may be paying the local authority (a 'surplus' generating contract), then option 2 may provide a more accurate means of recognising the maximum surplus being offered.

4.139 One potential difficulty with both alternatives in option 2 is that a particularly low price may mean all other bidders score very poorly on price, which cannot then be addressed via improved service quality – there are examples where the 'winning' bid under this type of approach has actually provided a poorer level of service, but the price scoring has unduly favoured a cheaper model despite the local authority's intentions to have a 60:40 or 50:50 price: quality balance. This type of scenario emphasises the importance of assessing both affordability and deliverability/sustainability rather than just price alone.

4.140 If the second option for scoring price is being considered, the local authority should also consider setting minimum score thresholds in relation to key service criteria, so that they are not forced to accept a submission that actually results in very poor service quality.

4.141 When developing the evaluation matrix it is highly recommended that a scenario testing workshop is undertaken to 'test' the outcome that the matrix would deliver when different types of hypothetical submission are scored – in this way, the local authority can be confident that the results from the matrix will accurately reflect its priorities for the project.

04. Tender Phases

Bid evaluation team selection

4.142 The period of bid evaluation requires intensive resource from both the local authority and its advisors in order to review, clarify, score, moderate and select a shortlist/preferred bidder. Early in the process, consideration will need to be given to who will form the evaluation team and what their role will be. Time then needs to be allocated in diaries to ensure sufficient resource is available at the critical times.

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

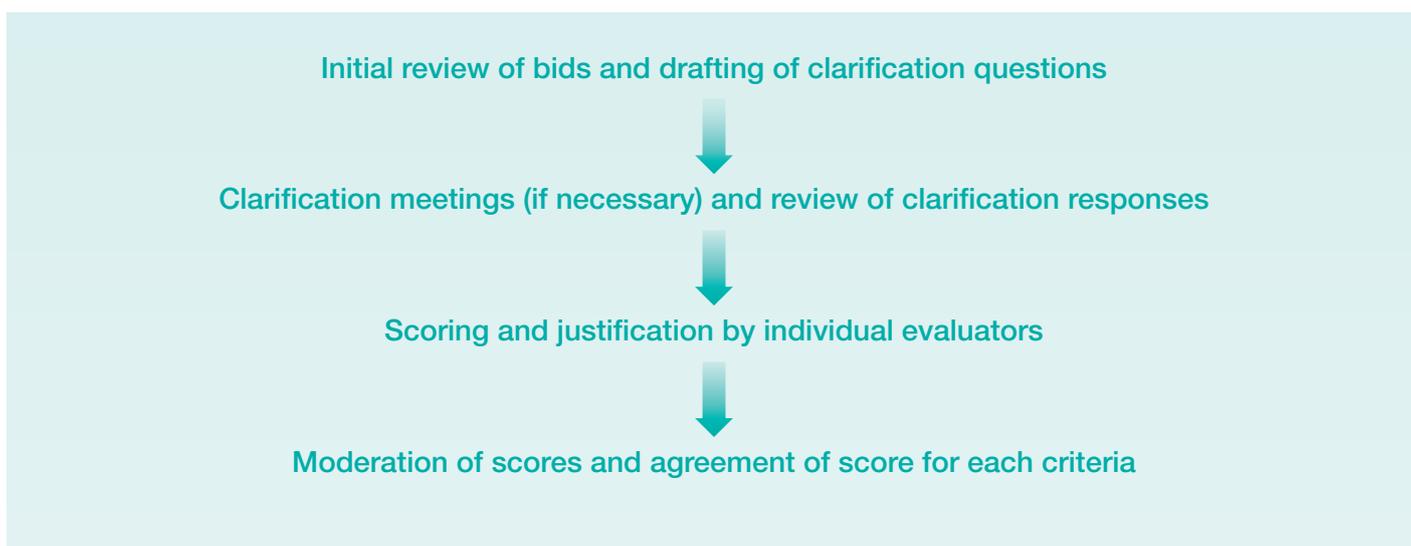
- Leisure
- Finance
- HR
- Legal
- Property
- Planning (only for competitive dialogue or competitive procedure with negotiation)
- Procurement.

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

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

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

4.147 The normal process for the evaluation team would be:



04. Tender Phases

Clarification questions & meetings

4.148 As part of the initial review of the submissions, evaluators should seek to identify clarification questions relating to any areas of the bids that are not clear. These written questions can then be submitted to the bidders and form the basis of clarification meetings, where bidders are given the opportunity to respond and clarify their submissions to the evaluation panel. Clarification meetings may not be required in all instances, depending on the nature of the questions.

4.149 In all cases, written responses to clarifications should also be requested, as this forms an important part of the audit trail for the evaluation process.

4.150 It is worth noting that the clarification process is aimed at ensuring the evaluation panel has a clear understanding of the bid submissions – it is not an opportunity for further dialogue with the bidders, albeit the clarification process can identify topics for subsequent stages of dialogue (if following the competitive dialogue route).

Practical Tip:

What can be left to preferred bidder stage?

The local authority must ensure that the procurement regulations are followed correctly, and, if competitive dialogue is followed, that a commercial solution is identified during dialogue.

Notwithstanding this, however, as noted above authorities should be considerate of the costs for contractors bidding. This is particularly the case around the legal documentation.

- **Competitive dialogue contract mark-up:** This is a very costly area and where possible a fully agreed set of legal documents should only be required when down to the last 1 or 2 bidders or at preferred bidder stage depending on the nature of the contract (this point is reflected in the main toolkit, in relation to needing to be cognisant of bid costs, whilst ensuring procurement regulations are adhered to). If a full mark-up of the contract is required prior to final tender submission, it is reasonable to confirm to bidders that cross referencing checking, and proof reading of the legal documents can be completed at preferred bidder stage.
- **Services Specification:** The Services Specification will need to reflect the agreed position reached during the bid process and will need to be tailored at preferred bidder stage to reflect the tender solution selected by the local authority.
- **Legal consistency check:** The checking process to ensure that all documents, schedules and the contract work together and outline a clear framework under which to deliver the project is a task that can be completed at preferred bidder stage.
- **Title due diligence:** As noted earlier in this chapter, full title due diligence can be left until preferred bidder stage. If any searches or replies to CPSEs have previously been issued by the local authority during the bid process, these may need to be updated and re-issued prior to contract signature.
- **Project Specific matters:** Whilst a commercial solution should be proposed at tender stage, it may be that project specific matters need to be incorporated into the contract and legal documents at preferred bidder stage.

It should be recognised by parties that there will be an element of fine tuning of the legal documents at the preferred bidder stage. The points noted above must be considered, and the legal documents updated, to ensure that the outcome of the procurement process is clearly captured in the final form documents, and that parties have a suite of documents that reflect the agreed final tender solution accepted by the local authority.

04. Tender Phases

Scoring table

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

Table 4.6. Example 5-point scoring table

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

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

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

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

04. Tender Phases

The moderation meeting

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

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

Evaluation reporting

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

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

Providing feedback to bidders

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

4.160 Having invested a great deal of time and resource in their bid preparations, it is appropriate to provide bidders with detailed feedback on their submission if requested by the unsuccessful bidders and identify areas where their bid submissions can be improved.

4.161 Authorities should also consider offering bidders the opportunity for a debrief meeting at which further feedback on their submission can be provided, which will no doubt be helpful to bidders in future submissions.

4.162 The local authority's legal advisors will be able to provide template letters for the intention to award and then subsequent contract award notifications.

Light Touch Regime and Concessions

4.163 The 2015 Regulations and the Concessions Contracts Regulations 2016 provide local authorities with a high degree of discretion in how they structure the tender stage under the light touch regime and when procuring a concession. There are no set procedures to be adhered to however local authorities will need to ensure that bidders are treated equally in accordance with the EU Treaty principles when structuring their tendering stage.

4.164 In practice local authorities can choose to adopt one of the procedures set out within the 2015 Regulations on a voluntary basis and structure that procedure as it wishes, taking into account the overall nature of the contract being procured. The documentation to be issued to bidders therefore will very much depend on the complexity of the contract in question and this will dictate the structure that the local authority ultimately adopts i.e. whether it wishes to accept initial tenders (such as under the open, restricted or potentially competitive procedure with negotiation) for relatively simple procurements, or build in a number of stages within a process similar to the competitive dialogue procedure for projects which require a greater degree of negotiation. In practice therefore, the structure of the tender stage will need to be considered and agreed on a case by case basis. The relevant elements of the different tender documentation and evaluation approaches set out in detail above can then be applied as considered appropriate.

04. Tender Phases

Key risks to consider

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

Project management notes

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

Checklist before continuing

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

05. Award and Implementation

Introduction

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

Award & Implementation Steps

- Step 1: Legal procedural aspects
- Step 2: Authority sign off procedures
- Step 3: Staffing implications
- Step 4: Communications strategy
- Step 5: Facility handover
- Step 6: Future contract monitoring

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

Step 1: Legal procedural aspects

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

Intention to Award Letters – notifying all bidders of the local authority's intention to appoint a preferred bidder and to commence clarification and confirmation of commitments with the successful tenderer.



Giving feedback to bidders on the relative advantages and disadvantages of their bid as against the successful bidder's bid.



Once the local authority has made the decision to award the contract, the various letters to the successful/unsuccessful bidders are issued and any standstill period (if applicable) commences.



Formal publication of award, where an OJEU notice was issued.



Following confirmation of all commitments, the contract is finalised and signed by both parties.

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

- Confirmation and clarification of commitments/finalisation of the Leisure Management Contract and associated Schedules/execution of leases
- Confirmation of technical detail for any capital works, for example, covering demolition, design, engineers drawings, method statements, programme, M&E, room data sheets, identity of sub-contractors
- Development of any required sub-contracts
- Updating of the Schedules to the contract and associated appendices to reflect the agreed positions (where applicable)

05. Award and Implementation

- Legal consistency check between the contract, schedules and associated appendices to ensure correct use of defined terms and cross references. It is advisable that a full proof read is undertaken
- Updating of the TUPE information and mobilisation plan for staff transfer
- Provision of pre-commencement service documentation, for example:
 - 3-5-year maintenance plan and annual maintenance plan
 - 3-5-year marketing plan and annual marketing plan
 - PPM programme
 - 5-year sports development plan and annual plan and programmes
- Provision of final method statements covering, for example:
 - Pricing
 - Programming
 - Opening hours
 - Health & safety
 - Child protection
 - Security
 - Staffing structures, qualifications & training
 - Catering & vending
 - Cleaning
 - Accommodation
 - Environmental & energy management
 - Customer care
 - Sports development
 - Health & Wellbeing
 - Marketing
 - Reporting
 - IT systems
 - Programmed & reactive maintenance
 - Quality management
 - Equality and diversity
 - Licences & legislation
 - Business continuity
 - Authority outcomes
 - Specialist sports surfaces.
 - Confirmation of change in revenue figures
 - Provision of final version of financial model
 - Agreement of participation targets
 - Agreement of reporting scorecard.

5.5 This process should not result in any significant changes to the documents and is simply a cross-checking and confirmation process. As noted in chapter 4, however, it is vital to ensure that project specific matters included in the successful tender are reflected in the final form legal documents prior to contract signature.

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

Step 2: Authority sign-off procedures

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

Practical Tip:

When completing their legal due diligence, the successful bidder may request copies of the local authority's internal approvals and evidence of who is authorised to signed the documents. The local authority should ensure that any minutes issued to the preferred bidder are redacted as and when appropriate. Pursuant to clause 5 of the template contracts (contained at Appendix A and Appendix B), the local authority is also able to request evidence that the contractor has the corporate power to enter into the project documents.

Step 3: Staffing implications

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

05. Award and Implementation

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

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

Practical Tip:

If an Admission Agreement is required between the new employer, the local authority and a pension fund, this should be progressed with the preferred bidder and the Fund as soon as possible.

Step 4: Communications strategy

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

- Staff (as noted earlier)
- Council Members
- Clubs and existing user groups
- Existing individual customers and facility members
- Local community.

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

Step 5: Facility handover arrangements

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

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

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

05. Award and Implementation

Step 6: Future contract monitoring

5.15 Of paramount importance in ensuring the contract achieves the aspirations of the local authority and the target outcomes, will be the future monitoring arrangements. Careful consideration should be given to how the contract monitoring will be resourced and the reporting arrangements to senior management and Councillors.

5.16 There are a number of options available, including:

- Outsourced monitoring function
- Central in-house monitoring function
- Monitoring within the service department.

5.17 Many authorities now have centralised monitoring arrangements, either in-house or outsourced, to ensure consistency of approach and quality of information. In this case, it will be important for the central team to work with the service department and contractor to agree how targets will be measured and reporting formats. The central team will then be responsible for ensuring information is reported on a timely basis and for interrogating the accuracy of the information on an ad hoc 'audit' basis. The service department will retain responsibility for interpretation of the data in many instances and for agreeing remedial strategies/future plans as necessary, given their specialist knowledge.

5.18 It is also likely that the local authority's finance team will be involved at some stage of the process, given the need for the contractor to submit management fee invoices and calculations of any financial adjustments for poor performance, which will require checking and approval.

5.19 In all cases, it is critical that sufficient time is set aside for monitoring the contract as this will promote implementation of the service plans and support overall quality of delivery. Where an authority does not currently have resources set aside for contract monitoring, consideration should be given to ring-fencing an element of any savings to fund a monitoring role.

05. Award and Implementation

Key risks to consider

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

Project management notes

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

Checklist before continuing

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

06. Variations To Contracts Under The Procurement Regulations

6.1 The case of *Presstext* (C-454/06) (2008) Bus. L.R D118 set out a number of guiding principles regarding variations to existing or concluded contracts. In the case, the ECJ had to deal with the question of when amendments made to an existing public agreement should be considered to be the award of a brand new public services contract under procurement rules. The ECJ essentially established a materiality test in terms of when the procurement rules would be triggered; this would be the case where the changes resulted in the contract being “materially different in character from the original contract”. “Materially” was defined by the ECJ as:

- where 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; or
- when it extends the scope of the contract considerably to encompass services not initially covered; or
- when it changes the economic balance of the contract in the favour of the contractor in a manner which was not provided for in the terms of the initial contract.

6.2 This test is now embodied, amongst other additional provisions, within Regulation 72(8). To the extent that any provisions are still not compliant with either case law or the relevant provisions of the Regulations. However the application of these provisions require careful consideration on a case by case basis and we advise that local authorities take project specific legal advice in terms of the application of these provisions to their proposed scope of changes.

Regulation 72 (1) – Modification of Contracts during their Term

6.3 Contracts and framework agreements may be modified without a new procurement procedure in accordance with any of the following cases:

Regulation 72 (1) (a):

where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses:

- (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
- (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;

Note: If the original procurement documents are clear that certain modifications may be made, this may avoid the need to run a new procurement. The modifications must have been provided for in “clear, precise and unequivocal review clauses” and the scope and nature of the possible modifications must be clear. However, any such modification must not alter the overall nature of the Contract.

6.4 Regulation 72 (1) (b):

for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor:

- (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, or
- (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority, provided that any increase in price does not exceed 50% of the value of the original contract;

Note: This provision can be relied upon if it becomes necessary to purchase new works, services or supplies from the original Contractor and any such purchase was not included in the original procurement exercise. This change can only be relied on where a change of Contractor (i) cannot be made for economic or technical reasons and (ii) would cause significant inconvenience or substantial duplication of cost for the Contracting Authority.

In addition, the change will only be permitted if it does not result in an increase in price of more than 50% of the value of the original Contract. It is possible to make several modifications relying on this ground within the Regulations/ Directive and the 50% increase in price limit applies to each separate modification. However, there is a “good faith” element in that this must not be used as a means of circumventing the procurement rules (Regulation 72(2)) and furthermore, if the Contracting Authority relies on this provision, it must publish a subsequent notice in the OJEU confirming that it has made the change pursuant to this problem (Regulation 72(3)).

06. Variations To Contracts Under The Procurement Regulations

- 6.5** Regulation 72 (1) (c):
where all of the following conditions are fulfilled:
- (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
 - (ii) the modification does not alter the overall nature of the contract;
 - (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.

Note: If an event or set of circumstances occurs which a Contracting Authority, acting “diligently”, could not have foreseen, it is possible to modify the Contract without a fresh procurement exercise. It must however be a change where the modification does not alter the overall nature of the Contract and does not result in an increase in price of more than 50% of the value of the original Contract.

It is again possible to make several modifications relying on this provision and again the 50% increase in price limit applies to each separate modification. However again there is also a “good faith” element in that this must not be used as a means of circumventing the procurement rules (Regulation 72(2)) and the Contracting Authority must publish a notice in the OJEU (Regulation 72(3)).

- 6.6** Regulation 72 (1) (d):
where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of:
- (i) an unequivocal review clause or option in conformity with sub-paragraph (a), or
 - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part;

Note: Regulation 72(1)(d) allows a new Contractor to replace the original Contractor in two circumstances (i) when the change is envisaged in the Contract or Procurement Documents; or (ii) where the replacement is as a result of “corporate restructuring, including takeover, merger, acquisition or insolvency”. However, the new Contractor must meet the pre-qualification criteria; and the change in Contractor must not result in other substantial amendments to the Contract. The “good faith” requirement applies again in these circumstances.

- 6.7** Regulation 72 (1) (e):
(a) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 6.9 below; or
(b) where paragraph 6.8 below applies.

- 6.8** Regulation 72 (5):
This paragraph applies where the value of the modification is below both of the following values:
(a) the relevant EU financial thresholds, and
(b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,
provided that the modification does not alter the overall nature of the contract or framework agreement.

Note: If the value attributable to the modification (i) falls below the relevant procurement threshold currently £164,176 (sub-central and NHS Trusts)/£106,047 (central government) for Supplies and Services and £4,104,394 for Works; and (ii) is less than 10% of the initial Contract value for supplies and services Contracts, or 15% of the initial Contract value for a Works Contract then any such modification will not be deemed to be substantial. Again the modification must not alter the overall nature of the contract. It is possible to make more than one modification to a Contract under these circumstances however the cumulative value of the modifications must not exceed the relevant procurement threshold.

06. Variations To Contracts Under The Procurement Regulations

6.9 Regulation 72 (8):

A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph 6.3(e) where one or more of the following conditions is met:

- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have:
 - (i) allowed for the admission of other candidates than those initially selected,
 - (ii) allowed for the acceptance of a tender other than that originally accepted, or
 - (iii) attracted additional participants in the procurement procedure;
- (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (d) the modification extends the scope of the contract or framework agreement considerably;
- (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph 6.3(d).

Note: Regulation 72(8) sets out the circumstances in which modifications will always be considered to be substantial and so require a new procurement. These are:

- *modification renders the Contract materially different in character from the one concluded;*
- *modifications that could have resulted in a different outcome in the Procurement Process; i.e. which would have allowed for the admission of other candidates, acceptance of other tenders, or attracted additional participants in the procedure;*
- *modifications which shift the economic balance of the contract in favour of the Contractor. For example, a price increase could fall into this category;*
- *modifications which extend the scope of the Contract considerably. For example, a substantial increase in the duration or extension of the subject matter of the Contract;*
- *where a new Contractor replaces the original Contractor (other than where this is allowed under Modification 4 above).*

07. Other Feedback

7.1 In compiling this toolkit, beneficial additional comments have been received from various interested parties in the industry. Where appropriate, the comments have been included in the main body of the toolkit. However, a number of additional comments have been re-produced below in order that a balanced reflection of market views is provided and to capture additional points of interest.

7.2 The comments do not necessarily reflect the opinion of Sport England or the authors, but are provided to display the range of views and key issues noted by industry partners.

- All contracts should be market tested and not moved, as happens in many cases, directly from an authority into a 'local authority trust' - The only way to really test value for money and quality of the service is by going to the market
- There is no problem with a 'mixed economy' for service delivery
- Authorities should be considerate of the costs for contractors bidding. This is particularly the case around the legal documentation, contract mark-up etc. This is a very costly area and where possible a fully agreed set of legal documents should only be required when down to the last 1 or 2 bidders or at preferred bidder stage depending on the nature of the contract (this point is reflected in the main toolkit, in relation to needing to be cognisant of bid costs, whilst ensuring procurement regulations are adhered to)
- The Competitive Dialogue process can work well if managed correctly. However authorities need to be aware that due to the increase in the levels of activity in the market and bidders previous experience of Competitive Dialogue processes that have been mismanaged, this may deter companies from bidding for a project where authorities are using the Competitive Dialogue process. In many cases, what an authority may think is a complex challenge is in fact relatively straightforward and does not require a Competitive Dialogue process. It is anticipated that the Competitive Procedure with Negotiation will now become the favoured route.
- Where possible, at least one dialogue session is required. The bidders need to better understand the local authority's objectives, vision and aspiration they also need to see if they are an authority they could work for in 'genuine partnership'. Similarly the local authority also has the opportunity to test the bidders values and understanding of the contract
- The contract needs to be fair, balanced and realistic and not one sided with the contractor having to cost for all the risks, some of which may never be realised. 'Fair' positions on most issues and sensible risk shares adopted is key
- Tracker lists are critical to ensuring issues are addressed and resolved, not forgotten
- The process should be governed by clearly stated deadlines and it would be prudent to seek the bidders input re the

stated deadlines in advance of the commencement of the process. Instead of trying to enforce timelines that the local authority wants to run with, the local authority should agree with bidders a realistic timeline. With a long procurement process account can be taken of national holidays and annual leave etc for both parties

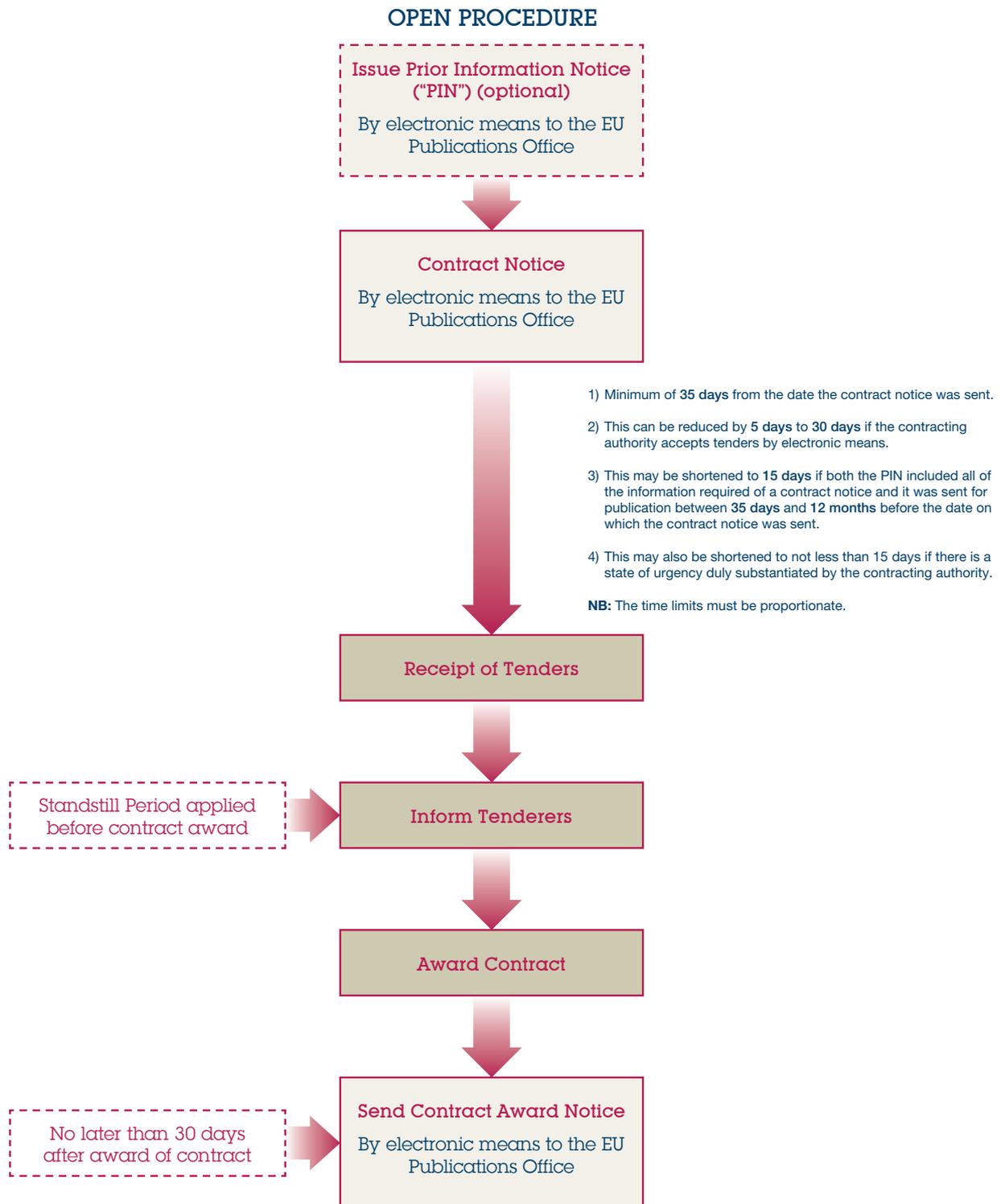
- No more than 2 bidders should be invited to participate in the final stages of the process, given the costs and workload involved on both sides
- Monitoring and financial adjustment performance mechanisms need to be thought through from a practical/operational point of view. For example, if the contract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

08. Acknowledgements

Sport England would like to thank the following parties for their time and contributions to development of the toolkit and associated template documentation:

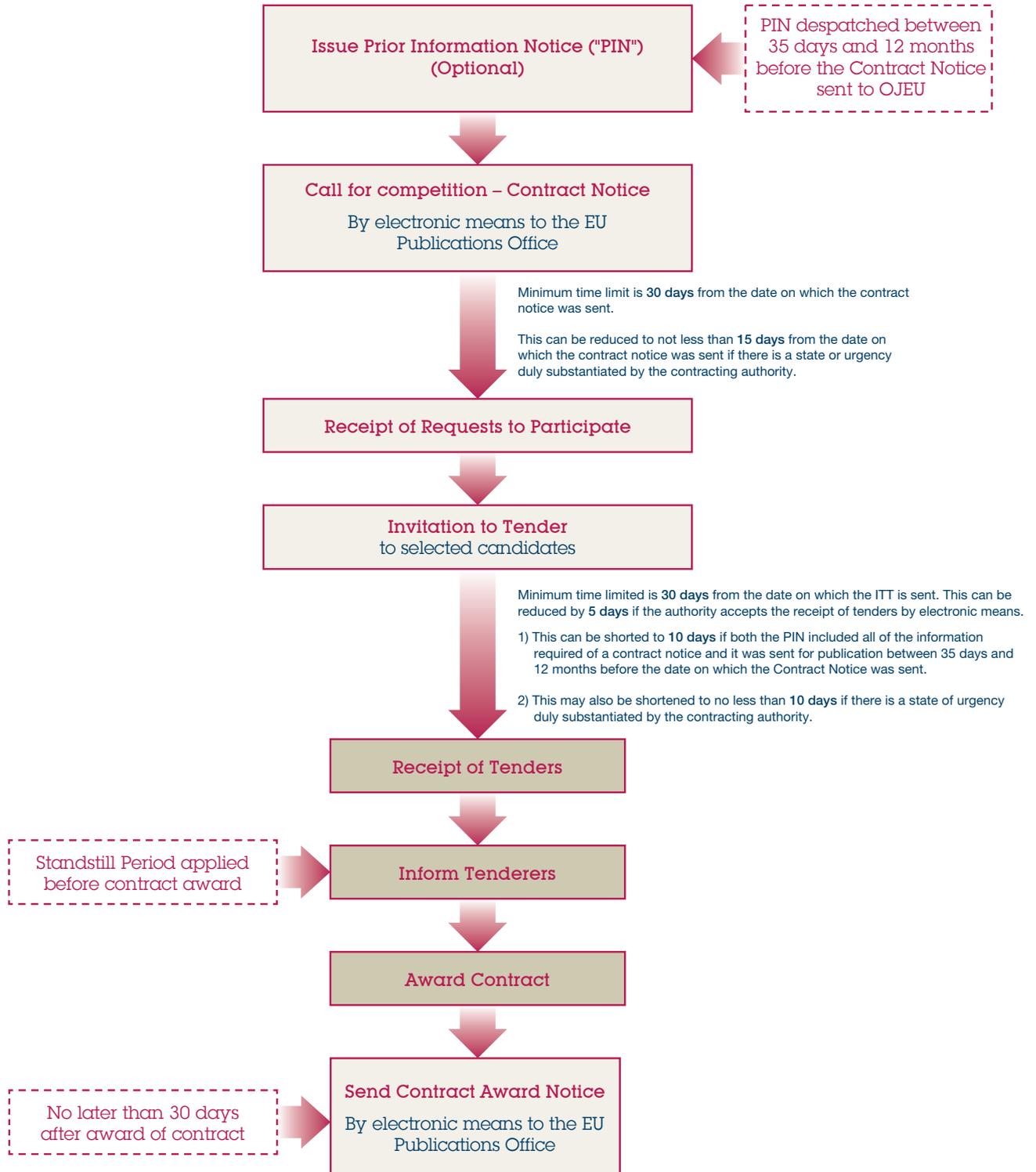
- FMG Consulting & Nabarro LLP, who have developed and drafted the toolkit and associated contracts and schedules on Sport England's behalf.
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 - Bevan Brittan LLP
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 - Freeths LLP
 - Greenwich Leisure Limited
 - Neil Allen Associates
 - Leonie Cowen & Associates
 - Manchester City Council
 - MAX Associates
 - Oldham Council
 - Parker Arrenberg LLP
 - Parkwood Leisure
 - Pinsent Masons LLP
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 - Sandwell Borough Council
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 - Stoke on Trent Public Health Team
 - Strategic Leisure
 - The Sports Consultancy
 - The Sport, Leisure & Culture Consultancy
 - Torkildsen Barclay
 - Vision Redbridge
 - 1Life.

Annex 1 – Procurement Process Diagrams



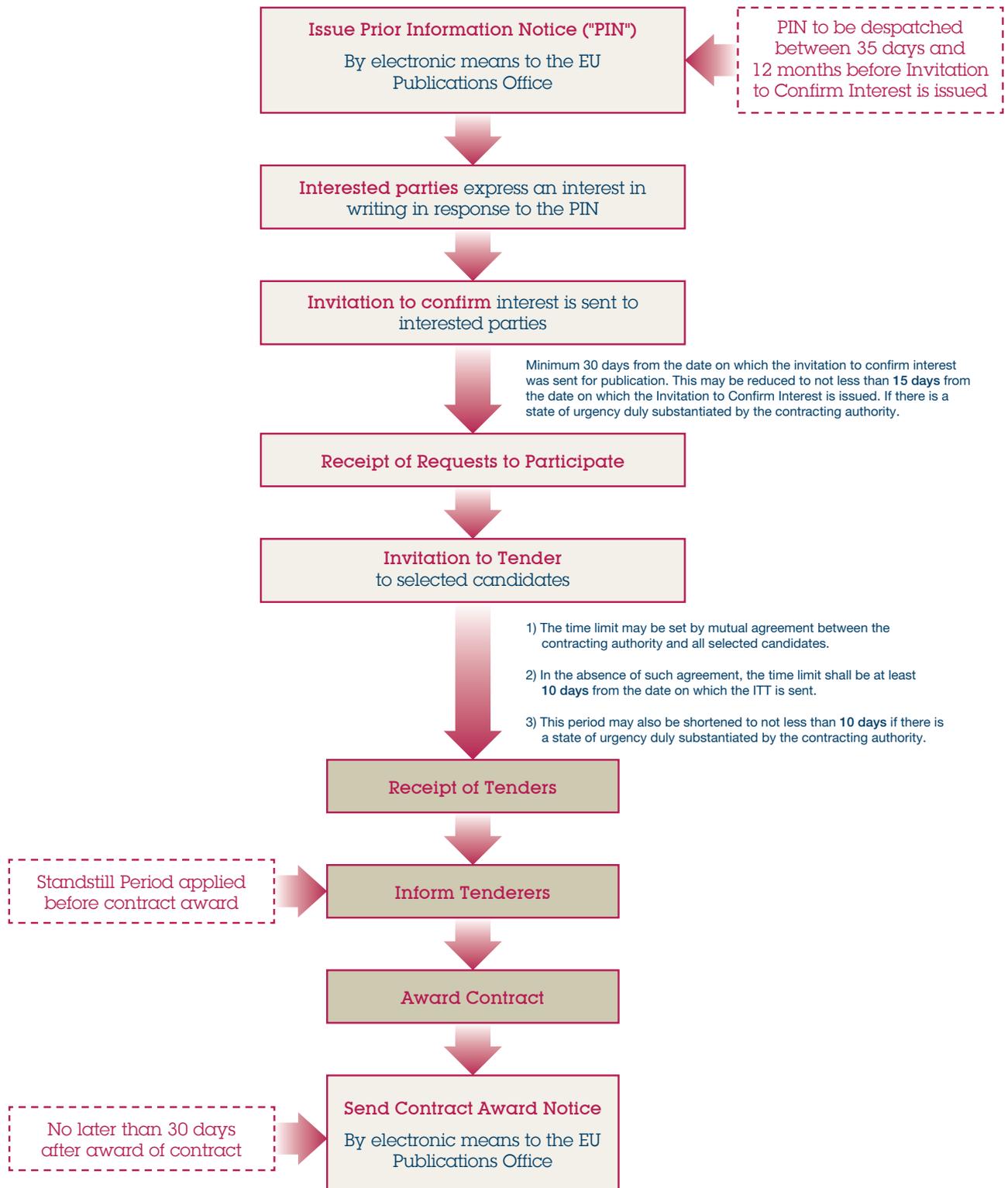
Annex 1 – Procurement Process Diagrams

RESTRICTED PROCEDURE (USING A CONTRACT NOTICE AS A CALL FOR COMPETITION) (applicable to central or sub-central authorities)



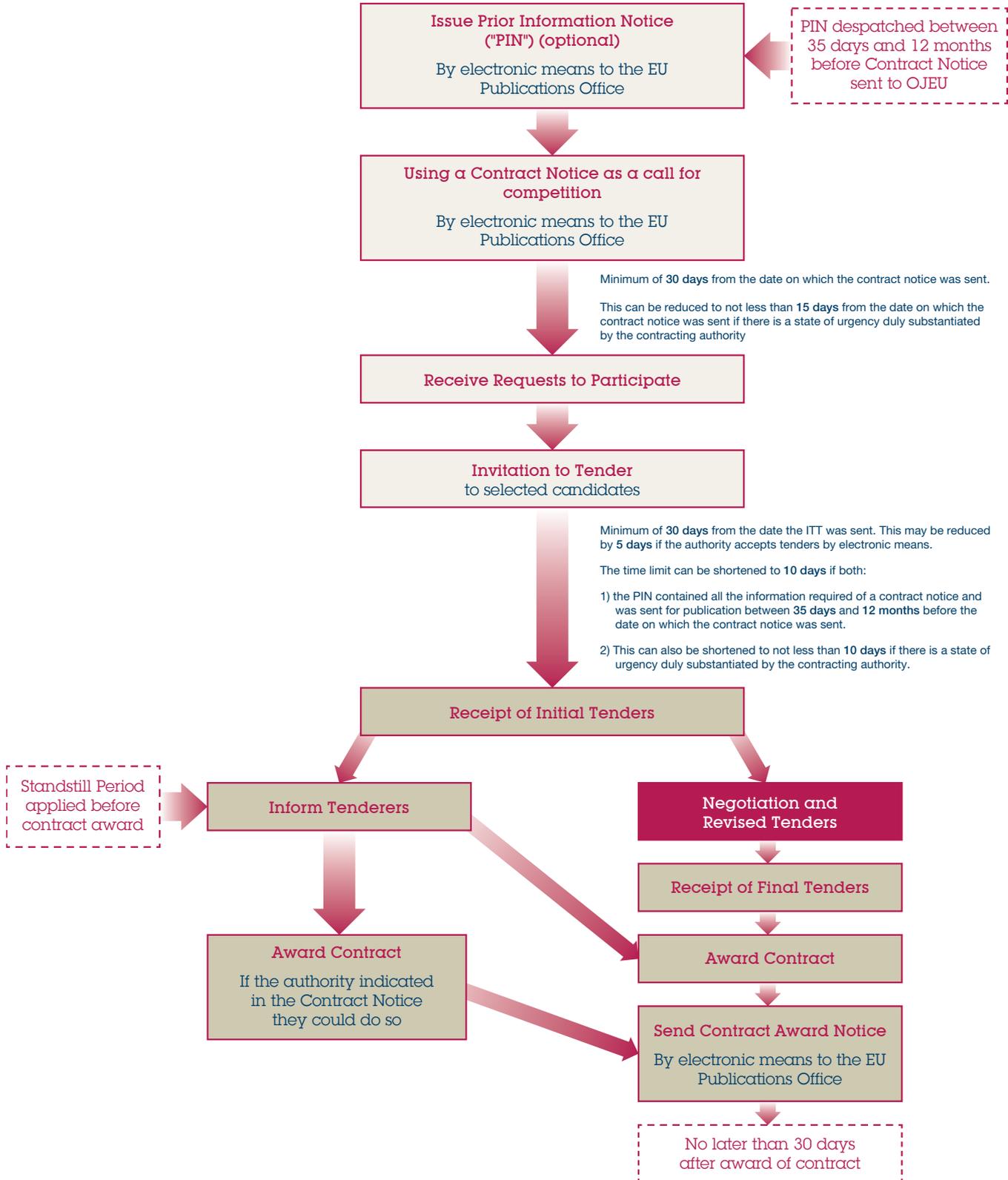
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RESTRICTED PROCEDURE (USING PIN AS A CALL FOR COMPETITION) (available for sub-central authorities only)



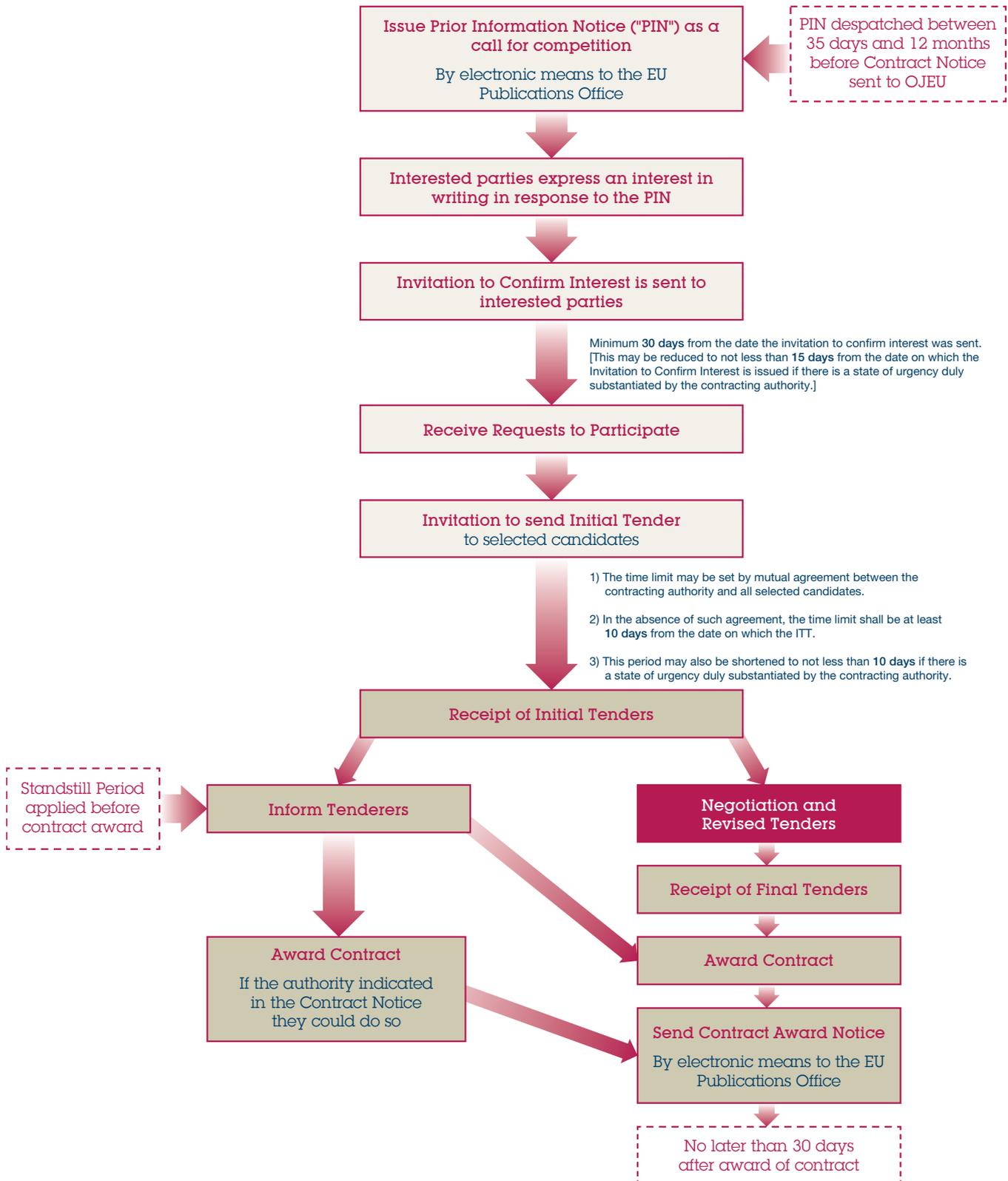
Annex 1 – Procurement Process Diagrams

COMPETITIVE PROCEDURE WITH NEGOTIATION (USING A CONTRACT NOTICE AS A CALL FOR COMPETITION) (applicable to central or sub-central authorities)



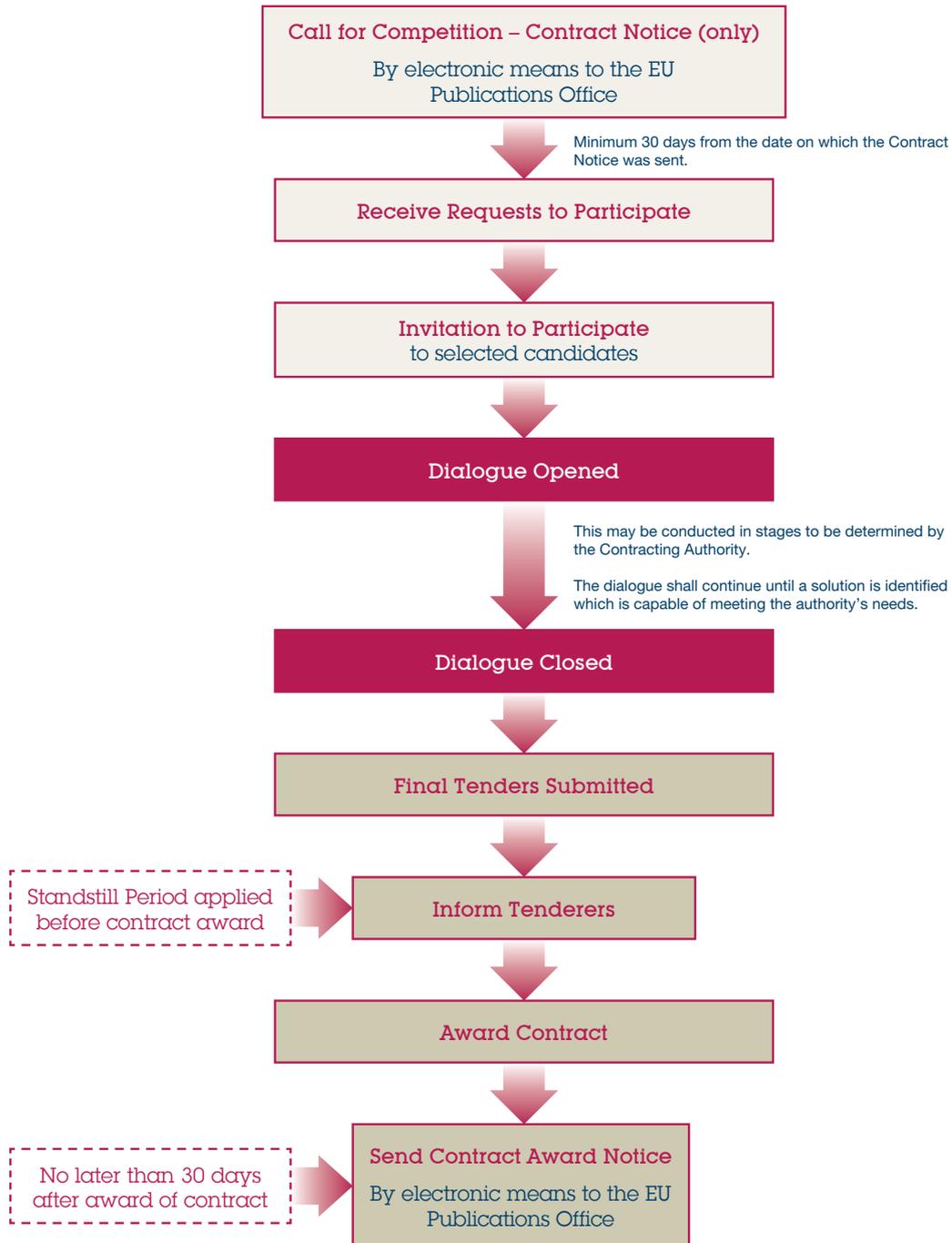
Annex 1 – Procurement Process Diagrams

COMPETITIVE PROCEDURE WITH NEGOTIATION (USING PIN AS A CALL FOR COMPETITION) (for use by sub-central authorities only)



Annex 1 – Procurement Process Diagrams

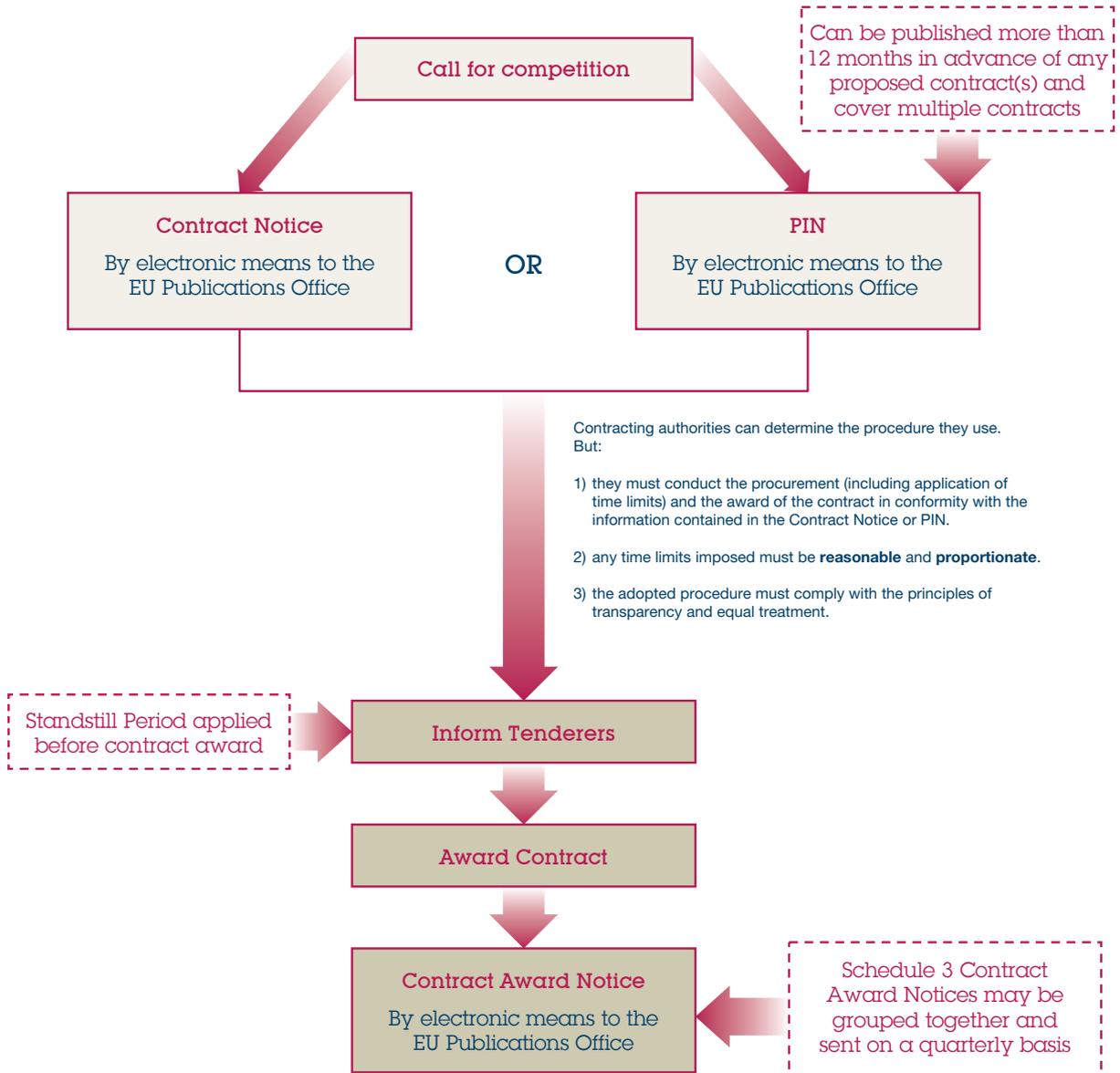
COMPETITIVE DIALOGUE



Annex 1 – Procurement Process Diagrams

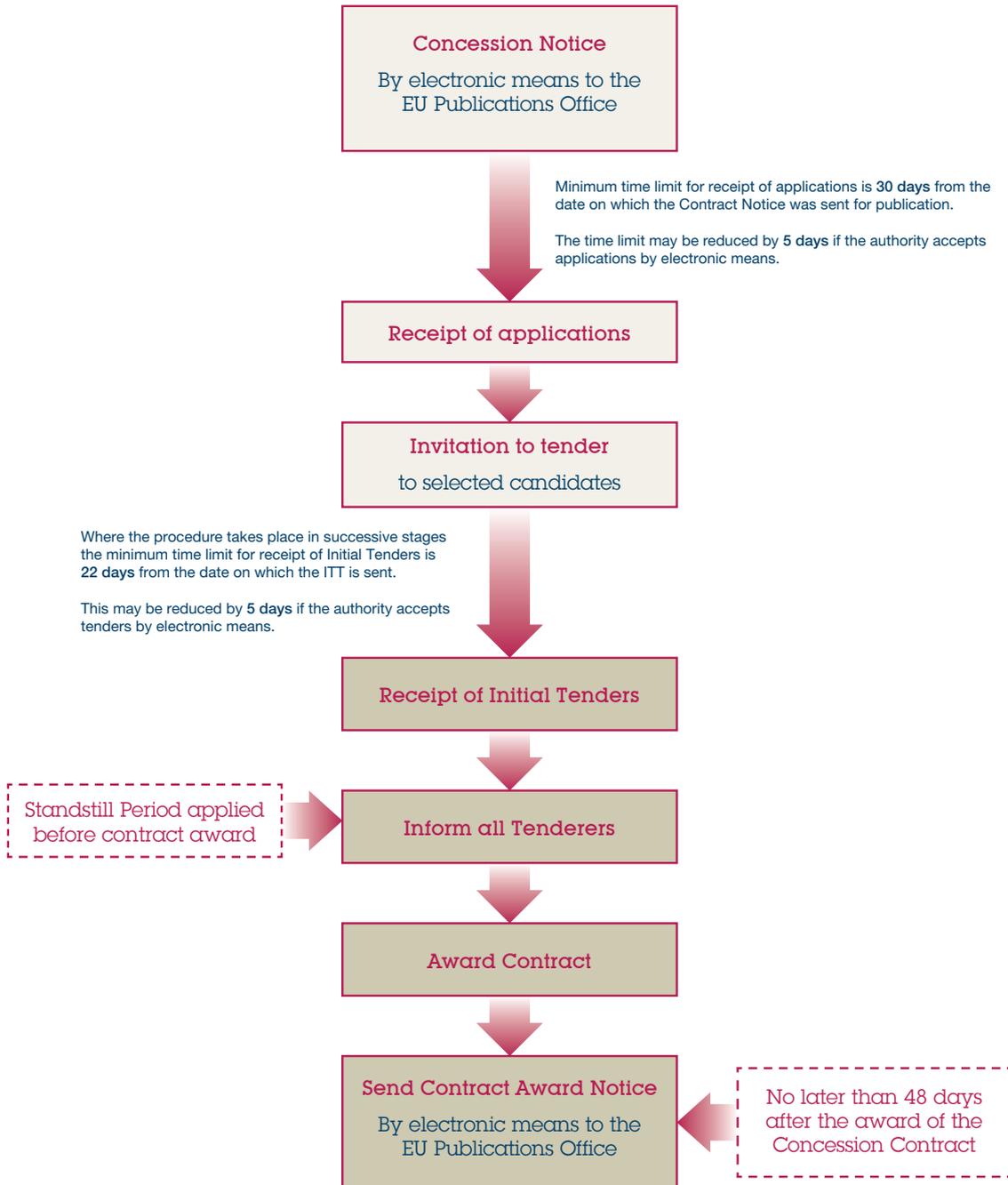
LIGHT TOUCH REGIME

(applies to contracts which fall under Schedule 3 of the Public Contracts Regulations 2015)



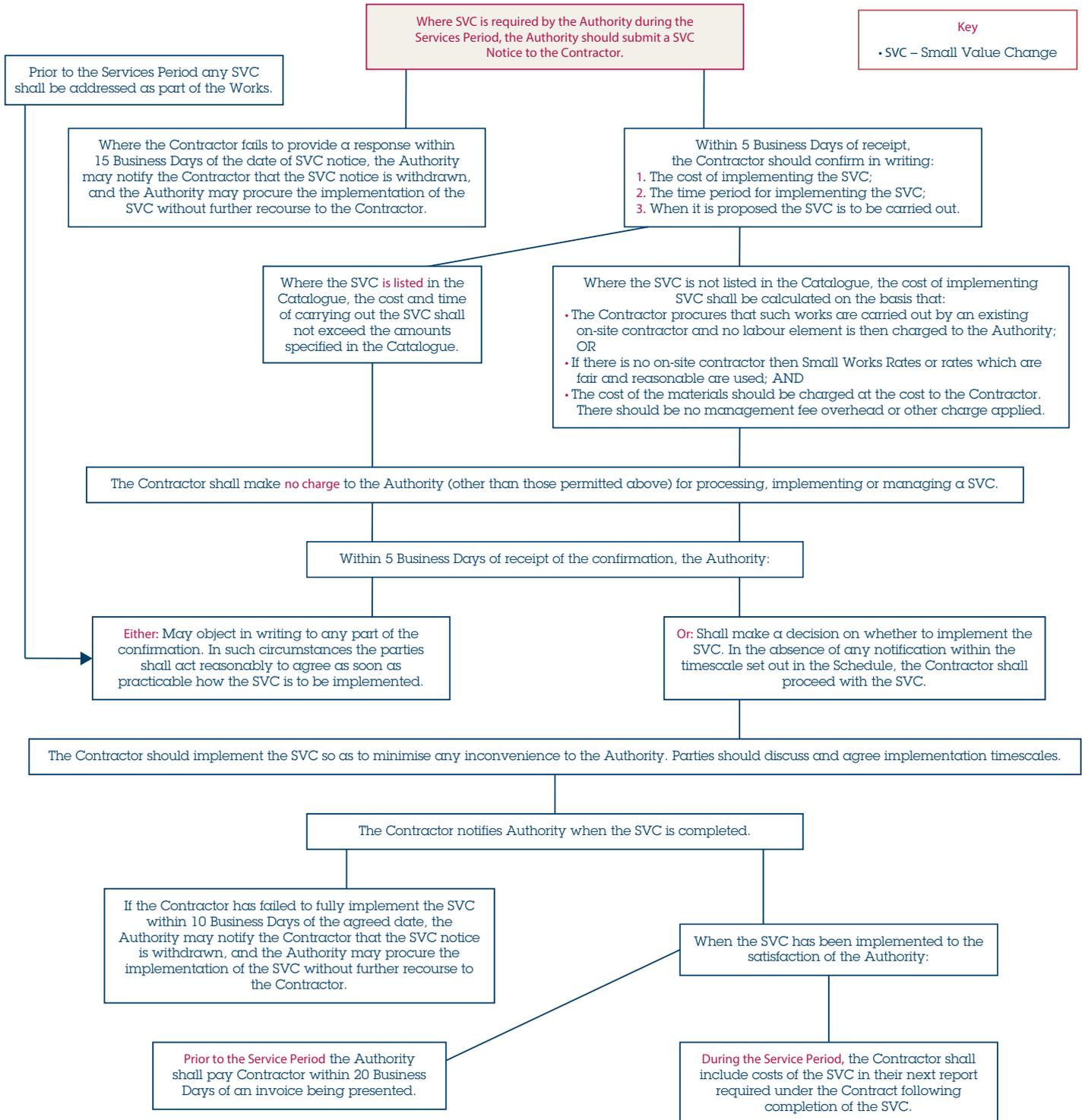
Annex 1 – Procurement Process Diagrams

CONCESSION CONTRACTS



Annex 2 – Change Protocol Diagrams

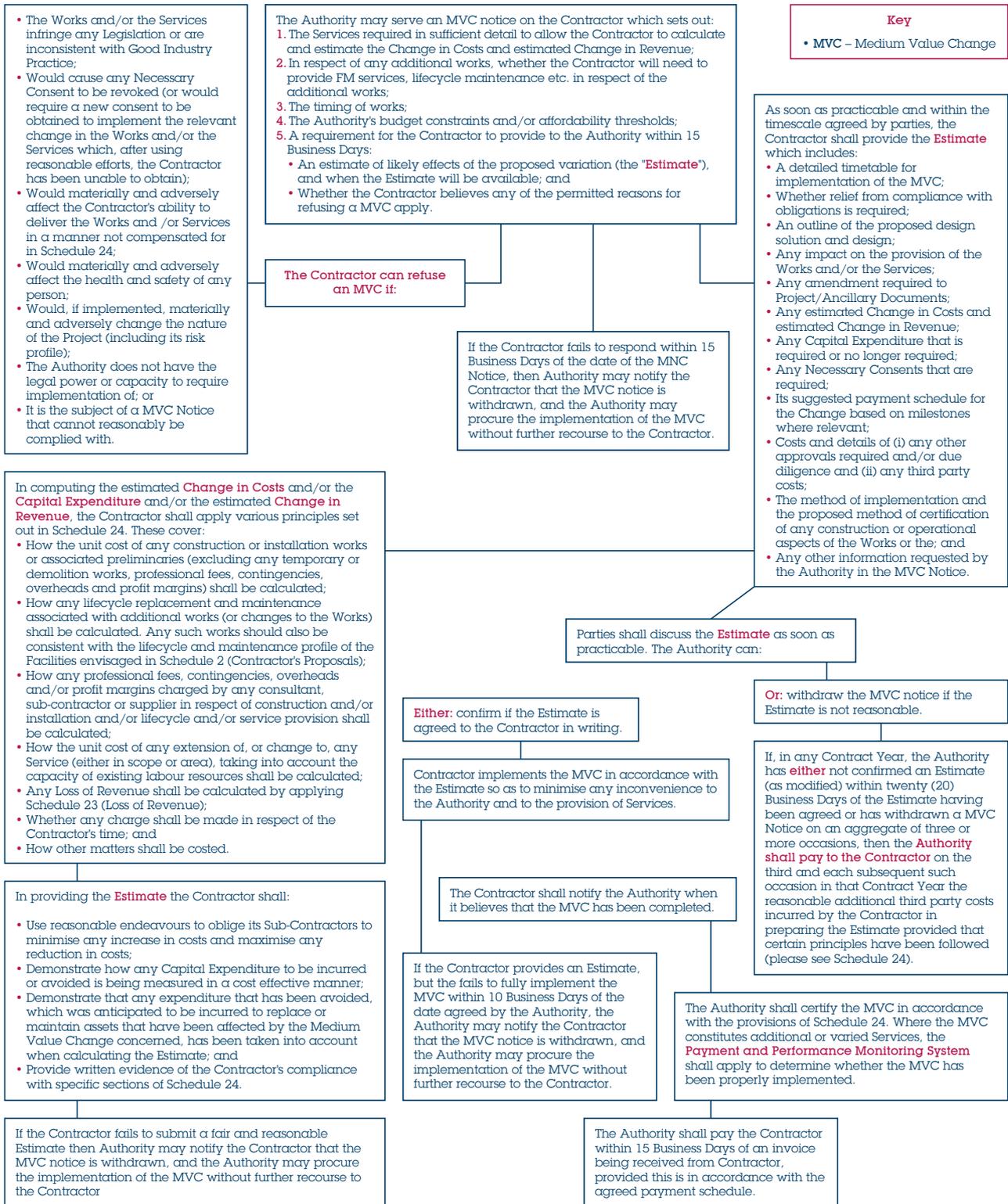
SMALL VALUE CHANGES – DBOM



NOTE: Schedule 24 deals with how and when the catalogue should be updated
See Schedule 24 for notes on due diligence required and/or amendments to Project Documents.
This should be read alongside the Change Process (Schedule 24) and is intended only to be a very high level summary. Any local authority or organisation or other person in receipt of this template documentation should take their own legal, financial and other relevant professional advice when considering the Change Process.

Annex 2 – Change Protocol Diagrams

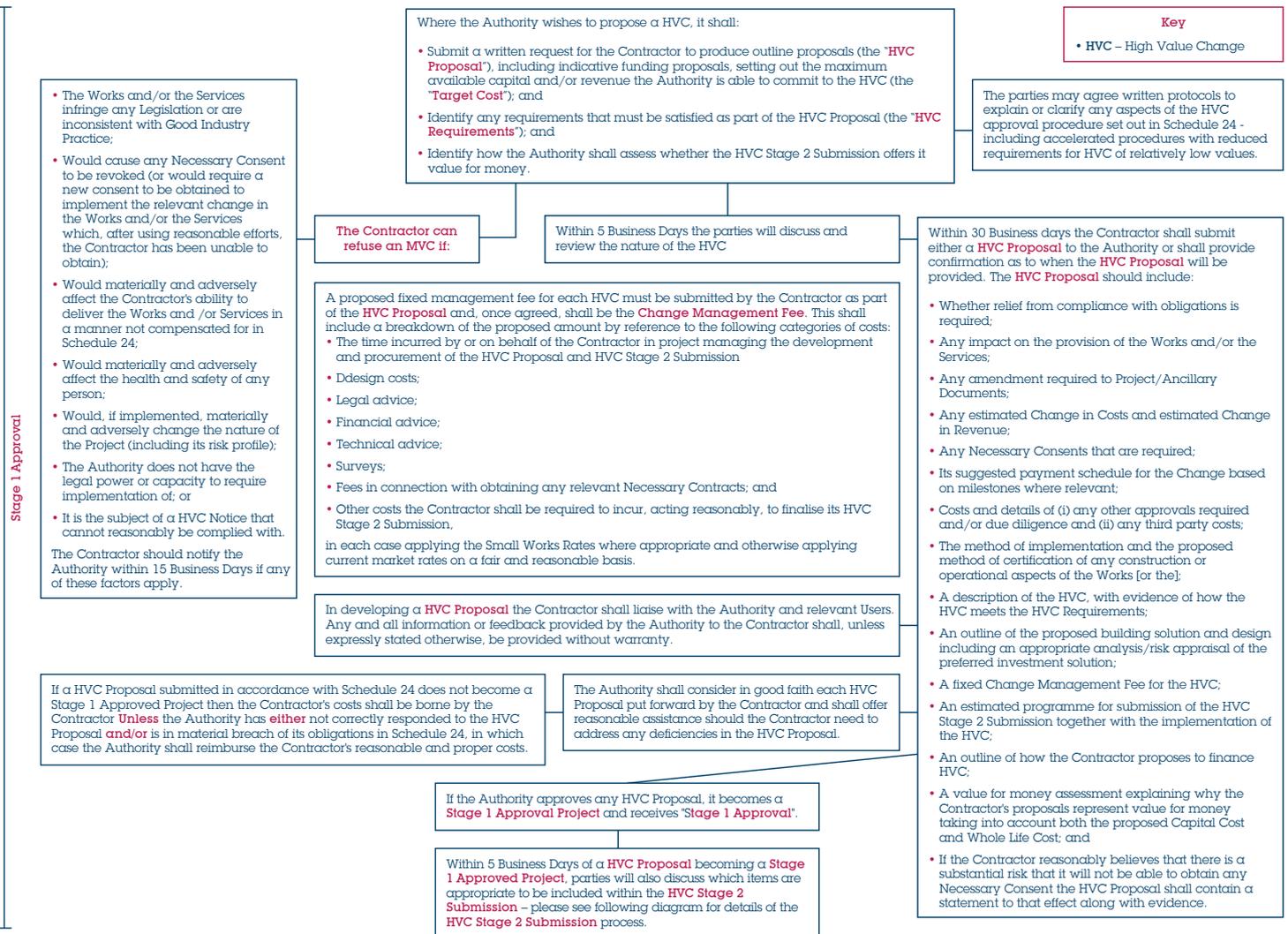
MEDIUM VALUE CHANGES



NOTE: See Schedule 24 for notes on due diligence required and/or amendments to Project Documents
 Any adjustment to the Annual payment shall be calculated in accordance with the Financial Adjustments clause
 This should be read alongside the Change Process (Schedule 24) and is intended only to be a very high level summary. Any local authority or organisation or other person in receipt of this template documentation should take their own legal, financial and other relevant professional advice when considering the Change Process.

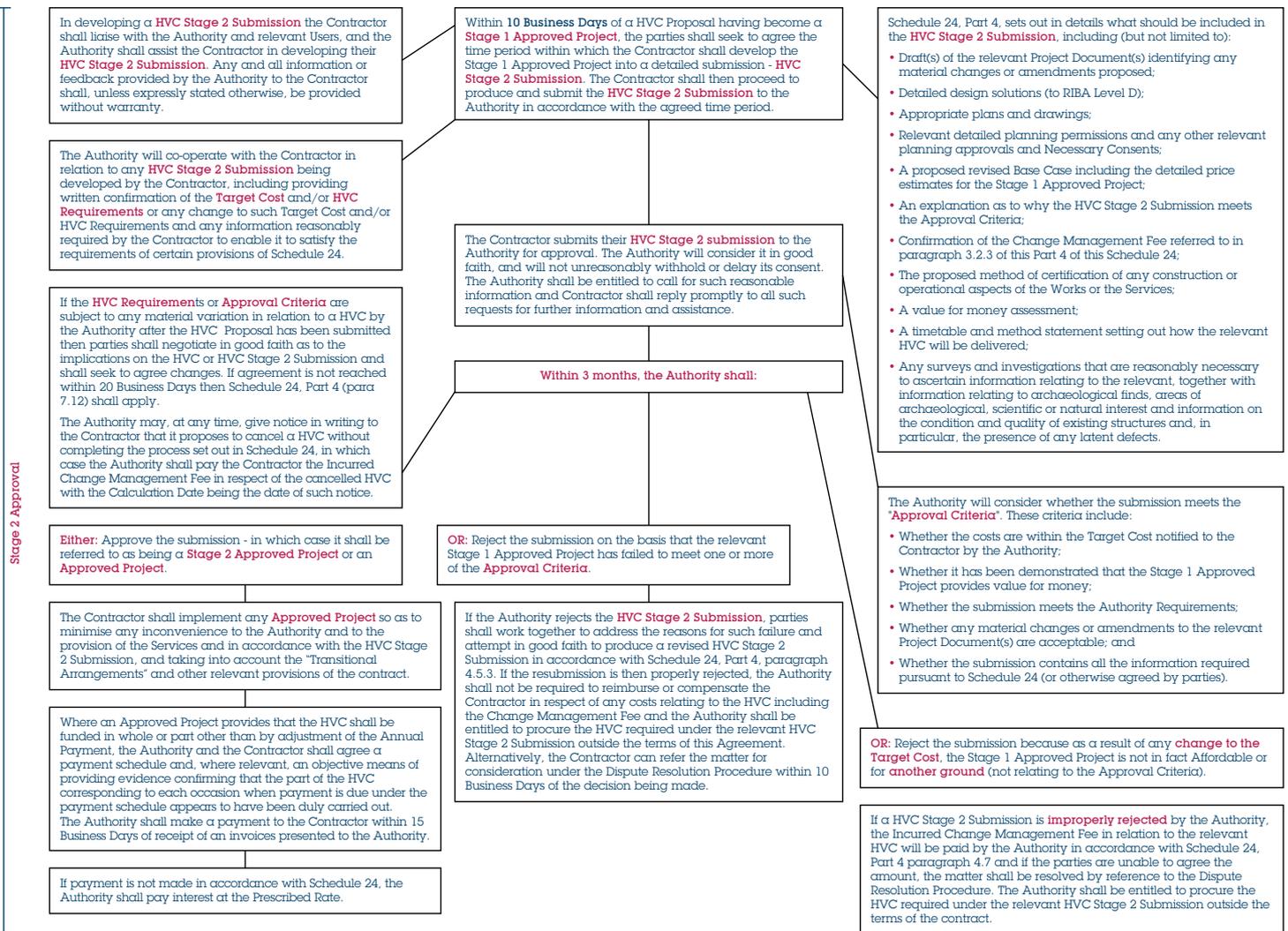
Annex 2 – Change Protocol Diagrams

HIGH VALUE CHANGES



Annex 2 – Change Protocol Diagrams

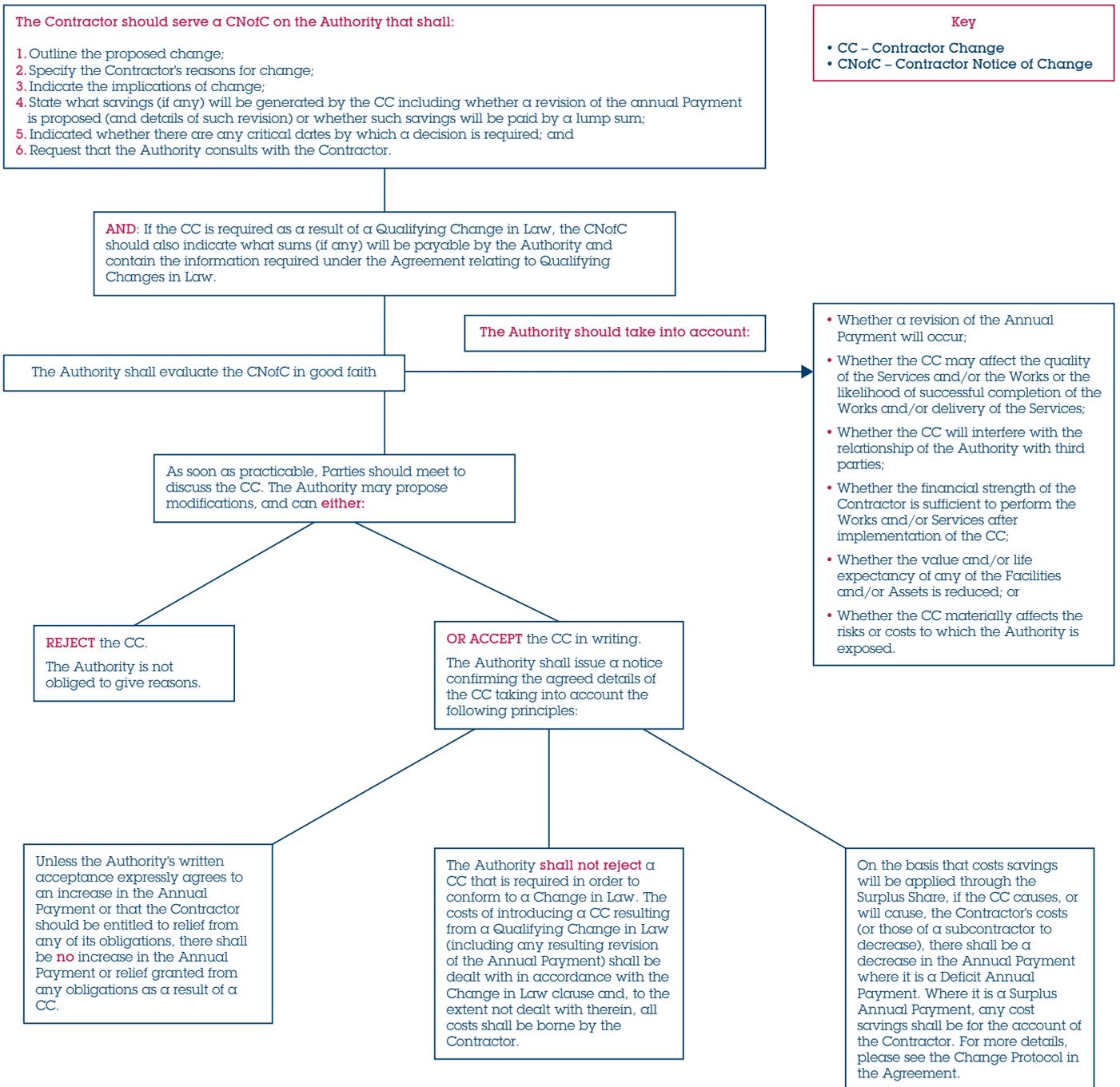
HIGH VALUE CHANGES



NOTE: See Schedule 24 for notes on due diligence required and/or amendments to Project Documents
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 Parties should co-operate and provide the relevant information in accordance with Schedule 24, Part 4 paragraph 8.
 If the above timescales are not complied with in relation to approving a HVC Proposal or HVC Stage 2 Submission, parties should refer to Schedule 24, Part 4 paragraph 5.

Annex 2 – Change Protocol Diagrams

CONTRACTOR CHANGES



NOTE: This should be read alongside the Change Process (Schedule 24) and is intended only to be a very high level summary. Any local authority or organisation or other person in receipt of this template documentation should take their own legal, financial and other relevant professional advice when considering the Change Process