



THE SCOTTISH OFFICE

NHS
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National Health Service in Scotland Management Executive

St. Andrew's House
Edinburgh EH1 3DG

Dear Colleague

SELECTING ADVISERS ON PRIVATE FINANCE PROJECTS

Summary

1. The purpose of this Circular is to set out the principles which Health Boards and NHS Trusts should expect to follow in selecting advisers on private finance projects. The attached guidance has been prepared by the Treasury's Private Finance Unit with the help of the Private Finance Panel Executive and others.

Background

2. The guidance covers:

- *the decision on whether to appoint advisers;
- *identifying candidates;
- *awarding contracts, including points in letter of award; and
- *source of advice.

Although the guidance is not being published or circulated to private sector contracts, it can be regarded as an "open" document. Copies (without this covering Circular) may be given as appropriate to private sector contracts.

Action

3. Please ensure that this circular is seen by all those concerned with private sector finance projects or proposals for them.
4. Please copy this Circular to Health Board Directors of Finance and Unit General Managers for information.

Yours sincerely

JOHN ALDRIDGE
Acting Director of Finance

21 November 1994

Addressees

For action:

General Managers,
Health Boards

General Manager,
Common Services Agency

General Manager,
State Hospital

General Manager,
Health Education Board
for Scotland

Chief Executives,
NHS Trusts

To be copied to:
Directors of Finance,
Health Boards and
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SELECTING ADVISERS ON PRIVATE FINANCE PROJECTS

Guidance for Departments

September 1994

Purpose

This note concerns the broad principles which departments should expect to follow in selecting advisers to work on projects under the private finance initiative. It should be read in the light of the recommendations, which the Government has accepted, of the report of the Multidepartmental Scrutiny on the Government's Use of External Consultants (HMSO, August 1994). Departments are encouraged to consult the Private Finance Panel Executive and the Treasury on the terms of reference given to advisers.

2. Departments will be aware that contracts for advisory services may be subject to the Public Services Contracts Regulations 1993 implementing the EC Services Directive. The relevant requirements include the use of prescribed procedures for the award of contracts in certain cases. General guidance is being issued separately on how EC rules are likely to apply to private finance projects.

3. Contact points are given under "Sources of advice" in paragraphs 19-23 below.

Obtaining external advice

4. Departments should ensure from the earliest stage of private finance projects that appropriate advice is available, giving consideration first to the availability and suitability of in-house resources. Depending on the size and complexity of a project there may be a case for appointing external advisers. Before this is done the potential benefits should be considered in relation to the likely costs. The purpose of obtaining external advice may include that of benefiting from experience of work on other private finance projects.

5. If it is decided to use external advisers when the feasibility of a project is being considered, these should normally be limited to financial advisers (merchant bank, management consultant or accountant). The purpose should be to carry out a limited study as the basis for Ministers' decision on whether to proceed.

6. If Ministers decide to proceed, departments should consider in the light of paragraph 4 above whether to appoint external financial and/or legal advisers. Their task should be to advise on the contracting process from competitive procedures through contract negotiation to the completion of contracts. In certain cases, appointment of other, more specialist advisers (such as a property or information technology adviser) may be appropriate.

7. The objective in all cases should be to ensure before a project goes ahead that an acceptable structure of risk and reward is set out in specific and clear terms in the legal documentation.

Identifying candidates

8. The Treasury's Private Finance Unit is establishing a "Directory of Advisers" to show work done by advisers on private finance projects. Departments may wish to consult this directory before identifying possible candidates for further appointments¹. However, firms should not be ruled out simply because they do not have experience of work on private finance or privatisation. Departments may decide in the case of significant contracts to invite expressions of interest by advertisement, and may be obliged in some cases to do so by EC rules (see paragraph 2).

9. In the case of **financial advisers** the department should be looking to firms which have a detailed knowledge of project finance and experience in dealing with public sector bodies.

10. **Legal advisers** will only normally be contracted after the feasibility of a project has been confirmed. In the first instance a department should ask their own legal advisers to consider which firms would be best suited. Treasury Solicitor may be consulted by departments' internal advisers about possible candidates.

¹ The directory will be available to departments shortly. The Treasury is discussing with DTI the relation of the directory to the single database of consultants proposed in the report of the Multidepartmental Scrutiny.

11. Departments should look in appointing legal advisers for:

- experience in dealing with the specific areas involved in the project (for example, in a project involving information technology a firm should have experience of the IT industry);
- a good understanding of EC procurement law;
- a working knowledge of construction law, commercial contract law and tax law;
- a good background in project finance and banking;
- a working knowledge of employment law, specifically in relation to public sector employees; and
- a familiarity with local authority vires issues.

Obviously, departments will need to consider which of the above requirements are most important to their specific projects.

12. Departments are likely themselves to be in the best position to draw up lists of potential specialist advisers. If not, the Central Unit on Procurement may be a useful initial contact.

Awarding contracts

13. Possible candidates should be sent a list of questions relevant to the work, and invited to provide details of their expertise and relevant experience, including that on previous private finance projects. The short-list drawn up for interview should normally number three or four. Departments may wish to invite the relevant Treasury Expenditure Division to be represented on interview boards for financial advisers. Treasury Solicitor may be willing to take the lead in selecting legal advisers, if departments so wish in a particular case.

14. During the selection process departments should invite firms to provide details of the resources the firm would devote to the task, including the names, qualifications, experience and status of the staff they propose to use. In particular they should obtain a statement of the commitment which would be given by key members of the team and the roles they would have. Relevant details should be recorded in letters awarding contracts.

15. Departments are also advised to include in appropriate award letters a statement that the client has relied upon the representations and warranties contained in written presentations relating to suitability and appropriateness, and shall read and construe them as if specifically incorporated in the letter of award.

16. Departments should in all cases aim to procure services which are cost-effective and of the right professional quality. They should be aware that relying on a single firm to provide advice on a project for a significant period of time and in the formative phases could, in certain circumstances, give that firm a significant advantage over its competitors. The resulting barrier to entry could enable that firm to charge higher fees than would otherwise have been possible.

17. There should be a clear understanding recorded about the ownership of intellectual property resulting from the work being undertaken. Ownership should normally lie with the client department.

18. Departments should make every effort to ensure that a firm providing advice does not advise other clients in a manner prejudicial to the proper interests of the department concerned.

Sources of advice

19. The Private Finance Panel Executive is ready to advise departments on the use of external advisers for particular projects and on suitable terms of reference. Departments should consult their normal contact on the Executive or **Barry Williams** (071 222 4080). Those responsible for projects will also wish to consult the centres of expertise in purchasing consultancy within each department.

20. As well as maintaining a directory of advisers appointed to advise on private finance projects, the Treasury's Private Finance Unit can indicate the rates normally charged by different types of advisers. Contact: **Barbara Mascetti** (GTN (or 071) 270 5527).

21. Detailed advice on contract terms and conditions for procurement of services is contained in CUP Guidance No 42, "Contracting for the Provision of Services", September 1993. Copies are available from the Treasury Publishing Unit (GTN (or 071) 270 4558).

22. The separate guidance on how EC rules are likely to apply to private finance projects will be circulated shortly to departments. Copies will also be available from **Barbara Mascetti** (number as above).

23. Other useful contacts are as follows:

Accountancy advice Stephen Smith
 Accounting Policy Division
 Treasury (GTN (or 071) 270 1764)

Legal services Eric Gray
 Lawyers' Management Unit
 (GTN (or 271) 210 3392)

General issues on services Barrie Ashford
 Central Unit on Procurement
 GTN (or 071) 270 1633)

EC procurement rules Dick Meadows
 Public Sector Procurement
 Division, Treasury
 (GTN (or 071) 270 1650).