

**Procurement**  
Procurement Policy Note

## Procurement Policy Note – Taking Account of Bidders' Past Performance

Action Note 09/12 08 November 2012

### Issue

- 1) This Procurement Policy Note ("**PPN**") sets out Government policy to ensure bidders' past performance is taken into account in certain future Government procurements.
- 2) This PPN will initially apply to Departments, their Executive Agencies and Non Departmental Public Bodies ("**NDPBs**") (together "**Departmental Bodies**") when procuring goods and/or services in respect of information and communications technology, facilities management or business processing outsourcing with a total anticipated contract value of £20 million or greater (excluding VAT). This PPN applies in relation to Framework Agreements only where it is anticipated that there will be Call-off Agreements in respect of such goods and/or services with an individual anticipated value of £20 million or greater (excluding VAT). The application of this PPN beyond its initial scope will be kept under review.
- 3) Since this PPN sets out the Government's view of procurement best practice on how Departmental Bodies are to apply minimum standards for reliability based on past performance, contracting authorities other than Departmental Bodies and contracting authorities procuring goods, services and works outside the scope of this PPN may wish to apply the principles set out in this PPN with suitable modifications.
- 4) The purpose of this PPN is to provide guidance for future procurements on how Departmental Bodies are to apply minimum standards for reliability based on past performance. Departmental Bodies should note that, although the application of minimum standards for reliability is important, it is only one aspect of the overall assessment of the suitability of bidders in any procurement. Departmental Bodies should, therefore, seek information as to all other aspects of bidders' technical or professional ability (for example, experience and resources) as well as their economic and financial standing and assess these against relevant standards.
- 5) In setting and applying minimum standards for reliability based on past performance, and in assessing all other aspects of a bidder's suitability to be awarded a public contract, Departmental Bodies are reminded of the requirement to observe the fundamental principles of equal treatment and non-discrimination, transparency and proportionality.
- 6) This PPN is supplementary to, and should be implemented alongside, existing guidance in relation to selection documentation. See <http://www.cabinetoffice.gov.uk/resource-library/procurement-policy-note-0112-use-pre-qualification-questionnaires>. The standard Government PQQ will be updated to reflect the contents of this PPN and re-issued in due course.

## Timing

- 7) This PPN applies from 8 November 2012 to the award of all in-scope stand-alone public contracts and Framework Agreements (as set out in paragraph 2 above) for which an OJEU Notice has not yet been published

## Dissemination

- 8) Please circulate this PPN within your Department and to its Executive Agencies and NDPBs. An electronic copy can be accessed at <http://www.cabinetoffice.gov.uk/resource-library/type/1384>.

## Contact

- 9) Enquiries about this PPN should be addressed to the Cabinet Office Service Desk on 0845 000 4999 or via [servicedesk@cabinet-office.gsi.gov.uk](mailto:servicedesk@cabinet-office.gsi.gov.uk)
- 10) The Cabinet Office is keen to receive feedback on this policy as it is applied in order to improve its application. Feedback should be directed to the Cabinet Office Service Desk entitled "Supplier Performance - Feedback". The Cabinet Office will also be monitoring compliance with this PPN.

## Summary of Approach

- 11) Under Directive 2004/18/EC and the Public Contracts Regulations 2006 ("**Regulations**"), contracting authorities are entitled to establish minimum standards of technical or professional ability (including minimum standards for reliability based on past performance) which must be met by potential bidders for public contracts.
- 12) To ensure consistently good delivery of public services and value for money, it is important that bidders with the requisite standards of technical and professional ability are selected. In the past, there has not always been a consistent approach to the consideration of the past performance of bidders to ascertain whether they can confidently be relied on to perform the obligations under the contract to be awarded.
- 13) Accordingly, to provide greater assurance about performance and greater protection for the taxpayer and recipients of the services they provide, Departmental Bodies should in future procurements include minimum standards for reliability based on past performance. As explained in paragraphs 23 - 25 of this PPN, Departmental Bodies should ask for specified information (which will include certificates of performance) about past performance in the last 3 years. They should then satisfy themselves:
  - a) that the principal contracts of those who would provide the goods and/or services have been satisfactorily performed in accordance with their terms; or
  - b) where there is evidence that this has not occurred in any case, that the reasons for any such failure will not recur if that bidder were to be awarded the relevant contract.
- 14) If the Departmental Body remains unsatisfied that the principal contracts of those who would provide the goods and/or services have been satisfactorily performed, it should exclude that bidder on the grounds that it has failed to meet the minimum standards of reliability set.

- 15) The other aspects of technical and professional ability of all remaining bidders who have met the minimum standards of reliability should then be assessed by the Departmental Body as specified in its procurement documentation.

### Summary of Actions

- 16) In order to implement this PPN, procuring Departmental Bodies should:
- a) include a paragraph informing bidders of the policy set out in this PPN in all relevant procurement documentation (see Annex 1);
  - b) specify the minimum standards relating to past performance and information required in relation to these standards in OJEU Notices/adverts (see paragraph 22 of, and Annex 2, to this PPN);
  - c) incorporate the same minimum standards and requests for evidence from bidders in other documentation relating to the selection stage (for example, PQQs or ITTs depending on which procedure is adopted);
  - d) where appropriate, verify information provided by any bidder in relation to past performance by checking with any reasonably available source of information, giving that bidder an opportunity to make representations on any further information so obtained (see paragraphs 31 - 35 of this PPN);
  - e) having considered the information provided by bidders and any further information obtained following any verification undertaken of the evidence provided by bidders, apply the minimum standards for reliability based on past performance to exclude bidders which fail to meet them;
  - f) assess whether a bidder continues to meet the minimum standards for reliability at specified subsequent stages in the procurement process, where appropriate, taking into account updated performance evidence from bidders (see paragraphs 40 - 42 of this PPN); and
  - g) include wording in new Framework Agreements and related OJEU Notices to allow the Framework Agreement owner to re-assess compliance with the minimum standards in relation to past performance upon request from a Call-off Agreement user (see paragraphs 43 - 47 of, and Annex 5 to this PPN).
- 17) In order to support procuring Departmental Bodies in their implementation of this PPN, Departmental Bodies should (in their capacities as customers) provide certificates of performance to their suppliers on request in the form appended to Annex 3 ("**Certificates**"). A copy of each Certificate issued should also be sent to the Cabinet Office, since the Cabinet Office will be establishing a central repository of Certificates and other information which will enable Departmental Bodies, where appropriate, to verify the information provided by bidders to show that they meet the minimum standards for reliability. Certificates may also contain information which the Cabinet Office will find useful in its co-ordination of the more active steps to be taken to improve the performance of the Government's major suppliers: see note *Strategic Supplier Risk Management Policy* at <http://www.cabinetoffice.gov.uk/content/crown-representatives>.
- 18) In order to support Departmental Bodies in the provision of Certificates, Departmental Bodies should ensure that wording is included in all relevant procurement documentation such as PQQs and ITTs in the form set out in Annex 6 to this PPN.

## **Actions to Take During in-Scope Procurements**

- 19) The actions Departmental Bodies should take at each stage of the procurement process in relation to in-scope procurements are set out below.

### ***Informing bidders of the policy***

- 20) A paragraph informing bidders of the policy set out in this PPN should be included in all relevant procurement documentation, such as PQQs and ITTs, and other appropriate correspondence with bidders, to ensure they are aware of Government's approach to managing supplier performance. Template wording is included at Annex 1 to this PPN.

### ***Pre-procurement***

- 21) Departmental Bodies should ensure that sufficient early market engagement takes place before publication of an OJEU Notice to ensure a broad range of suppliers is likely to bid during the subsequent competition. This will minimise the risk that only a small pool of suppliers may bid for the work and thereby reduce the risk that the interest expressed in being awarded the contract will come only from suppliers whose past performance is such as to not qualify them as suitable to be awarded the contract being procured.

### ***OJEU Notice***

- 22) Minimum standards which bidders have to meet, including those relating to reliability based on past performance, must be stated in the OJEU Notice along with details of the information required for the Departmental Body to assess whether or not a bidder meets those minimum standards. These must be based on the principal goods and/or services delivered in the previous 3 years and certify that they have been provided satisfactorily in accordance with the contracts in question. Departmental Bodies should tailor the minimum standards and information requests to suit their particular procurement. Template wording that can be used by Departmental Bodies with appropriate modifications and related guidance are set out in Annex 2 to this PPN.

### ***Evidence required***

- 23) Pursuant to the OJEU Notice and procurement documentation each bidder should provide a list comprising a statement of the principal goods sold and/or services provided by the bidder in the previous 3 years. Departmental Bodies should consider whether this statement should be limited to particular categories of such principal goods sold and/or services provided, so as to provide more focussed evidence and a less demanding requirement for information on bidders.
- 24) Each bidder should attempt to obtain Certificates from those to whom the goods and/or services on the list were provided. If any such Certificate cannot be obtained, the certification may be provided by the supplier itself.
- 25) If the Certificate (whether provided by the recipient or the supplier) does not state that the goods and/or services have been provided satisfactorily in accordance with the terms of the contract under which they were to be provided, bidders should provide information to show that the reason or reasons for such failure will not recur in the performance of the contract being procured.

### ***Consortia, sub-contractors and successor entities***

- 26) It is possible that a bidder for a public contract may be a consortium rather than a single entity. It is also possible that both single bidders and consortia may wish to rely on the

resources of other entities (including members of the consortium or other group entities) when discharging their obligations under the contract to be awarded; or that they may wish to sub-contract performance of parts of the contract. Departmental Bodies should enable bidders (including consortia or other group entities) to satisfy the minimum standards for reliability based on past performance by reference to the past performance of such other entities.

- 27) A bidder that intends to appoint a sub-contractor may not always have done so at the time when the bidder's suitability falls to be assessed. That should not in itself disqualify the bidder. As described below, a bidder's reliability should be re-assessed during the procurement process. If at any such point, the sub-contractor has been appointed, its reliability should be assessed as part of that re-assessment. If the sub-contractor is appointed after any contract has been concluded, Departmental Bodies should ensure that, under the terms of the contract, their approval is required and that the sub-contractor at least meets the requirement for reliability based on past performance that it would have had to meet had it been appointed before the contract was concluded.
- 28) A bidder may also be a recently formed entity that is continuing an undertaking or undertakings (or part of an undertaking or undertakings) previously conducted by one or more other entities. Departmental Bodies should enable such bidders to satisfy the minimum standards for reliability based on past performance by reference to the previous performance by the relevant undertaking or undertakings (or parts of them).

### ***Provision of Certificates by Departmental Bodies***

- 29) In order to support procuring Departmental Bodies in their implementation of this PPN, Departmental Bodies should (in their capacities as customers) provide Certificates to their suppliers on request. A copy of each Certificate should also be sent to the Cabinet Office.
- 30) Where a Departmental Body is unable to certify that the supplier has performed satisfactorily, the Departmental Body should give reasons why performance was not in accordance with the contract. The reasons may include:
  - a) delays in providing the goods and/or services in accordance with the contract;
  - b) failure to supply all the goods and/or services in accordance with the scope set out in the contract;
  - c) failures to meet any service levels and/or supply the goods and/or services in accordance with quality standards;
  - d) any other failure by the supplier to comply with its obligations under the contract.

### ***Verification of information provided by bidders***

- 31) Departmental Bodies are not obliged to accept whatever information a bidder may provide without question. Where appropriate, they are entitled to verify whether or not what the bidder says is correct. A Departmental Body may have reason in a particular case, for example, to doubt:
  - a) whether the list of contracts provided is comprehensive;
  - b) whether a bidder has been unable to obtain a Certificate from a person to whom it supplied goods or services;
  - c) whether a contract has in fact been performed satisfactorily in accordance with its terms, notwithstanding a Certificate stating that to be the case;
  - d) whether the reasons given for any past performance not being in accordance with the

relevant entity's contractual obligations are comprehensively stated; or

- e) whether any remedial action taken in regard to these reasons will be effective in ensuring that they will not recur in the performance of any contract to be awarded as a result of the procurement.

In addition, Departmental Bodies may wish to verify a random selection of such Certificates, particularly in cases of "self-certification" by bidders. If this is intended, Departmental Bodies should explain the approach they intend to take in the relevant tender documents.

- 32) In deciding whether or not it is appropriate to verify any information provided to them and how to do so, Departmental Bodies must (as in other cases) treat bidders equally and without discrimination and act in a transparent way. Thus, for example, if the Departmental Body considers it to be appropriate to verify the information provided by one bidder in the circumstances, it must equally regard it as appropriate to verify the information provided by another bidder in similar circumstances. Similarly, Departmental Bodies should be consistent in their approach to verification. The extent of the steps that they take to verify any information provided should be the same as between different bidders in similar circumstances.
- 33) There may be differences, however, in the sources of information available to Departmental Bodies for verification purposes in respect of particular bidders if that information needs to come from persons other than the bidder<sup>1</sup> or the person to whom any goods or services on any list were supplied. Departmental Bodies should take reasonable and proportionate steps to verify any information provided by bidders where that is appropriate. In some cases it may not be possible to verify information from a particular bidder by taking reasonable and proportionate steps. In such a case the Departmental Body is still entitled to verify other information or information from other bidders where that can be done reasonably and proportionately. Bidders in such a case are treated equally by reference to the same standards and the resulting difference in the steps taken to verify the information in the two cases would be justifiable given the differences in the information obtainable by reasonable and proportionate steps in each.
- 34) One source of information for verification purposes is the Cabinet Office, which is now establishing a central repository as mentioned in paragraph 17 above. Where a Departmental Body considers that it is appropriate to verify any information provided by such a supplier, it may seek verification of it with the Cabinet Office; but it should not assume that seeking relevant information only from the Cabinet Office for the purpose of verification is sufficient. The Departmental Body should also consider what other sources of information may be available in respect of any entities who may be involved in the procurement in determining what steps should be taken to verify any information provided in respect of them.
- 35) Before taking any decision adverse to a bidder in the light of any further information obtained as a result of seeking to verify the information it has provided, Departmental Bodies should inform the bidder of that information and give the bidder an opportunity to make representations or to provide further information in response.

***Transparency and the exclusion of bidders for failure to achieve minimum standards***

- 36) Departmental Bodies are required to act in a transparent way when deciding whether or not to verify information provided by bidders and whether a bidder meets or fails to meet any specified minimum standards. Departmental Bodies should normally have an appropriately qualified panel to determine whether any bidder meets any minimum standards for professional and technical ability. Where appropriate, legal advice should be sought. Decisions on whether or not to verify information supplied by bidders, how to do so and whether or not

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<sup>1</sup> Departmental Bodies may require bidders to provide information to clarify or supplement that which they have already provided.

any specified minimum standards are met should be documented with reasons.

- 37) If following receipt and review of all the information initially provided by the bidder, that obtained as a result of verification and any further supplementary or clarificatory information supplied by the bidder, the bidder does not meet the minimum standards of reliability set, the Departmental Body should exclude the bidder from the procurement and notify it accordingly.
- 38) The Departmental Body is entitled to assess for itself, for example, whether it is satisfied that the circumstances giving rise to any previous failure to perform obligations under a contract will not recur in the contract being procured (see for example Annex 4).
- 39) The Departmental Body may also find itself considering a difference of views between a customer and a bidder as to whether performance of a previous contract was in accordance with its terms (for example where there is a continuing dispute between the parties). In such cases, the Departmental Body will need to form its own view as to whether it is satisfied that performance was or was not satisfactory based on the available evidence, notwithstanding that the same issue may be under consideration in court or arbitration proceedings. If the Departmental Body is not satisfied that performance was satisfactory, then the minimum standard would not have been met.

***Re-assessment during subsequent stages in the procurement process (not relevant to procurements adopting the open procedure)***

- 40) Under procurement law the suitability of a bidder to be awarded a contract is assessed separately from the assessment of the economic merits of the bid it may make. That does not mean, however, that the suitability of the bidder may not be assessed more than once at different stages in the procurement process. Particularly in complex or lengthy procurement processes, Departmental Bodies should take steps to ensure that any material changes to the bidders' circumstances since the initial assessment of reliability at selection stage are considered at appropriate points, (for example, before appointment of a preferred bidder or the conclusion of any contract).
- 41) This can be achieved by:
  - a) ensuring that appropriate wording to make this clear to bidders is included in the OJEU Notice (see Annex 2); and
  - b) asking the bidders to update the evidence provided in relation to past performance at an earlier selection stage to reflect more recent performance on new or existing contracts (or confirm if nothing has changed) and re-assessing whether they meet any specified minimum standards.
- 42) This will allow the Departmental Body to take into account performance on more recent contracts and any new developments in relation to contracts which had already commenced at the time of the selection stage. Departmental Bodies should verify evidence which bidders provide in their update as set out above.

**Framework Agreements**

- 43) This PPN also applies to both owners and users of Framework Agreements in so far as (i) they cover goods and/or services in respect of information and communications technology, facilities management or business processing outsourcing and (ii) they may involve an individual Call-off Agreement for such matters with an anticipated value of £20 million or greater (excluding VAT)

***New Framework Agreements***

- 44) Departmental Bodies letting new Framework Agreements, to which this PPN applies, should

comply with this PPN in establishing the Framework Agreements.

- 45) They should include provision for the re-assessment of suppliers' compliance with the minimum standards on request from any Framework Agreement user prior to the proposed award of a Call-off Agreement with a value of £20 million or greater (excluding VAT).
- 46) New Framework Agreements should also include contract conditions that a supplier will not be eligible to be awarded a Call-off Agreement under the Framework Agreement if it does not comply with the specified minimum standards for reliability based on past performance at the time of the proposed award of the Call-off Agreement.
- 47) To do this, Departmental Bodies must include wording in the OJEU Notice (see Annex 2 for template wording) and in the Framework Agreement (see Annex 5 for template wording).

***Existing Framework Agreements***

- 48) Where performance issues become apparent with a supplier on an existing Framework Agreement, whether in delivering contracts under that Framework Agreement or in delivering other contracts to the Departmental Body or other customers, Framework Agreement owners and users should work together to ascertain the scope of action possible under the contractual terms and conditions of the Framework Agreement.



## **Annex 1 - Template Wording Informing Suppliers of the Policy**

This template wording should be included in all relevant procurement documentation, such as PQQs and ITTs and in other appropriate correspondence with bidders in respect of contracts to which the PPN applies, to ensure they are aware of Government's approach to ensuring that there can be confidence that, based on their past performance, those suppliers who are awarded contracts can be relied on to perform them satisfactorily in accordance with their terms.

*The Government has developed an approach to ensuring that previous poor performance by suppliers can be taken into account and robustly assessed prior to entering into certain new contracts (as described in "[Procurement Policy Note – Taking Account of Bidders' Past Performance](#)"). This will give Government confidence, based on past performance, that those awarded such contracts will perform them satisfactorily in accordance with their terms.*

*The policy is that, as part of any assessment of a bidder's technical and professional ability, Departmental Bodies should ensure that any failure to discharge obligations under the previous principal relevant contracts of those who will be involved in performing the contract (if awarded to the bidder) is taken into account in the assessment of whether specified minimum standards for reliability for such contracts are met.*

*In addition, under the policy, Departmental Bodies will re-assess reliability based on past performance before key points in the procurement process (i.e. short listing, preferred bidder status, conclusion of contract etc.). Bidders will accordingly be asked to update the evidence they provide in relation to past performance to reflect more recent performance on new or existing contracts (or to confirm that nothing has changed).*

## Annex 2 - OJEU Notice Wording and Guidance

## Part A - OJEU Notice

III.2.3) Technical capacity	
Information and formalities necessary for evaluating if requirements are met:	Minimum level(s) of standards possibly required (if applicable):
<p>The information required to demonstrate compliance with the minimum standard for reliability having regard to past performance is set out below.</p> <p>(1) The bidder must supply a list comprising a statement of all the [relevant] principal goods sold and/or services provided in the previous 3 years by the entity or entities specified in A or B below.</p> <p>["Relevant" goods and/or services are [insert]. See Notes 2, 4, 6 and 7 below]</p> <p>Any reference to a "bidder" or "entity" includes reference to a consortium, where relevant, whether or not the consortium has a legal personality.</p> <p>The criteria by reference to which the <u>principal</u> goods and/or services have been identified should be stated by the bidder.</p> <p>[The list should include at least any contracts for....]</p> <p>A.</p> <p>The list referred to above must include at least either:</p> <p>(a) * contracts under which [relevant] goods and/or services have been provided by the bidder or</p> <p>(b) a contract (or contracts) under which it has provided [relevant] goods or services [of some specific value, quantity or description] See Notes 2, 3, 4, 6 and 7 below.</p> <p>Where the bidder is an entity that is continuing an undertaking or undertakings (or any part of an undertaking or undertakings) which were previously conducted by one or more other entities (each a "predecessor entity"), the list of such contracts must include the contracts under which [relevant] goods and/or services were provided by each predecessor entity.</p>	<p>Any bidder/consortium must meet the minimum standard in relation to reliability based on past performance.</p> <p>The minimum standard for reliability having regard to past performance is that the [Departmental Body] is satisfied that the contracts required on the list to be provided have been satisfactorily performed in accordance with their terms or, where that has not occurred, the reason or reasons why that has not occurred in relation to any such contract, will not recur in the performance of the contract to be awarded [or of any contract to be awarded under the Framework Agreement].</p> <p>The [Departmental Body] will assess whether or not this minimum standard is met at the [initial] selection stage. <i>[in cases other than under the Open Procedure for a single contract:</i> In addition the [Departmental Body] will also re-assess whether this minimum standard is met prior to shortlisting, the granting of preferred bidder status, and/or the conclusion of the contract [or Framework Agreement].</p> <p>[The [Departmental Body] will also assess whether this minimum standard is met on request from the Framework Agreement user prior to the proposed conclusion of a Call-off Agreement with a value of £20 million or greater (excluding VAT). Failure to meet the minimum standard set will render the supplier ineligible for that Call-off Agreement under the Framework Agreement.]</p>

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Alternatively, where the bidder may rely on other entities (including, in the case of a consortium, members of the consortium) to enable it to perform the contract [and/or any contract to be awarded under the Framework Agreement], save as specified below the list must:

- (i) describe the function that each such other entity will perform under the contract to be awarded [and/or any contract to be awarded under the Framework Agreement], and
- (ii) include at least either:
  - (a) \* contracts in respect of [relevant] goods and/or services provided by the bidder (or a predecessor body) and \* contracts in respect of [relevant] goods and/or services provided by any other entity (including any member of the consortium) on which the bidder may intend to rely to enable it to perform the contract [and/or any contract to be awarded under the Framework Agreement], or
  - (b) in respect of the bidder or any other such entity, a contract (or contracts) under which [relevant] goods and/or services were provided by it [of some specific, value, quantity or other description]

[and in either case which are relevant to the function that each will perform under the contract to be awarded [or to be awarded under the Framework Agreement] *See Notes 2 to 7 below.*

Where the bidder is an entity which has been formed for the particular purposes of bidding for the contract the subject of this Notice, the bidder may comply with paragraph B(ii) above by including in its list contracts under which [relevant] goods and/or services were provided by those entities on whom the bidder will rely to perform the contract (or their predecessor entities), instead of the bidder itself.

Where it is envisaged that the bidder will rely on one or more sub-contractors to enable it to perform the contract to be awarded [or any contract to be awarded under the Framework Agreement] to be performed:

- in so far as any sub-contractor has not been appointed, the list should describe the function that sub-contractor will perform but need not include any contract by such a sub-contractor, and
- in so far as the anticipated value of any

<p>particular sub-contract is less than 5 per cent of the total contract value, the bidder need not comply with the requirements in B(ii) above in relation to that particular sub-contract.</p> <p>(2) The bidder must also provide:</p> <p>(a) certificates in the form set out in the Annex to this Notice from those to whom goods and/or services on the list were provided;</p> <p>(b) if any such certificate cannot be obtained, an explanation of the steps taken to obtain it and why it is not available and a certificate (in the same form) from the entity that provided the goods and/or services instead;</p> <p>(c) if the certificate does not state that the goods and/or services have been provided satisfactorily in accordance with the terms of the contract in question, information to show that any reason why they were not so provided will not recur in the performance of the contract to be awarded [or any contract to be awarded under the Framework Agreement].</p> <p>(3) In considering whether it is satisfied that the minimum standard for reliability based on past performance is met, the [Departmental Body] reserves the right to verify the information required and to require the bidder/consortium to clarify or supplement it.</p> <p>.....</p>	<p>.....</p>
<p>[The information required to demonstrate compliance with the minimum standard[s] for other aspects of technical or professional ability is [are]:]</p>	<p>[The minimum standard[s] for other aspects of technical or professional ability is [are]:]</p>

**Part B - Guidance on completing OJEU Notice**

It is important that the statements with regards to minimum standards and information requirements are (like other aspects of the OJEU Notice) tailored to the Departmental Body's procurement. The template wording presents a range of alternatives which should be considered:

1. The OJEU Notice must be tailored in accordance with the type of contract being procured (for example, whether it is a Framework Agreement).
2. To enable an assessment of reliability based on past performance to be made, it will be necessary to ensure that sufficient information has been obtained on which to make a reliable assessment.
3. This might involve asking for information about a specified minimum number of contracts. This approach may however exclude bidders who have provided goods and/or services on a sufficient scale to enable an assessment of reliability to be made under a smaller number of large contracts. Departmental Bodies should consider whether there are alternative ways of obtaining a sufficient evidence base in the context of the procurement they are undertaking.
4. Departmental Bodies should also consider whether to specify the types of goods and/or services which are relevant for the purposes of assessing reliability in a particular procurement. The performance of a previous contract may assist an assessment of the reliability of the entity even if the goods or services provided under that contract were not the same as those now being procured. However, given the size of the contracts to which this PPN relates and the entities likely to bid for them (who may supply many different types of goods and/or services), Departmental Bodies may well wish to limit the type of the goods and services which will be used for the purposes of assessing reliability to those which are relevant. In addition, Departmental Bodies may be concerned with the past performance of contracts of a similar scale, complexity, target environment, number of sites, value or duration as that to be awarded. If so, Departmental Bodies should define what are regarded as relevant goods and/or services for the purposes of the assessment of reliability.
5. Such judgments may also be relevant when considering whether the contracts should be limited to functions that are relevant to the function that any entity will perform if the bidder is awarded the contract (where more than one entity will be involved in performing the contract).
6. In deciding whether, and (if so) how, to limit the list required of principal goods or services provided in the previous three years, Departmental Bodies should avoid so narrowing the evidential base for the assessment of reliability based on past performance that the entities concerned may not be able to demonstrate their reliability by reference to a sufficient number, type or nature of contracts in that period.
7. In considering the information to be required to satisfy the minimum standard of reliability based on past performance, Departmental Bodies/users should take account of the administrative burden on bidders of these requests.
8. Departmental Bodies who consider that previous specific experience is required in delivering the goods and/or services to be procured can specify an additional minimum standard for that purpose (as they can for other aspects of technical or professional ability).

9. The minimum standard and information required to assess whether or not it is met specified in the OJEU Notice must remain the same throughout the procurement. It should be replicated in any invitation to tender for the open procedure, any pre-qualification questionnaire or any other document setting out the selection criteria and information required to assess whether or not they have been met.

**Annex 3 - Certificate of Performance**

Name of Supplier..... ("Supplier")

Contract Title..... ("Contract")

Customer..... ("Customer")

**Contract**

Details of the Contract to which this certificate relates are set out in the table below:

Contract Number	Customer Contact (name, address, telephone number and e-mail) with whom [the Departmental Body] can raise further queries should we wish to do so	Contract title plus brief description of the goods supplied and/or services provided, and the consideration received	The dates on, or between, which the goods or services were (and/or were to be) sold or provided
<i>[Details to be completed by bidder]</i>			

**Performance****OPTION A:**

We hereby certify that, to the best of our knowledge and belief, the Supplier has satisfactorily supplied the goods and/or services described in the table above in accordance with the Contract.

**OR****OPTION B:**

We are unable to certify that the Supplier has satisfactorily supplied the goods and/or services described in the table above in accordance with the Contract for the following reasons:

.....

.....

.....

*(please continue on a separate page where there is insufficient space)*

**Guidance for Customers**

If you are unable to certify that the Supplier has satisfactorily supplied the goods and/or services in accordance with the Contract, please provide the reason or reasons why performance was not in accordance with the Contract. These may include:

1. delays in supplying the goods and/or services;
2. failures to supply all the goods and/or services in accordance with the scope set out in the Contract;
3. failures to meet any service levels and/or supply the goods and/or services in accordance with quality standards;
4. any other failure by the Supplier to comply with its obligations under the Contract.

You may wish to take legal advice in relation to completing this certificate.

**Liability of any customer certifying**

Whilst the Customer believes the information in this certificate to be truthful and accurate, the Customer does not assume any responsibility and does not assume any liability and so cannot give any guarantee or make any representation or warranty as to the contents of this certificate. The Customer shall therefore not be liable for and hereby excludes liability for any loss, damage (including any special, exemplary, indirect, incidental, consequential damages, costs or associated legal fees) that may be suffered as a result of use of the certificate and its content, to the fullest extent permitted by law.

Nothing in this certificate shall affect, or constitute a waiver of, the Customer's rights or remedies in relation to the Contract.

Signed ..... [To be signed by the person with sufficient knowledge of and responsibility for the contract in question] for and on behalf of [insert customer] *[In the event of self-certification this certificate of performance should be signed by the Bidder]*

Name .....

Date.....



## Annex 4 - Worked Example

A Departmental Body wishes to run a procurement to find a supplier able to deliver services to support a complex and rapid application development project to support a Departmental policy.

In its OJEU Notice the Departmental Body has requested from bidders a list of relevant principal contracts (together with supporting certificates) relating to the delivery of application development services and relating to the delivery of complex projects.

Bidder A has identified 14 relevant contracts and provided certificates for four of these, all provided by Departmental Bodies. It has explained that it has sought certificates from its other, private sector customers, who have refused to provide them, citing confidentiality. Therefore, it has self-certified the remaining 10 certificates, stating that it has performed the services satisfactorily.

With regard to the certificates in which the bidder has certified its own performance, the Departmental Body asked to see correspondence from a random sample of 2 of the 10 customers to check that they have in fact refused to certify and also whether there was also any other information available with respect to those contracts which might indicate that they had not been performed satisfactorily in accordance with their terms. All bidders were treated equally in these respects.

One of the four customers which did provide a certificate of performance has stated that performance was unsatisfactory on that contract. The certificate identifies a failure on the part of the bidder properly to manage a complex project to time that led to the termination of the contract. The bidder claims, however, that the problem will not recur if it is awarded the contract the Departmental Body proposes to let. It explains that it has recently appointed a Major Programmes Director who will oversee future major projects (such as the contract which the Departmental Body is proposing to award) who will review the bidder's project management disciplines. The Departmental Body concludes that it is not satisfied that the reasons for failure to perform the earlier contract will not recur in the performance of the contract which it is procuring (as the disciplines have not yet been reviewed and shown to be effective) and, therefore, that the minimum standard set for reliability has not been met.

*[Departmental Bodies may wish to create their own worked example and disclose this to bidders as part of their PQQ (or other selection stage documentation).]*

## Annex 5 – Template Framework Agreement Wording

### Clause

#### **1. Re-assessment of Minimum Standards**

- 1.1. No Call-Off Agreement with an anticipated contract value in excess of £20 million (excluding VAT) shall be awarded to the Contractor if it does not show that it meets the Minimum Standards at the time of proposed award of that Call-Off Agreement.
- 1.2. The [Framework Agreement Owner] shall assess the Contractor's compliance with the Minimum Standards upon the request of the Call-Off Agreement User.
- 1.3. In the event that the Contractor does not demonstrate that it meets the Minimum Standards in an assessment carried out pursuant to clause 1.2 [of this Agreement], the [Framework Agreement Owner] shall so notify the Contractor and the Call-Off Agreement User in writing.

### Definition

"**Minimum Standards**" means the minimum standards for reliability as set out in OJEU Notice Reference [insert OJEU Notice reference]

## Annex 6 – Template Wording Governing Conditions of Entry to Competition

This template wording should be included in all relevant procurement documentation, such as PQQs and ITTs and in other appropriate correspondence with bidders in respect of contracts to which the PPN applies, to ensure that they are aware of these conditions of entry to the procurement.

- 1. The [relevant entity] waives any contractual right or other confidentiality obligation in connection with the customers mentioned in a list of contracts used to demonstrate evidence of past performance and agrees that these customers may provide information to the [Departmental Body] in the form of certificates of performance (in the form set out in [the Annex to the OJEU Notice]) and answer any clarifications that the [Departmental Body] or anyone acting on behalf of the [Departmental Body] in connection with this procurement may have. The [relevant entity] confirms that save for any deceitful or maliciously false statements of fact or purported fact included in a certificate or subsequent clarification from the [Departmental Body] the customer will not owe the [relevant entity] any duty of care for or otherwise have any legal liability to the [relevant entity] in respect of any factual inaccuracies, whether innocent or negligent, and/or in respect of any expressions of opinion by the customer. This provision is for the benefit of each customer and may be relied on by them for the purposes of the Contracts (Rights of Third Parties) Act 1999.*
- 2. The [Departmental Body] confirms that it will keep confidential and will not disclose to any third parties other than the Cabinet Office and other Departmental Bodies, for the purposes of verification, the content of any certificates of performance from a customer.*
- 3. If in breach of this provision [1] any [relevant entity] commences legal proceedings against a customer in relation to any certificate of performance or subsequent clarification provided by it to the [Departmental Body] in the courts of any jurisdiction the [relevant entity] agrees that the customer shall be entitled to bring proceedings against the [relevant entity] in the English Courts to enforce the terms of this provision (regardless of whether it is enforceable in the jurisdiction where the proceedings are brought) and to be indemnified in full for any legal costs incurred in defending such proceedings and indemnified in respect of any compensation that the customer is ordered to pay to the [relevant entity] as a result of such proceedings. This provision will not relate to any proceedings commenced in good faith for any liability that falls outside the scope of this provision.*