



Invitation to Tender

For

The Review of Financing Arrangements of Prospective Purchasers of Gas Distribution Businesses

CIRCULAR ADVICE No 1

Issued 17th January 2005

Further to the invitation to tender document issued on 23rd December 2004 please find within Ofgem's responses to questions asked by tenderers.

The closing date for questions remains 14th January 2005.

The closing date for receipt of responses remains 12 noon 21st January 2005.



Q1. Conflicts of Interest

Following questions from tenderers on conflict of interests, Ofgem would like to provide further guidance. In addition to what is already requested in the Invitation to Tender (ITT), tenderers should state whether they are undertaking (or have undertaken in the recent past) similar work for other companies or organisations and in particular whether they are undertaking or have undertaken any work in relation to purchasers of gas distribution networks.

Ofgem will not necessarily deem a bid non compliant but reserves the right to request further re assurance (if required) from tenderers and to make the final decision on whether or not any identified conflict of interest represents a risk to this project.

Q2. Will each purchaser's financial model already have been the subject of a model audit? i.e. have the financial models been independently reviewed and are they considered fit for purpose to the extent that Transco requires. The model audit report/sign off should typically include (interalia) confirmation that the model:

- is robust and materially error free;
- is generally compliant in all material aspects of Generally Accepted Accounting Principles
- is compliant with the prevailing taxation legislation
- is consistent with all material respects with the underlying documentation;
- reflects the assumptions contained in data books; and
- is accompanied by a detailed user guide.

If the models require an audit, we will be able to carry out that service, however this will result in an increased scope.

A. At this stage, we do not have information on this but we expect that the purchasers will have taken steps to satisfy themselves in this regard

Q3. Is it possible for you to supply any information on the capital structure of the three bids? The relative complexity of the financing of the bids would obviously impact on the level of work required to fully evaluate them. For example, are bidders using the structured / leveraged debt markets or more conventional financing methods?

A. Ofgem has received preliminary information from the purchasers relating to the financial structures they each intend to adopt. In the light of this information, Ofgem expects that, to a greater or lesser extent, all of the financing arrangements will incorporate some structuring, including in one or more cases whole-of-business securitisation features. Ofgem is not at liberty to disclose the information it has received at this stage. Tenderers should therefore assume that the work required to review all three structures will be commensurate with an average level of complexity.

Q4. Depending on the complexity of the financial structures, it may be necessary to carry out a legal review of the documentation and how this impacts on the financing. Will you be engaging / have you already engaged lawyers to carry out a legal review of the bid documentation?

A. This work, to the extent necessary, is included in the scope of the tender. However, we do not expect that the amount of legal due diligence required would be any greater than is needed to understand the respective rights of the various parties to the financing arrangements. It would certainly fall short of the degree of comfort lenders/trustees, etc., would require. Accordingly, we do not expect to need to retain the services of separate legal advisers.

4. Could you clarify what is expected in the final report in terms of "Governance Arrangements"? For example does this refer to the corporate governance of the companies themselves, or their responsibilities to Ofgem and ultimately the public end-user?

4. We expect that the final report would refer to the corporate governance of the companies.

5. Confidentiality and Freedom of Information

Your attention is drawn to the following:

As a public authority, Ofgem is subject to the provisions of the Freedom of Information (FOI) Act 2000. If you consider that any information supplied by your company in response to this Invitation to Tender is either commercially sensitive or confidential in nature, this should be clearly highlighted and the reasons for its sensitivity given. In such cases, the relevant material will, in response to FOI requests, be examined in the light of the exemptions provided for in the FOI Act.

The following term shall apply to any agreement awarded under this tender exercise. Tenderers are asked to confirm acceptance of the following term in relation to Confidentiality and Freedom of Information in their response.

1. Confidentiality and Freedom of Information

Confidentiality

- 1.1 If any information is given to the Contractor by a third party under a condition that such information shall be treated as confidential to the Contractor and shall not be disclosed to the Contracting Authority without the consent of the informant, the Contractor will respect the confidential nature of that information, and will provide to the Contracting Authority the name of the informant (if not confidential to the Contractor) and such other details as shall be necessary to enable the Contracting Authority to seek the informant's consent to disclosure.
- 1.2 Each party:-
 - (a) shall treat all Confidential Information belonging to the other party as confidential and safeguard it accordingly; and
 - (b) shall not disclose any Confidential Information belonging to the other party to any other person without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of this Agreement.
- 1.3 The Contractor shall take all necessary precautions to ensure that all Confidential Information obtained from the Contracting Authority under or in connection with the Agreement:-
 - (a) is given only to such of its members of staff and professional advisors or consultants engaged to advise it in connection with the Agreement as is strictly necessary for the performance of the Agreement and only to the extent necessary for the performance of the Agreement;

- (b) is treated as confidential and not disclosed (save with the prior approval in writing of the Contracting Authority) or used by any member of its staff or such professional advisors or consultants otherwise than for the purposes of the Agreement.
- 1.4 Where it is considered necessary in the opinion of the Contracting Authority, the Contractor shall ensure that all its members of staff or such professional advisors or consultants sign a confidentiality undertaking before commencing work in connection with the Agreement.
- 1.5 The Contractor shall not use any Confidential Information received otherwise than for the purposes of the Agreement.
- 1.6 The provisions of clauses 1.2 to 1.5 shall not apply to any Confidential Information received by one party from the other:-
 - (a) which is or becomes public knowledge (otherwise than by breach of this Agreement);
 - (b) which was in the possession of the receiving party, without restriction as to its disclosure, before receiving it from the disclosing party;
 - (c) which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;
 - (d) is independently developed without access to the Confidential Information; or
 - (e) which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under the FOIA, The Code of Practice on the Discharge of Public Authorities' Functions under Part I of the FOIA or the Environmental Information Regulations (Freedom of Information) as all may be amended from time to time.
- 1.7 Nothing in this clause shall prevent the Contracting Authority:
 - (a) disclosing any Confidential Information for the purpose of:-
 - (i) the examination and certification of the Contracting Authority's accounts; or
 - (ii) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Contracting Authority has used its resources; or
 - (b) disclosing any Confidential Information obtained from the Contractor:-
 - (i) to any other department, office or agency of the Crown; or

- (ii) to any person engaged in providing any services to the Contracting Authority for any purpose relating to or ancillary to the Agreement;
 - (c) provided that in disclosing information under sub-paragraph (b) (i) or (ii) the Contracting Authority discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.
- 1.8 In the event that the Contractor fails to comply with this clause, the Contracting Authority reserves the right to terminate the Agreement by notice in writing with immediate effect.
- 1.9 The provisions under this clause are without prejudice to the application of the Official Secrets Acts 1911 to 1989 to any Confidential Information.
- 1.10 The provisions of clauses 1.2 to 1.9 above shall apply during the period of this Agreement and at any subsequent time.

Freedom of Information

- 1.11 The Contractor acknowledges that the Contracting Authority is subject to the requirements of The Code of Practice on the Discharge of Public Authorities' Functions under Part I of the FOIA, the FOIA and the Environmental Information Regulations (as all may be amended from time to time) and shall assist and cooperate with the Contracting Authority (at the Contractor's expense) to enable the Contracting Authority to comply with these Information disclosure requirements.
- 1.12 The Contractor shall and shall procure that its sub-contractors shall:
- (a) transfer the Request for Information to the other party as soon as practicable after receipt and in any event within two working days of receiving a Request for Information;
 - (b) provide the Contracting Authority with a copy of all Information in its possession or power in the form that the Contracting Authority requires within five working days (or such other period as the Contracting Authority may specify) of the Contracting Authority requesting that Information; and
 - (c) provide all necessary assistance as reasonably requested by the Contracting Authority to enable the Contracting Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA.
- 1.13 The Contracting Authority shall be responsible for determining at its absolute discretion whether:-

- (a) the Information is exempt from disclosure under the Code of Practice on the Discharge of Public Authorities' Functions under Part I of the FOIA, the FOIA and the Environmental Information Regulations;
 - (b) the Information is to be disclosed in response to a Request for Information, and
 - (c) in no event shall the Contractor respond directly to a Request for Information unless expressly authorised to do so by the Contracting Authority.
- 1.14 The Contractor acknowledges that the Contracting Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the FOIA, be obliged under The Code of Practice on the Discharge of Public Authorities' Functions under Part I of the FOIA, the FOIA, or the Environmental Information Regulations (as all may be amended from time to time) to disclose Information:-
 - (a) without consulting with the Contractor, or
 - (b) following consultation with the Contractor and having taken its views into account.
- 1.15 The Contractor shall ensure that all information produced in the course of the Agreement or relating to the Agreement is retained for disclosure and shall permit the Contracting Authority to inspect such records as requested from time to time.
- 1.16 The Contractor acknowledges that any lists or schedules provided by it outlining Confidential Information are of indicative value only and that the Contracting Authority may nevertheless be obliged to disclose Confidential Information in accordance with clause 1.14.