



Llywodraeth Cymru  
Welsh Government

# **Mutual Investment Model (MIM) Independent Tester Contract Supplemental Guidance for Accommodation Sector Projects**

## **Version 1 - December 2017**

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## **Independent Tester Contract Scope of Services in the Accommodation Sector**

### **Supplemental Guidance Note**

The following guidance has been developed for Authorities undertaking a MIM scheme in the Accommodation sector and supplements guidance contained in Chapters 5 (Health) and 6 (Education) of the MIM Standard Form Project Agreements User Guide, relating to Schedule 13 (Independent Tester Contract). Capitalised terms in this guidance shall have the meaning given to them in Schedule 1 of the MIM Standard Form Project Agreement (Accommodation Version), unless otherwise defined herein. References to **"Authority"** means the contracting authority responsible for procuring the relevant MIM project. Use of this guidance is not a substitute for project specific advice and Authorities must take appropriate legal, financial and technical advice when applying it.

#### **1. Independent Scrutiny during the Construction Phase**

- 1.1 As anticipated by the MIM Standard Form Project Agreements User Guide published in March 2017, the standard scope of services in the Independent Tester Contract has been reviewed by Welsh Government in light of recent construction issues on PPP projects and the release of the Report of the Independent Inquiry into the Construction of Edinburgh Schools, dated February 2017.
- 1.2 As a result, the amendments shown in Annex 1 to this guidance note are now mandatory for all MIM projects in the Accommodation sector. However, it will still be necessary for Authorities to review the scope of work provided for at Annex 1 on a project specific basis and for Authorities to seek approval from Welsh Government on the approach adopted.

#### **2. Public Procurement of the Independent Tester**

- 2.1 The anticipated value of the Independent Tester's services is £200,000 to £400,000, therefore it is expected that the thresholds in the Public Contracts Regulations 2015 will be exceeded and the procurement of the Independent Tester should be fully compliant with the Public Contracts Regulations 2015 ("**2015 Regulations**"). This is the case regardless of whether the Authority pays the Independent Tester a share of the fee under clause 5 of the Independent Tester Contract directly, or not.
- 2.2 In terms of the 2015 Regulations, there are four principal types of procurement procedure: open, restricted, competitive procedure with negotiation and competitive dialogue. It is recommended that Authorities should procure the Independent Tester's Contract by using the restricted procedure.

#### **3. Use of the Restricted Procedure**

- 3.1 The restricted procedure is governed by section 28 of the Regulations.

- 3.2 The key stages of the restricted procedure are set out below:

**Prior Information Notice ("PIN") (optional)**

- 3.2.1 PINs are a means of notifying tenderers about an upcoming contract before the contract notice is published.
- 3.2.2 A possible benefit for the Authority of the use of a PIN is that it allows for certain minimum time periods to be reduced, provided that the PIN is issued a minimum of 35 days prior to the publication of the contract notice and provided that the PIN is published with the "procurement documents". These procurement documents include the contract, tender specification, pre-qualification questionnaire ("**PQQ**"), descriptive document/information memorandum supporting the PQQ, invitation to tender and other supporting information which would assist potential tenderers in making a decision to submit a PQQ response.

**Advertisement using a Contract Notice**

- 3.2.3 In accordance with the requirements of the User Guide, the Authority must publish a contract notice to commence the public procurement of the Independent Tester as soon as possible following the appointment of the Successful Participant in for the MIM project. The contract notice should be published on the sell2wales portal.
- 3.2.4 The contract notice should include information such as: details of the contracting authority, procurement procedure chosen, scope of the contract, estimated value and timescale for replying to the contract notice.
- 3.2.5 In addition, the "procurement documents" must be made available online from the publication date of the contract notice if a PIN (with these procurement documents) has not been published.

**Prequalification**

- 3.2.6 The evaluation of completed PQQ responses is used to shortlist tenderers who meet the applicable selection (qualification) criteria.
- 3.2.7 The Authority can impose requirements ensuring that potential tenderers have the necessary technical experience and financial standing to perform the contract and the Authority can include minimum qualification requirements in respect of that experience and financial standing. For example, in the context of the procurement of the Independent Tester, the User Guide requires that all key personnel who will be involved in the performance of the Independent Tester contract must have a minimum of 10 years' experience of completion testing in the relevant sector.
- 3.2.8 The PQQ must include mandatory disqualification criteria (such as conviction in organised crime/ corruption/ bribery/ fraud/ money laundering etc.) and

discretionary disqualification criteria (such as insolvency, poor past performance, conflict of interest etc.).

- 3.2.9 The Authority may not exclude a potential tenderer on a mandatory or discretionary basis if the tenderer in question has provided sufficient evidence to demonstrate that it has "self-cleaned" (i.e. taken measures such as paid compensation, collaborated with authorities and taken measures to prevent the issue from recurring.)
- 3.2.10 The minimum time limit for receipt of requests to participate in the form of a PQQ response (this will be from the date the contract notice is issued) is 30 days.
- 3.2.11 Only tenderers shortlisted by the Authority following its evaluation of completed PQQs are able to submit a tender. The Authority may limit the number of shortlisted tenderers to five. Shortlisting must be transparent and non-discriminatory. In the PQQ, the Authority must identify the minimum requirements and shortlisting questions and criteria which will be used to shortlist the tenderers who will be invited to submit a tender.

#### **Invitation to Tender ("ITT")**

- 3.2.12 The Authority must simultaneously invite the shortlisted tenderers to submit their tenders. An ITT must include the requirements for the tender deliverables (e.g. pricing), contract award criteria and the requirements for submission.
- 3.2.13 The minimum time limit for submission of tenders (from the issue of the invitation to tender) is 30 days, or 25 days if the Authority allows for tenders to be submitted electronically.
- 3.2.14 Where the Authority uses a PIN in addition to the contract notice, the minimum time limit for the receipt of tenders may be shortened to 10 days if:
- (i) the PIN includes all the information required in the Regulations, insofar as that information is available at the time that the PIN is published; and
  - (ii) the PIN was sent for publication between 35 days and 12 months before the date on which the contract was sent.

#### **Evaluation and Award of Contract**

- 3.2.15 The award of the contract for the Independent Tester must be based on an evaluation of which tender is the "most economically advantageous tender". The contract award criteria used to determine the most economically advantageous tender must be linked to the subject-matter of the contract and must be transparent.

3.2.16 The Authority must disclose the contract award criteria (including any award sub-criteria) and the weightings for those criteria in the ITT.

3.2.17 Given the importance of the role which the Independent Tester will be carrying out and the need for high quality of performance, it is recommended that the ratio of quality:price award criteria weighting should be at least 70:30.

### **Post Award**

3.2.18 As soon as possible after a decision to award the contract is made, the Authority must inform unsuccessful tenderers in a "standstill notice":

- (i) why their tender has been rejected; and
- (ii) what the characteristics and relative advantages of the tender selected are and the name of the successful tenderer.

3.2.19 Following notification of the unsuccessful tenderers, there is a mandatory standstill period of 15 days, which is reduced to 10 days if the standstill notice is sent electronically.

3.2.20 The contract award notice should be published by the Authority no later than 30 days of the contract award. This notice should be in the format prescribed by the Regulations.

### **3.3 Indicative Procurement Timetable**

<b>Activity</b>	<b>Proposed Timescale</b>
<b>Publication of PIN (optional)</b>	35 days prior to the contract notice
<b>Publication of contract notice</b>	Published after selection of the Successful Participant
<b>Submission of PQQ Responses</b>	30 days following the contract notice
<b>Evaluation of PQQ Responses and shortlisting of tenderers (including governance)</b>	Assume 14 days.
<b>Receipt of Tenders</b>	30 days from the date on which the ITT is sent (25 days if tenders can be submitted electronically and 10 days if PIN used)
<b>Evaluation of Tenders</b>	Assume 14 days

Activity	Proposed Timescale
<b>Notification of Successful Tenderer</b>	As soon as possible after the evaluation is complete
<b>Standstill Period</b>	10 days after informing unsuccessful tenderers (provided notice to unsuccessful tenderers is by electronic means)
<b>TOTAL NUMBER OF DAYS (from publication of contract notice)</b>	<b>98 days (standard)</b> <b>93 days (electronic submission)</b> <b>78 days (if PIN used)</b>

## Annex 1

The scope of service to be provided by the Independent Tester is set out in Appendix 1 to Schedule 13 (*Independent Tester Contract*) of the MIM Standard Form Project Agreement (Accommodation Version). Required amendments to the MIM Standard Form Project Agreement (Accommodation Version) are shown in comparison format below.

### SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT<sup>1</sup>

The Independent Tester shall perform the role of Independent Tester as referred to in Clauses 17 (*Pre-Completion Commissioning and Completion*), ~~and~~ 18 (*Post Completion Commissioning*) ~~and 19~~ (~~Fossils and Antiquities~~) (including complying with any time limits specified in such Clauses) and Schedule 6 (*Construction Matters*), Schedule 7 (*The Programme*), Schedule 8 (*Review Procedure*), Schedule 10 (*Outlining Commissioning Programme*) and Schedule 17 (*Compensation on Termination*) of the Design Build Finance and Maintain Agreement<sup>2</sup>, by providing the following scope of Services:

#### 1 MONTHLY REPORT AND COMPLETION CERTIFICATION

The Independent Tester shall:

- 1.1 During the Works, attend monthly site progress meetings and provide the Authority and Project Co with a monthly report on the activities carried out by the Independent Tester and the status of the Project.
- 1.2 Undertake [regular on-site monitoring and inspections ~~(, with the maximum interval between minimum aggregate duration of such inspections not exceeding [♦] weeks)~~ being [♦] hours a month (including attendance at the monthly site progress meetings referred to at paragraph 1.1 above)],<sup>3</sup> during the Works, ~~as necessary,~~ and in the case of completion activities, in accordance with Clauses [17.8 (*Commissioning Price Prior to Completion Date*), 17.10 (*Pre-Completion Inspections*) and 18.4 (*Information*)] of the Design Build Finance and Maintain Agreement<sup>4</sup>.
- 1.3 Report on the completion status of the Project, identifying any work that is not compliant with the Authority's Construction Requirements, Project Co's Proposals, the Approved ~~Reviewable Design Data (RDD Items ("Approved RDD"))~~ and/or the Completion Criteria in accordance with Clause [17.11 (*Pre-Completion Matters*)] of the Design Build Finance and Maintain Agreement.

<sup>1</sup> Authorities to ensure that the scope of services is appropriate.

<sup>2</sup> Authorities to insert any other relevant references.

<sup>3</sup> Develop specifics on a project by project basis. The regularity of inspections should be governed by the capex of the project, as follows:

- £5,000,000 - £24,999,999: four (seven hour) days a month (2 visits, monthly meeting, desk study and reporting)
- £25,000,000 - £99,999,999: five (seven hour) days a month (3 visits, monthly meeting, desk study and reporting);
- £100,000,000 upwards: seven (seven hour) days a month (4 visits, monthly meeting, desk study and reporting).

<sup>4</sup> Insert periods here if not included in Completion Criteria. Consider stages before works' closed up'

1.4 [Certify the Access Conditions relating to the [♦] areas [within a Phase] have been met and issue [a Phase]/ [an] Access Certificate, in accordance with paragraph 6 of Schedule 10 (Outline Commissioning Programme) of the Design Build Finance and Maintain Agreement.]

1.31.5 Determine whether any relevant Phase is finished or complete in accordance with the Completion Criteria and advise Project Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether a relevant Phase of the Project is finished or complete.

1.41.6 Certify the [Phase] Actual Completion Date and issue a Certificate of Practical Completion in accordance with the Design Build Finance and Maintain Agreement.<sup>5</sup>

1.51.7 On the same day as the date of issue of the [relevant] Certificate of Practical Completion, issue a Snagging List specifying any Snagging Items. Monitor and review rectification of such Snagging Items in accordance with Clause 17.14 (*Snagging Items*) of the Design Build Finance and Maintain Agreement.

1.61.8 Review the Snagging Programme for the rectification of all Snagging Items to be carried out and advise Project Co and the Authority as appropriate. Identify items that have a lead time of more than twenty (20) Business Days.

1.71.9 Monitor and report (weekly) on the completion of Snagging Items against the Snagging Programme. On satisfactory completion of the Snagging List, issue the Snagging Items Completion Certificate in accordance with Clause ~~17.12~~ (~~[Phase] Completion Certificate~~) 17.15 (Snagging Items) of the Design Build Finance and Maintain Agreement.

1.81.10 In order to enable the Independent Tester to discharge these primary functions which are to be performed independently, fairly and impartially to and as between Project Co and the Authority and having regard to the interests of Funders, the Independent Tester shall discharge the further duties described below.

1.91.11 [The Independent Tester shall:

1. 911.1 No earlier than the date that falls on the date that is [♦] weeks following the [relevant Phase] Actual Completion Date carry out the WiFi Post-Completion Tests so they have been completed by no later than the WiFi Tests Completion Date.

1. 911.2 Within five (5) Business Days of any inspection made pursuant to paragraph 1. 911.1 above notify Project Co and the Authority of any outstanding matters required to be attended to before the WiFi Post-Completion Tests can be considered to be completed.

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<sup>5</sup> This will include (amongst other things) testing Energy Efficiency against the levels bid (and incorporated within Project Co's Proposals)



- 1.911.3 Determine whether the WiFi is finished or complete in accordance with the WiFi-Post-Completion Completion Criteria and advise Project Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the WiFi is finished or complete.
- 1.911.4 Certify the [relevant Phase] WiFi Actual Completion Date and issue a Certificate of WiFi Completion [for the relevant Phase].]

## 2 GENERAL

The Independent Tester shall:

- 2.1 Familiarise itself with the Design Build Finance and Maintain Agreement (including the Design Data, the Design Quality Plan, the Construction Quality Plan<sup>6</sup> and any Changes issued from time to time and any other relevant documentation or information referred to in the Design Build Finance and Maintain Agreement, relevant Service Level Specification and Method Statements)[, the Equipment ~~services-contract~~Services Contract] and the Construction Contract to the extent necessary to enable it to provide a report to the Authority and Project Co on any contradictory requirements contained within the same and to be in a position to carry out the Services in accordance with the terms of the Design Build Finance and Maintain Agreement and this Agreement.
- 2.2 Following notification by Project Co, pursuant to Clauses 17.8 and 17.10 (*Pre-Completion inspection*) of the Design Build Finance and Maintain Agreement, inspect and comment as required on the Works [each relevant Phase] as required by Clause 17.11 (*Pre-Completion Matters*) of the Design Build Finance and Maintain Agreement.

## 3 DESIGN AUDIT REVIEW

The Independent Tester shall:

- 3.1 Monitor and report upon the implementation of the Design Quality Plan ~~and Construction Quality Plans~~ for the construction, structural and engineering services design for the Project, [on a monthly basis during the Works].
- 3.2 ~~Monitor~~Through sample audit of [twenty-five percent (25%)] of the detailed working drawings and specifications for a sample number range and type of rooms ~~which, or such greater number as is~~ in his professional judgment ~~is~~ appropriate to be selected by the Independent Tester ~~to~~ monitor and verify that they comply with the Approved RDD as described in the Design Build Finance and Maintain Agreement. ~~The Independent Tester has indicated that in normal circumstances [twenty-five percent (25%)] of rooms should be sampled.~~ If in the professional judgment of the Independent Tester, because of the results of its sample or other

<sup>6</sup> Insert reference to any equipment list or other document as appropriate.

circumstances a ~~different~~greater than [twenty-five percent (25%)] sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between Project Co and the Authority by the Dispute Resolution Procedure) any ~~change~~increase in the percentage sampling resulting in a change in fees will be borne by Project Co and the Authority as they shall agree or as determined by the Dispute Resolution Procedure.

- 3.3 [Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the Design Build Finance and Maintain Agreement, [insert reference to Equipment ~~services~~ ~~contract~~Services Contract and any Equipment performance measures] and quality standards as set out in the [refer to Equipment Service Level Specification] and the Quality Plans.]

#### 4 PROCEDURE REVIEW

The Independent Tester shall:

- 4.1 Monitor and report on the operation of the quality assurance procedures of the Contractor at ~~regular~~[monthly] intervals ~~(maximum [♦] weeks)~~ during the execution of the Works.
- 4.2 The Independent Tester shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of the [Mechanical and Electrical engineering services] prior to the Authority's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Changes to the Works in accordance with the Design Build Finance and Maintain Agreement.~~-~~
- 4.4 [Review any samples or mock ups as required by Schedule [♦] and check that they have been approved in accordance with the Design Build Finance and Maintain Agreement.]

#### 5 CONSTRUCTION REVIEW

The Independent Tester shall:

- 5.1 Visit the Site and monitor the Works for their compliance with the Authority's Construction Requirements, Project Co's Proposals and the Approved RDD.<sup>7</sup> The frequency and timing of the Independent Tester's visits are dependent on the progress of construction on Site. The Contractor shall agree a programme with

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<sup>7</sup> Authorities to insert any other relevant documents.

the Independent Tester for the inspection of [Key Construction Processes]<sup>8</sup> and the completed [Phases of the] Works and shall give the Independent Tester advance notice of these Works being carried out on Site.

- 5.2 ~~Randomly~~At least [once a month], randomly check that the Works are being undertaken in accordance with the Construction Quality Plan that has been agreed by the Authority and Project Co and report on findings.
- 5.3 Review the written mechanical and electrical engineering services testing and commissioning procedure pursuant to paragraph 4.2 above and—, through a sample audit of [fifty percent (50%)], undertake selective witnessing of the mechanical and electrical services final testing and commissioning. ~~The Independent Tester has indicated that these sampling proportions should amount to approximately [fifty] percent [(50%)]~~—The Independent Tester shall review [one hundred] percent [(100%)] of all final test ~~results~~certification and reports. If in the professional judgment of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate for final testing and commissioning, he shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by Project Co, the Authority or the Contractor as they shall agree and failing such agreement, as determined by the Dispute Resolution Procedure.
- 5.4 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete.—
- 5.5 Check the delivery of hard copies of the relevant operating manuals, relevant approvals, test results, inspection records, "final issue" construction drawings, "as-built" building specification and "as-built" drawings to the Authority [and monitor compliance with required 'data drops' of the same, pursuant to the BIM Protocol and the Design Build Finance and Maintain Agreement].

## 6 PARTICIPATION IN DISPUTE RESOLUTION

~~As~~In accordance with Clause 3 (Services and Varied Services) of the Independent Tester Contract, as and when required by the Authority or Project Co, the Independent Tester shall participate in the Dispute Resolution Procedure of the Design Build Finance and Maintain Agreement (as such term is defined in the Design Build Finance and Maintain Agreement) to the extent that issues under the Design Build Finance and Maintain Agreement which have been referred to the said Dispute Resolution Procedure relate to the Independent Tester's other obligations and tasks as set out in this Appendix 1 and this Agreement.

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<sup>8</sup> To be defined on a project specific basis. This should include stages of the Works that need to be inspected before being covered over by subsequent activity so that the Independent Tester may satisfy himself that these stages have been constructed in accordance with the Quality Plans, without the need for opening up