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# BRINGING PPP PROJECTS TO CLOSE

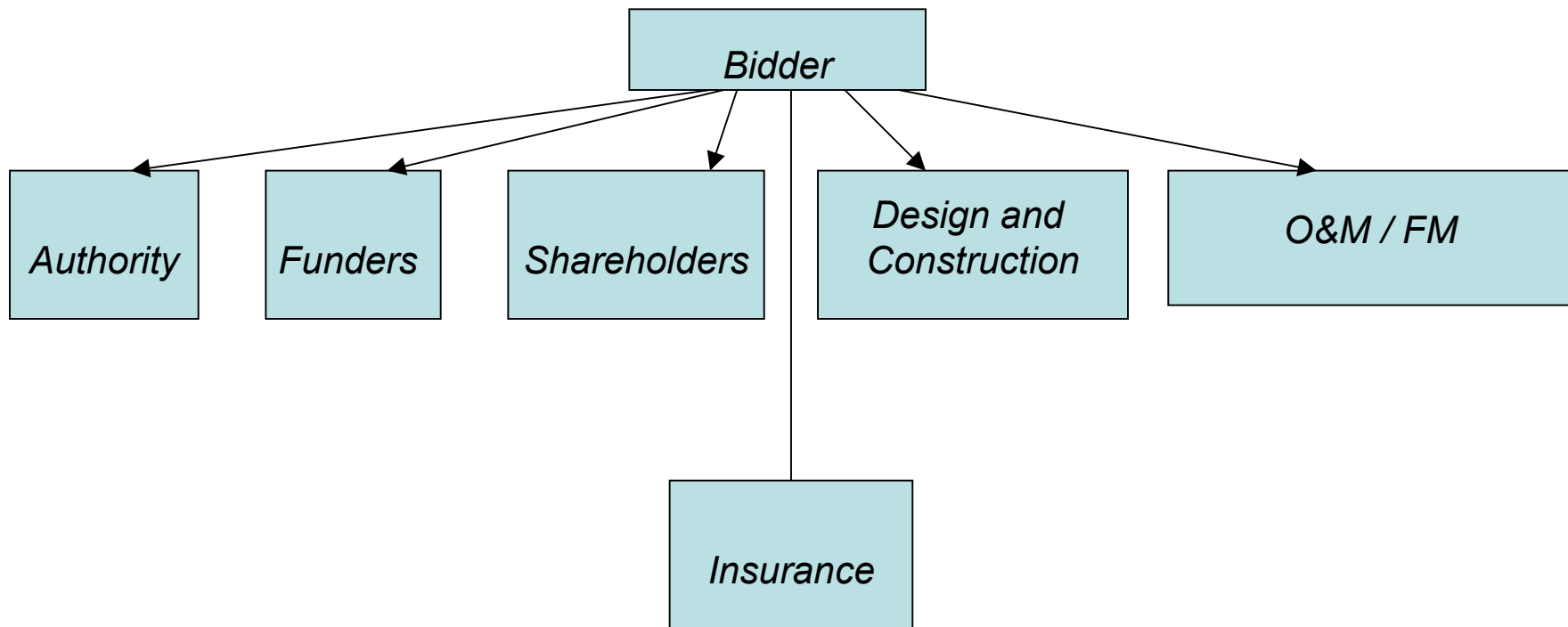
a lawyer's perspective

Eamonn Conlon

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- The Contractual Structure
- The Contracts
- The Players
- Timetable
- Getting the Contracts Signed
- Getting to Close
- “Snakes in the Grass”
- Conclusion – a good project manager is priceless



- **Authority Documents**
  - Authority & Bidder – “Project Agreement”
  - Authority & Funders – Funder Direct Agreement
  - Authority & Consultants and Sub-Contractors – Direct Agreements
- **Bank Documents**
  - Bank & Bidder – “Senior Funding Agreement”
  - Other security documents – bonds, additional lending facilities
  - Bank & Consultants and Sub-Contractors – Direct Agreements
- **Equity Documents**
  - Shareholders Agreement
  - Cross-indemnities between shareholders
  - Internal agreements between joint venture companies
- **Construction Documents**
  - Design & Build Contract
  - Consultants and Sub-Contractor Appointments
  - Direct Agreements with Bidder (where sub-contractors), Authority and Banks
- **FM/Services Documents**
  - Services Contract
  - Interface Agreement
  - Direct Agreements with Authority and Funders

- 3 +Legal advisers to funders, bidder and authority
- 2 Technical Advisers engaged by bank and authority (in-house for bidders)
- 2 Financial Advisers engaged by bidders and authority (in-house for banks)
- 3 Insurance Advisers engaged by banks, bidders and authority
- Others

## Stage One: Prequalification:

### Acting for the Authority:

- drafting of OJEU Notice,
- reviewing legal aspects of the pre-qualification documentation,
- assisting in the shortlisting of candidates

### • Acting for the Bidder:

- May need to submit pre-qualification information

### • Acting for the Funder:

- Usually no input at this time

## Stage Two: Selection of preferred bidder

- **Acting for the Authority:**
  - drafting the legal aspects of the tender documentation,
  - assisting in the dialogue/negotiation phase of the competition,
  - assisting in the assessment of tenders in order to select a preferred bidder
- **Acting for the Bidder:**
  - Submit mark up of project agreement
  - May meet with Authority
- **Acting for the funder**
  - May comment on documentation

## **Stage Three: Appointment of preferred bidder**

### **Acting for the Authority:**

- assisting in clarification stage with preferred bidder,
- Work towards close: negotiating contracts to which Authority is a party,
- Review all other contracts
- finalising contract for execution
- drafting award notice for submission to the OJEU

### **Acting for the Bidder:**

- Work towards close – drafting and negotiating all contracts

- **Acting for the Bank:**

- work towards close – drafting and negotiating all contracts

- NB: Lawyers provide ongoing advice regarding compliance with EU procurement rules

## **ACTING FOR THE BIDDER: FOUR TEAMS**

### **Team One: Lead Team:**

- Project Agreement,
- Funder Direct Agreement

### **Team Two: Banking Lawyers:**

- Senior Funding Agreement,
- other security documents

### **Team Three: Corporate Lawyers:**

- Shareholders Agreement
- Cross-indemnities between shareholders
- Internal agreements between joint venture companies

### **Team Four: Construction/O&M Lawyers:**

- Design & Build Contract
- Consultants and Sub-Contractor Appointments
- O&M Contract
- Interface Agreement
- Direct Agreements

Example: “Project Agreement” – Between Bidder and Authority  
Schedules:

- Services Output Specification, Construction specification, drawings, FF&E lists, access regime during construction, construction programme – all appended to the contract, all drafted by Technical Consultants
- Site – plan of proposed building/structure
- Service Availability Requirements – drafted by technical consultants
- Payment Mechanism – figures from financial advisers, calibrated from the technical input
- Design Review Procedure – what design documents are to be reviewed?
- Insurances – insurance advisers provide
- Schedule setting out list of Agreements – who are the Specialist Consultants?

## “CPs” - Conditions Precedent –

### Checking:-

1. The Bidder is able to enter into the Contract
2. The Authority owns the land and asset
3. The insurances are in place.
4. The Agreements are in place.
5. The Funding is in place.

**Example: The Bidder is able to enter into the Contract.**

**Require:**

- Certificate of Incorporation
- Memorandum and Articles of Association
- Board Resolution authorising Company to enter into the Contract, authorising signatory to contracts
- Certificate from Director of Company confirming that the Company can enter into the Contracts
- Funders will seek from Bidder, shareholders, Building Contractor, O&M Contractor, and any Parent Companies that are providing Guarantees.

	Document	Parties	Responsibility for Drafting	Status and Action
1	Project Agreement	Bidder and Authority	Authority Lawyer	Indemnities Clause to be agreed by 03/10/06

Meetings to discuss every fortnight, then every week,  
then every day

Two days with all parties in same building to agree final issues

## Additional Stakeholders:

- Landowners – additional agreements regarding access
- Utility companies – additional agreements regarding utility works
- CIE & county councils – additional agreements regarding infrastructure works
- Employee Transfer Agreements- where the authority is not the employer of the current services providers

## Acting for the Authority:

- What consents are required?
- Example - schools projects in Northern Ireland:
  - Department of Education approves full business case – two different departments within DE
  - Strategic Investment Board acknowledges form of contract – apply for final derogations from standard drafting.

- Need a person who can make commercial decisions – lawyers advise, but somebody needs to make the call.
- Need a person who drives the timetable – always a reluctance to agree items until final hour.
- Need a person who can take a high level overview of issues – important not to get caught up in a minutiae
- Draw focus away from cause of the problem to solution to the problem