Welcome to the Summer Edition of the Projects Bulletin

Welcome to our new partner, Cathy Harris, and her assistants, Jafar Khan and Preety Singh. You will find an article by Cathy Harris and Jafar Khan on the use of the LIFT procurement programme for polyclinics (page 1). You will also find a review of the new guidance on the Competitive Dialogue (page 4), an analysis of the new planning bill (page 6), and an update on the new public procurement rules (page 7).

Polyclinics and LIFT

One of the main points made by Lord Darzi in his report “A Framework for Action” (“Darzi Report”) is that there needs to be greater focus on localised care so that care is concentrated around the patient and not the hospital. Lord Darzi has suggested that this can occur through a transfer of some services out of the major acute hospitals and into localised facilities. Ideally those services transferred would be services for which a GP has referred the patient to an acute hospital, hence avoiding the trap of patients having to join the end of a long list of people already waiting to be admitted to an acute hospital.

Such services transferred from acute hospitals to polyclinics would be those involving, for example, procedures that could be carried out at a surgery without the need for the patient to stay at the facility for recovery. In this way, the polyclinics are intended to be more of a “one stop shop”.

Further commentary on this topic has been provided in the King’s Fund report titled “Under One Roof – Will polyclinics deliver integrated care?” (“King’s Fund Report”). The King’s Fund Report suggests that there is also likely to be a significant shift of some specialist services from hospital to community settings, with 40% of outpatient activity to be delivered from polyclinics.

What exactly is a “polyclinic”?

Lord Darzi has suggested that around 150 polyclinics should be built at a cost of approximately £3.1 billion. He proposed that polyclinics would carry out minor procedures, urgent care and diagnostics (both pathology and radiology). Although the concept of a “polyclinic” continues to be rather nebulous, Dr John Lister of the London Health Emergency described it as “a combination of a super-sized health centre, a minor injury unit, a small scale outpatients department, and a base for community health services.” In fact the little guidance we have from Lord Darzi comes from his suggestion that these polyclinics will employ an average of around 90 medical and nursing staff, including 35 GPs and 3-4 consultants.

The Darzi Report does not suggest a method for procuring the polyclinics either. One obvious way forward is the use of Local Improvement Finance Trusts (“LIFT”). The King’s Report also considers the use of LIFT for the development of polyclinics and problems that might be encountered. However, there is an argument that in certain areas, the Department of Health may have no option other than to use LIFT as a procurement vehicle in any event, because the exclusivity given to LIFTCos under the framework agreements.

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What is LIFT?
Local Improvement Finance Trusts, or “LIFT”, is a procurement route for the development of new facilities or the redevelopment of existing facilities within a certain area. For the most part, LIFT focuses on regeneration and health services in poorer areas, where the health facilities may be in need of an upgrade. It covers both primary and out of hospital care through the setting up of a framework between the public and private sector. The framework governs how the public and private sector will work together to identify and implement new projects. So that a working relationship is established, the private sector is given exclusivity [subject to continuing to show value for money] in relation to carrying out the construction and providing facilities management services. Much like polyclinics, LIFT is intended to facilitate the development of health centres offering integrated, multi-professional care on a “one stop shop” model. Accordingly, it would seem logical that LIFT is be used as the procurement model for polyclinics.

Exclusivity
One of the issues that the Department of Health may face in procuring polyclinics is the exclusivity already granted to LIFTCos under the Strategic Partnering Agreement (“SPA”). In particular the standard form SPA provides that the LIFTCo shall have the sole, exclusive right to nominate its wholly owned subsidiaries to provide services, necessary for the design, construction and commissioning and the provision of the facilities maintenance services (known as “Project Services”) to the Local Health Economy and the Local Health Economy shall ensure that, subject to the terms of this Agreement, they contract with such wholly owned subsidiaries nominated by the LIFTCo under a Project Agreement for the provision of the Project Service and all other Major Capital Projects (that is, capital projects with a capital value in excess of £20,000) identified by the Local Health Economy as being required to enable them to provide primary and community based health and social care in the Area.

Such a prohibition effectively grants exclusivity to the LIFTCo in respect of the Project Services and Major Capital Projects in the Area. This raises the question of how the Department of Health will address such an exclusivity provision if it decides that it wants to procure polyclinics other than through LIFT, in areas in which the Local Health Economy has already entered into an arrangement with a LIFTCo.

OJEU Notice
Besides arguably being locked in by the exclusivity provision, the other issue in relation to the appropriate procurement method is whether a typical OJEU notice for a LIFT project is sufficiently broad enough to permit the building of a polyclinic as it was not originally envisaged that LIFT would be used for such a purpose.

For a LIFT project to be put out to tender, it needs to first be notified in the Official Journal of the European Union (“OJEU”). A typical OJEU notice for a LIFT project will describe the scope of the project as “to provide/manage the provision by its supply chain of a mixture of new build and refurbished serviced public and community based health, social care and customer service facilities, and headquarter and administrative facilities for the contracting authorities (“Relevant Facilities”) which may include other public and community accommodation which is associated and/or integrated with such Relevant Facilities”.

Other criticisms of LIFT
Some of the other criticisms of LIFT in the King’s Fund Report were that it has not really been achieving its goals by demonstrating cost savings or improvements in cost effectiveness, and has been failing to provide integrated healthcare.

Although these criticisms may be valid, the failings are issues that should be addressed by the public sector in making sure that the projects put forward to the LIFTCo have been the subject of adequate consultation with the GPs, and reflect the overall goal of providing a more integrated approach to healthcare.
service. Such failings are arguably from a lack of consultation and flaws in planning, not an intrinsic flaw in the procurement method.

**Recent projects involving general facilities**

Recently, there has been a move to procure more general medical facilities under LIFT. Recent examples of such projects include:

- The health centre at Alkrington (Greater Manchester), which was the first Wave 4 building under LIFT, completed on 8th April 2008. In particular, the health centre is in keeping with the more recent focus on providing localised centres which are one stop shops. Alkrington in particular will have a GP Surgery, Audiology, Orthoptics, Psychotherapy and District nurses treatment rooms, primary care mental health services, well baby clinic, epilepsy service, diabetic service, citizen advice bureau and podiatry.

- The Chadderton Health and Wellbeing Centre (Lancashire) reached financial close on 8th May 2008. The Wellbeing Centre planned for Chadderton will provide health facilities including a 25-metre swimming pool, community meeting rooms, a fitness suite and library.

- The Truro Health Park will bring together two existing surgeries into the one building. Situated in Cornwall, the construction work for the Truro Health Park commenced on 21 April 2008, with the operation phase set to commence in 2010. The Services to be provided from the Truro Health Park are likely to be GP Services, a minor operating theatre, family planning, podiatry, pharmacy, health promotion, speech and language therapy, child and family education, physiotherapy and dental services. Of interest however, is that under this LIFT arrangement, a food processing plant, albeit on a different site to the Truro Health Park, has also been built at Redruth (Cornwall). Commentators have suggested that this is an example of how LIFT is not simply about primary care, but also about social regeneration and about improving the area’s health.

In addition, three more community hospitals have been announced by Health Minister Ben Bradshaw as part of the £1.4 billion LIFT health building programme. The schemes will all be situated in the South East with a total capital value of £76.3 million, of which £23.5 million will be from the community hospitals and services fund. The projects are:

- Finchley Community Hospital (value £9.9m)
- Eltham & Mottingham Community Hospital (value £4.6m)
- King’s Avenue (Ashford) Community Hospital (value £9m)

Each new hospital will offer a range of services tailored to the needs of the local community, including GPs and other primary care practitioners providing extended hours opening and a range of outpatients and diagnostics services closer to people’s homes. Plans also include minor injuries units and integrated health and social care facilities.

**The Way Forward**

As the OJEU notices for LIFT projects have, in some instances, been interpreted broadly to include not only primary care, but also general social regeneration within the area, it remains to be seen whether this approach will be challenged as polyclinics are unlikely to be considered to fall outside the scope of a typical LIFT OJEU notice.

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Limitations of the guidance

As the introduction makes clear, there is no case law covering issues raised by the introduction of the new procedure and therefore the guidance can only be put forward on the basis of officials’ and practitioners’ best efforts at interpreting the relevant EU Directive (Directive 2004/18/EC), the public sector Regulations (the Public Contracts Regulations 2006) and various guidance notes issued by the European Commission. Subject to those limitations, the note is helpful in that it identifies the various steps in the competitive dialogue process, gives advice to authorities on how to structure those stages and deals with a number of the issues that are causing the most concern to the private sector (eg bid costs).

Choice of procedure

The note recommends that any authority which is proposing to use the negotiated procedure (a procedure commonly used in the past for PFI procurements) as opposed to competitive dialogue should set out its justification for the choice in writing, after taking suitable advice from its lawyers. It warns that any decision to use the negotiated procedure may attract scrutiny from the European Commission.

Authority staffing

The note points out that in general competitive dialogue procurements demand a greater input in terms of staffing, advice and support than other procedures and the authority therefore needs to ensure that it has enough skilled and experienced people in place at all stages of the procurement. During the dialogue stage the note suggests that it may be appropriate for the authority to set up two separate teams. In addition to the main procurement team, which will have been in place from the very first days of planning the new project, the guidance suggests that it may be appropriate to have a second team of officials to prepare for and undertake the detailed dialogue sessions with bidders. As the note points out, taking part in dialogue sessions (sessions which by their very nature shade into negotiation) is taxing for the individuals concerned and if a dialogue is being conducted with a number of bidders then the diary will be completely swamped with dialogue sessions. This means that no work will be done on the wider procurement issues and it will be very difficult to advance the documentation for the next stages. A separate dialogue team can devote itself to timetabling and taking part in dialogue sessions, feeding back the results to the main procurement team. The core team can concentrate on developing and revising the contracts and tender documentation to reflect the outcomes of the dialogue sessions and it will remain free to have an overview of the competition as a whole. The core team will also be able to challenge and intervene in the process of the dialogues if it considers that the detailed sessions are going “off track”. The note suggests that where a contracting authority adopts this twin team approach, the bidders should be encouraged to develop a comparable approach to resourcing and managing the dialogue stages.

Bid costs

The note recognises that the competitive dialogue procedure places a greater burden on the bidders in terms of bid costs. There will be higher costs for those bidders who complete the dialogue but are ultimately unsuccessful, but the note considers that the costs for the successful bidder will be “comparable to those under the negotiated procedure”. Although it recognises the additional burden on bidders who are subsequently unsuccessful, the guidance restates the Treasury’s policy that there is a strong presumption against contributing to bid costs. Whether to contribute to bid costs has to be judged on a case by case basis and may be justified where there are legitimate concerns about competitive tension that cannot otherwise be addressed (in other words, bidders will not come forward and bid without an undertaking to contribute towards their costs). This is likely to be the case in “mega procurements” such as large MoD contracts and the like. As part of its responsibility to manage bid costs, the authority should prepare position papers on all areas for dialogue in advance of the dialogue
sessions so bidders have enough time to develop their responses prior to the actual sessions. Authorities are also encouraged to provide title reports, condition surveys and site surveys to the bidders at an early point.

**Commercially sensitive information**

The guidance recognises the concern of bidders that the dialogue process may lead to commercially sensitive information leaking from one bidder to another. However the note is short on practical guidance as to how this can be avoided. In practice the only way of doing this may be to adopt the approach of negotiating several different solutions in parallel, with each bidder being required to negotiate a different project agreement. The guidance states clearly that “there is no requirement for all bidders to submit a priced solution on the basis of a single identical contract”. If one project agreement is used for all bidders, then there is always the risk that the amendments made to the common project agreement will give bidders an indication of options being put forward by other tenderers. As a matter of tactics, bidders who consider that they will be proposing innovative or proprietary solutions may wish to influence the authority to go down the route of having several parallel project agreements. Clearly the need to maintain parallel negotiations on three or four different draft agreements will impose higher demands on the authority in terms of staff resources and legal input.

The guidance also suggests that the authority should agree with each bidder which parts of its solution are commercially sensitive and should be treated as confidential and which parts of its solution are generic in nature and can be shared with other bidders. Although this is fine in theory, it will be a time consuming and difficult process to sort this out with all participants in the dialogue.

**Market failure**

By market failure the document means a situation where the number of credible bidders drops to one or less. If this occurs early on in the procurement process, the recommendation is that the procurement should be brought to a halt. If the failure occurs much later in the process, the contracting authority may decide to continue with the only remaining bidder but in that case it should ensure that there is transparent competition in the bidder’s supply chain. This will mean market testing any subcontracts to be let by the preferred bidder.

**Issues to be resolved after the close of the dialogue**

One of the difficulties of the competitive dialogue procedure is that there is very little room for change to the details of a solution after the final bids have been delivered. The guidance includes a helpful discussion of this area and lists some issues that frequently have to be dealt with after submission of final tenders. These include:

- Full details of the subcontracts to be awarded by the preferred bidder.
- Complete design detail. The guidance recognises that it is impracticable to require the level of detail necessary for contractual close to be delivered at the final tender stage. It quotes the Building Schools for the Future guidance which requires RIBA Stage D design for the purpose of selecting a preferred bidder, which is then developed to RIBA Stage E for contract close.
- Detailed planning applications. The guidance recognises that the detailed planning approvals may come at a later stage in the process and may of necessity lead to changes in design and possibly pricing.
- Interest rate swaps. The guidance recognises that the final cost of the financing cannot be ascertained until the swap is performed and this will not happen prior to financial close.

All in all, this new guidance from the Treasury and OGC is helpful for the market, if only because it indicates to the private sector the approach that is likely to be followed by public sector awarding authorities.

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“One of the difficulties of the competitive dialogue procedure is that there is very little room for change…”
On 27 November 2007 the Government introduced a new Planning Bill, designed to “reform the planning system, providing for quicker and more transparent decision-making”.

Amongst the changes introduced by the Bill, the most notable are the new system of development for projects of national significance, overseen by a new, independent commission, and the introduction of a new charge on development gain. The Bill replaces the eight current statutory regimes covering electricity generation, power lines, gas supplies, airports, harbours, roads, railways, waste and reservoirs with a single consent regime. Whenever one of these projects is undertaken, a single application for a development consent order is all that will be required.

**The Infrastructure Planning Commission (“the Commission”)**

Decision making for planning is currently stretched across four Secretaries of State. If the Bill is enacted as drafted, applications for NSIPs will be decided by a new Infrastructure Planning Commission, expected to be in place by April 2009. The Secretary of State for Communities will appoint a chair of the Commission, at least two other persons as deputies, a Chief Executive and the rest of the Commissioners (between 20 and 30 Commissioners in total).

Under the new system, ministers will be responsible for providing long-term “national policy statements”. It is then for the Commission to take planning decisions on NSIPs according to these statements. The Secretary of State may still retain control over decision-making where she has chosen not to designate (or keep in place) a national policy statement covering the relevant type of infrastructure.

**New Application Procedure**

Prior to making an application, developers will be required to consult widely. There are also various requirements to publicise, notify and take account of representations. Under the new regime, these requirements will be with the applicant, no longer with the determining authority. The Commission may only accept applications which comply with required standards, give reasons for any non-compliance with relevant guidance and follow the pre-application procedure (including the duties to consult, publicise and take account of representations). The application will then be examined by either a panel or a single commissioner.

The Bill also attempts to speed up the decision-making process for NSIPs by introducing new time limits. From its initial meeting on an application, the examining authority will have six months to finish examining the application and nine months in which to make a final decision.

**Paying for Gain**

The controversial planning gain supplement has been replaced in the Bill by a new charge; the Community Infrastructure Levy (“CIL”). CIL is designed to ensure that land owners who benefit from an increase in land value as a result of planning permission being granted for infrastructure bear the cost, wholly or partly, of that infrastructure, applying a tariff per house or square foot of commercial development, based on the model of the Milton Keynes roof tax.

The Bill states that CIL may be required in respect of land “whether or not its value has increased”, and calculating CIL by reference to increase in land value is merely provided as one of the options available to the Secretary of State. Landowners could therefore conceivably find themselves paying for a gain which they have either not received, or is larger than the gain they have received.

Also of note is that CIL will not replace section 106 agreements, but may be applied in addition to them. It is possible, therefore, that developers and landowners will find themselves paying twice over. Further, CIL will be linked to the development plan for the area, comprising the regional spatial strategy and the local development framework. A developer may be burdened with having to pay to fund infrastructure that they are providing in an area far away from the area of the local planning authority; providing no benefit to local communities.

**Saving Time and Money**

Industry and Commerce hopes that the Bill will flush out some of the delays, bureaucracy and inefficiency associated with the current planning regime, evidenced in projects such as Heathrow’s Terminal Five, thereby reducing costs to business associated with these problems. The Government estimates that the new regime will save around £300 million a year by reducing delays and administrative costs; nearly £5 billion by 2030. The accuracy of this prediction remains to be seen.

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**New Remedies Directive dated 11 December 2007 and standstill period**

The new Directive on the Remedies that are available for breach of public procurement rules is dated 11 December 2007 and published in the Official Journal of the EU on 20 December 2007 (OJEU L-335 page 31). It will be transposed into English law in the next 24 months.

The Remedies Directive 2007 impose a new obligation on contracting authorities to wait at least ten days after deciding who to award a public contract before executing the contract itself. The ten-day period is a new tool which will give unsuccessful bidders time to assess whether the decision to award the public contract was made in compliance with applicable public procurement rules. It is also called the “standstill period”. The UK has already implemented a ten-day standstill period which was introduced by the Public Contracts Regulations 2006, which came into force in the UK on 31 January 2006. The standstill period was the UK’s response to the ECJ’s Alcatel ruling imposing an obligation on Member States to review the provisions of national law in order to ensure it offers fair and efficient remedies for breach of procurement rules (Case C-81/98 Alcatel Austria).

Should a challenge of the tender procedure be successful, contracting authorities must not execute the public contract and instead must re-tender the works, services or supplies again. The Remedies Directive gives national courts in each Member State the power to allow the execution of public contracts despite of breach of the procurement rules if “required by overriding reasons relating to a matter of general interest” (Article 2d(3) of the Remedies Directive). National courts who decide to do so must nevertheless apply alternative penalties.

The ten-day standstill period will also apply to public contracts which have not been advertised or where contracting authorities ignored the need for a public call to competition.

Finally, for framework agreements and Dynamic Purchasing Systems, the national law may opt for a precontractual review procedure rather than the ten-day standstill procedure. This precontractual review would take place prior to the decision to award the framework agreement or public contract further to a DPS. But the requirement does not apply to subsequent call-off contracts or mini-competitions within a framework agreement.

**Updated thresholds for public procurement contracts**

On 1 January 2008, the procurement thresholds were modified to reflect the exchange rate between the European currency and the currencies of European countries members of the EU but not having adopted the Euro. The revised thresholds are:

**Public sector:**
- Works (all bodies): £3,497,313;
- Supplies and Part A services awarded by Schedule 1 bodies: £90,319 and by other bodies: £139,893;
- Part B services, research & development and certain telecom services (all bodies): £139,893;
- Small lots: supplies and services £54,327 and works: £679,090.

**Utilities:**
- Works: £3,497,313;
- Supplies and services: £279,785;
- Small lots: supplies and services £54,327 and works: £679,090.

**ECJ judgement Varec SA v Belgium (case C-450/06) dated 14 February 2008**

A recent judgement of the European Court of Justice on disclosure of business know how and secrets needs to be read in the context of the current debate on Competitive Dialogue. Belgium launched a tender for the supply of parts for military tanks. Varec SA submitted a bid but Varec’s bid was rejected on the ground that it did not meet the required technical specifications. The supply contract was awarded to another bidder. Varec challenged the decision and brought proceedings against the Belgian authority in front of the tender tribunal.

The successful bidder objected to the proceedings on the ground that if the tender tribunal accepted to review Varec’s challenge,
it would lead to an unacceptable breach of the successful bidder’s business secrets (unacceptable to the successful bidder, that is). The successful bidder refused to disclose the full details of its bid to the tender tribunal. The tender tribunal referred the issue to the Belgian supreme court (the Conseil d’Etat) which referred the issue to the ECJ. The question was whether the tribunal was obliged to protect confidential business information while at the same time being entitled to take note of such information but without disclosing it to third parties.

The ECJ decided that the tender tribunal must guarantee the protection of commercially-sensitive information when dealing with challenges of tender procedures. It also ruled that it is up to each tender tribunal in each Member State to decide on the level of protection of confidentiality and business secrets and that tender tribunals are allowed to take into account such confidential information when reviewing challenges brought by third parties.

This ECJ Judgement is particularly relevant as the debate on the respect of confidentiality of information used in the course of a Competitive Dialogue procedure does not show any sign of quietening down. Readers of the Projects Bulletin will recall that a concern shared by many that contracting authorities may cherry pick the best ideas from outlined submissions made by the participants in a Competitive Dialogue, and incorporate those ideas into an optimum set of output specifications for the Invitation To Negotiate. It is difficult to see what could be the incentive for potential bidders to disclose their know-how and intellectual property rights for the design of solutions during the initial stages of the tender where they may not even be appointed preferred bidder and see their business secrets disclosed to their competitors.

Neither the Directive 2004 nor the Regulations 2006 define exactly what confidential information is. Our opinion is that discussions during the Competitive Dialogue should take place without disclosing the solutions proposed or any confidential information to the other participants and any disclosure must be made with the participant’s consent only. The ECJ judgement in Varec SA does give some comfort that the voice of reason (or moderation rather) will be heard by contracting authorities and the High Court.

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