

**A GUIDE TO THE
DESIGN, SPECIFICATION
& CONSTRUCTION
OF
MULTI USE GAMES AREAS
(MUGAs)
INCLUDING
MULTI-SPORT SYNTHETIC TURF PITCHES
(STPs)**

**Part 2 (of 3) – General Procurement and Contracts
Guidance**

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Executive Summary

This report has been prepared for Sport England for use with its other design guidance notes.

According to central government procurement policy, reflecting issues in the Rethinking Construction manifesto, the three recommended procurement routes for construction are design & build, prime contracting and PFI work. Resort to traditional procurement methods should only be made, according to the policy, when there are exceptions reasons for doing so, having regard to the whole life costs of the asset.

The Rethinking Construction initiative has not yet been fully embraced within local government procurement policy. Instead, authorities are committed to securing best value – which is still be developed in lieu of CCT – and must do so within the EC procurement framework and procedures. It is notable that local government policy is undergoing review which may include conditioning award of grant funds for capital projects with compliance with Rethinking Construction principles; and rewarding co-operation between councils in their procurement activities.

Care should be taken with selection of professional advisors to assist with any capital project investment.

Design and build is one of the recommended procurement routes for large projects. Users should beware difficulties with design responsibility and control of the quality of work done. Neither prime contracting nor PFI arrangements are likely to be economic on projects value below £7m.

Care should be taken with tendering arrangements. Considerable caution is suggested with use of letters of intent. Equally, caution with two-stage tendering arrangements are also suggested to avoid protracted and unfavourable negotiations and potential EC procurement rules breaches.

1. INTRODUCTION: THE CHANGING PROCUREMENT LANDSCAPE

Generally

This report provides outline guidance on construction procurement and contracts for use by Sport England and applicants for funds distributed by Sport England.

A key aspect in any consideration of alternative procurement methodologies is a proper understanding of the governing guidelines or directives within which the choice of procurement route is exercised. This is particularly important in the public sector, or where grants are sourced in the public sector. Accordingly, the report initially focuses upon the Rethinking Construction movement which has inspired changes in procurement policy throughout the construction industry. This is covered in the balance of this Section. Section 2 examines the impact of that movement on current central government procurement policy for construction work as it stands as a result of Rethinking Construction. A review of local government procurement policy and how it is changing in response to encouragement to comply with Rethinking Construction principles and the Best Value framework is set out in Section 3.

Later, Sections 4 to 6 contain a more specific review of how a project may be procured and delivered. This commences with broad considerations such as selection of the project team and later examines key issues arising in choice of procurement route and merits of contractual arrangements.

The contents of this report are intended as a guide only and advice provided is on a non-specific basis. Particular advice should be sought on application of principles to local situations and conditions.

Rethinking Construction

In July 1998, a Government sponsored report¹, titled "**Rethinking Construction**"

<http://www.dti.gov.uk/construction/rethink/report/index.htm> was produced by a Construction Task Force chaired by Sir John Egan. It contained two key messages:

The Construction Industry's main clients take the view that the UK Construction Industry does not deliver consistent quality and value for money. Too often the performance of the industry is unreliable, projects run neither to time nor budget and too much effort and resource is invested in making good defects, premature repair and replacement and in litigation.

¹ The report was commissioned by John Prescott, Deputy Prime Minister.

The central message of Rethinking Construction was that through the application of best practices, the industry and its clients could collectively act to improve their performance. There was recognition that the industry could and indeed had to do much better. This was to be achieved through a series of Demonstration Projects which exemplify some of the innovations advocated in Sir John Egan's report "**Rethinking Construction**" which he produced as Chairman of the Construction Task Force.

The principles behind Rethinking Construction were: client leadership; focus on the customer; integrated teams throughout the delivery chain; and respect for people.

A key recommendation within the report was for creation of integrated supply chains as a means of securing greater value for money. A recurring theme was that design and construction should be executed through single point of contact and should not be fragmented.

Immediately after publication of the report, and to take forward the agenda, the DTI² sponsored creation of the Rethinking Construction group. This is an umbrella organisation that aims to provide strategic, overarching guidance to improving the processes and products of the construction industry. The Rethinking Construction Steering Group oversees four separate areas of activity:

The Housing Forum. This leads in housebuilding, refurbishment and repairs and maintenance in the private sectors.

The Movement for Innovation (M4i). This leads on non-housing construction in the private sector

The Local Government Task Force (LGTF). This leads on best practice for local government clients. The LGTF was established in March 2000 to encourage and assist local authorities to adopt the principles of Rethinking Construction. It has close links with other organisations that represent local authorities, such as the local government Association, IDeA³, CIPFA⁴ and ODPM⁵. LGTF focuses on demonstration projects and the very real improvements that these bring to the construction process. It also publishes advice and guidance to local authority practitioners.

² Department of Trade and Industry

³ The Improvement and Development Agency, which delivers practical solutions to improve local government performance.

⁴ Chartered Institute of Public Finance and Accountancy

⁵ Office of the Deputy Prime Minister

The Construction Best Practice Programme (CBPP). This group raises awareness of the benefits of best practice and provides the construction industry and its clients with the skills and knowledge to implement change.

In addition to these groups, a strategic forum for construction was set up in June 2001 under Sir John Egan's chairmanship. This is an industry representative body which operates at a high strategic level and provides input into developing the main agendas for change set out in the Rethinking Construction report. The strategic forum has recently published its report as a follow up to Rethinking Construction titled Accelerating Change. That report focuses on the three improvement agendas of client leadership, integrated supply chains and people issues to deliver widespread improvement to construction processes on the ground. Like its predecessor this report presents strategic targets to deliver improvements underpinned by a series of more detailed actions and recommendations.

Since publication of the Rethinking Construction report in 1998, new initiatives with respect to procurement have been led by Central Government, through the Office of Government Commerce. Central Government procurement policies, whilst mandatory for government departments, do not apply directly to local government. Recently, however, both OGC and the Rethinking Construction groups have sought to influence to a significant extent future local government procurement policy. Indeed it is possible, in the near future, that use of public funds will be linked to compliance with Rethinking Construction principles or that compliance with those principles is expected as part of Best Value analysis. Independently of the above, local authorities have had to be comply with a new Best Value regime, introduced in Local Government Act 1999 and still in its relative infancy. This is considered in more detail in the next section.

2. CENTRAL GOVERNMENT PROCUREMENT POLICY

Role of the Office of Government Commerce (OGC)

OGC was created following the completion of a review of civil procurement in central Government in 1999 by Mr Peter Gershon, who was then the Managing Director of Marconi Electronic Systems and a member of the Board of GEC plc. The review found that different Departments applied different approaches and practices to the procurement of essentially similar requirements. This lack of consistency meant that there was a wide gap between best and worst practice in Government. The review identified a number of weaknesses in Government procurement, concerning organisation, process, people and skills, measurement, and the contribution of the "centre" of Government. To deal with these weaknesses, the review called for the creation of a unified procurement organisation with the aim of providing a greater sense of direction in procurement and to push best practice in central civil Government.

The OGC was established in April 2000 with the appointment of Mr Peter Gershon as Chief Executive. It brought together the former Treasury units concerned with procurement policy, practice and development with the Property Advisers to the Civil Estate; the Central Computer and Telecommunications Agency; and the Buying Agency, three former Cabinet Office agencies. OGC has played a central role in modernising Government procurement practice.

The OGC was created to lead a wide-ranging programme to modernise procurement in central civil Government, and deliver substantial value for money improvements. The OGC seeks to offer customers and suppliers integrated, flexible and responsive support for all aspects of procurement and supplier management in central civil Government.

All of the OGC's work is based on a collaborative approach with central civil Government Departments, their agencies and Non-Departmental Public Bodies (NDPBs). The OGC works with central civil Government to achieve its aims, objectives and targets. Its high level objectives are to:

- Provide guidance and expertise to support the successful delivery of procurement-based projects and other forms of commercial activity;
- Develop the Government market so it is more efficient and attractive for both suppliers and customers;
- Develop a clear and supportive framework for best in class procurement activity to help achieve better value for money;
- Deliver efficient and effective services to external and internal customers, gaining widespread recognition for excellence and as a leading contributor to Government modernization."

The OGC's central civil Government remit does not cover the devolved administrations, but it does have a commitment to exchange information and knowledge across a range of its activities with them, and with the Ministry of Defence (MOD). The OGC's work designed to modernise and promote best procurement practice is based on a collaborative approach with Departments. Success therefore depends on Departments utilising the OGC's guidance and expertise.

The OGC's remit is limited to central civil Government and it does not therefore cover very significant areas of public spending such as Defence and the NHS. Nor does it cover local authority expenditure.

The Achieving Excellence Initiative

In order to drive forward the Rethinking Construction agenda, the government set up its Achieving Excellence initiative. Achieving Excellence was the three-year strategy to improve the performance of Central Civil Government Departments, Agencies, and Non-Departmental Public Bodies as clients of the construction industry. The practices set out in the initiative were to be adopted on all building, refurbishment and maintenance projects by March 2002.

The mission statement of the initiative was "Through the Achieving Excellence Initiative, Central Government Clients commit to maximise, by continuous improvement, the efficiency, effectiveness and value for money of their procurement of new works, maintenance and refurbishment."

The initiative was initially developed by the Government Construction Client Panel (GCCP) in consultation with the industry and was launched at a press briefing by the Chief Secretary to the Treasury on 4th March 1999. In his letter dated 23rd February to Cabinet colleagues, the Deputy Prime Minister requested his Cabinet colleagues to adapt this initiative. In April 2000, OGC took over the lead role in driving forward the Achieving Excellence initiative.

The OGC's Construction and Property Division took forward the **Government Construction Client 'Achieving Excellence' initiative**

<http://www.ogc.gov.uk/index.asp?docid=218> which required central civil government to achieve a range of performance targets by March 2002, including cost and time reductions, quality and safety improvements and client involvement in the management of the supply chain. The Construction Division lead on the **Achieving Excellence Initiative** and chair the **Government Construction Client Panel**, <http://www.ogc.gov.uk/index.asp?docid=217covering> best practice procurement in the public sector and the following:

To improve the procurement and management of property and construction within central civil government through disseminating advice on best practice. It will be informed by the **Gateway Review**

process⁶ <http://www.ogc.gov.uk/index.asp?docid=377> and will ensure lessons learned are taken forward in this initiative. Develop systems, procedures and indicators to measure, and ensure, improvements in the performance of property and construction procurement and management.

To develop, and provide advice on, forms of contract for use by central civil government. Identify, establish and manage a range of VFM framework (call-off) contracts.

A pool of Project Sponsors have been recruited to support departments without the necessary expertise/resource in construction projects, and to be deployed on the **Gateway Reviews**.

Achieving Excellence set out a three-year route map with clear targets for improving Government's performance. It had far-reaching implications for how construction procurement was to be carried out in Government organisations, covering elements such as:

- Project sponsor training;
- Minimising financial and management control chains;
- Full consideration of integrated supply chain routes such as design and build and Prime contracting when choosing the procurement strategy;
- Value for money (including whole-life costing) rather than the lowest price
- Implementation of "**Achieving Sustainability on Construction Procurement**"
http://www.ogc.gov.uk/embedded_object.asp?docid=1039 (PDF 361KB) [published in June 2000]

The initiative was covered in two documents:

- "**Achieving Excellence**" which showed the pan-Government targets for each of the next three years and how the initiative was linked to the targets of Sir John Egan's Report, "Rethinking Construction";
- "**The Action Plan**"
http://www.ogc.gov.uk/embedded_object.asp?docid=1046 which showed the exact requirements from each Department, Agency and Non-Departmental Public Body. Each organisation may develop their own timetable for introducing each of the elements of the action plan to ensure that the March 2002 deadline is met.

Target objective 4.2.1.3 of the Achieving Excellence Action Plan required Departments, Agencies and NDPB's to use "Integrated procurement

⁶ This process involves examining the business case for the project at key stages of the projects life.

Strategies " (which were identified as Design & Build, PFI and Prime Contracting) was to be generally used for projects, whereas traditional methods of Procurement were only be used when they offered better value for money. This target, like all others under Achieving Excellence, was to be fully implemented by March 2002 on all Maintenance, Refurbishment and New Works Projects.

To speed up implementation of the target, in May 2000, HM Treasury & OGC (see attached letter to **Government Colleagues** and the **Press release**) asked that, "from 1st June 2000 all Central Government clients should therefore limit their procurement strategies for the delivery of new works to PFI, Design and Build and Prime Contracting and from the 1st June 2002 these procurement strategies should be applied to all refurbishment and maintenance contracts. Traditional, non-integrated, strategies will only be used where it can be clearly shown that they offer best value for money. This means in practice that they will seldom be used."

As part of its role in leading the Achieving Excellence Initiative, OGC has undertaken three procurement related tasks of particular relevance to construction:

Issued changes to GC/Works/1 in 2000. The amendments were developed to align that standard form with elements of the 'Achieving Excellence' initiative. They import the concepts of whole life costing, value management and improved risk management into the contracts. Adopting these amendments was intended to enable central government departments to make progress towards the 'achieving excellence' targets.

Later in 2000 OGC redeveloped its procurement guidance notes, superseding the relevant CUP⁷ guides. Those revised guides endorsed and reinforced the Central Government procurement advice.

An action plan called Achieving Sustainability in Construction Procurement:

http://www.ogc.gov.uk/embedded_object.asp?docid=1039 was launched by Ministers in June 2000⁸. All Department, Agencies and NDPB's were asked to adopt this action plan by March 2003, which was to be applied to all Refurbishment, Maintenance and New Works Projects. This was to assist Departments to incorporate Sustainability Issues into Construction Procurement, a target of the Achieving Excellence Initiative. This report reiterates that Government Procurement Policy requires that all public procurement be on the basis of value for money. Value for money, according to the report, is the optimum combination of whole life costs and quality to meet the users' requirements. The report set a framework of ten goals: Re-use existing

⁷ HM Treasury's Central Unit on Procurement

⁸ The plan was produced by The GCCP Sustainability Action Group was chaired by Mr John Hobson, Head of Construction Directorate, DETR.

built assets; design for minimum waste; aim for lean construction; minimise energy in construction; minimise energy in use; do not pollute; Preserve and enhance bio-diversity; conserve water resources; respect people and their local environment; and set targets for minimum improvement.

In 2001 OGC's report **Achieving Excellence Through Health and Safety** http://www.ogc.gov.uk/sdtoolkit/reference/achieving/ae_h&s.pdf (387k) was published as part of the Achieving Excellence initiative. This report repeated that the government's preferred procurement routes were PFI, prime contracting and design and build. It suggested that the integrated teams inherent in these routes would contribute to greater health and safety in Construction.

OGC's policies through its Achieving Excellence initiative were endorsed by NAO in its report 'Modernising construction' published in 2001.

Procurement Processes

According to OGC guidance⁹ the overall procurement process from first inception to asset disposal should be mapped, by the organisation best placed to do so, at the earliest opportunity. Where necessary, the process map can be developed in greater detail as the project progresses.

By mapping the procurement process, better value for money can be achieved by:

- Identifying those elements of the project procurement process that do not add value
- Identifying potential blockages to the flow of the project procurement process (e.g. through intervention or interference by the client or other parties)
- Identifying opportunities for delivering the desired outcome in a more effective manner
- Much better forward planning and management.

Recent developments in Central Government Policy

In October 2002 CABE and OGC jointly published their report **Improving Standards of Design in the Procurement of Public Buildings** http://www.ogc.gov.uk/sdtoolkit/reference/achieving/stds_design.pdf (525k). The report concluded that the government's preferred public

⁹ Procurement Guide No 5.

procurement methods – design and build, PFI and prime contracting – must be complimented with an insistence on high design standards throughout the procurement process. The integrated design team should include a quality designer. Good design is summarised as a mix of functionality in use; build quality; efficiency and sustainability; designing in context and aesthetic quality. The reports other key recommendations were:

- Departmental policy should be that public funding for schemes should be conditional upon an acceptable level of design quality;
- Departments should repeal or update procurement guidance to bring it into line with Government’s policy on design and sustainability issues
- Departments should ensure that clients adopt an appropriate mix of minimum design standards, outputs and desired outcomes within their project specifications sufficient to reflect and protect the legitimate interests of the public sector client as an ongoing service provider.
- PFI should only be used where it offers best value for money taking account of a properly constructed and realistic Public Sector Comparator which reflects current best practice and conformity to all relevant government policy, including its commitment to design excellence.

OGC’s Procurement Guides are due to be replaced in early 2003 by Achieving Excellence Briefings. OGC has indicated that the new Briefings will reinforce the key messages about recommended procurement routes (PFI, Prime Contracting and Design and Build) with advice on when to take a particular route and the contract strategy to support the intended outcome.

Summary

Since the Rethinking Construction report was published in July 1998, Central Government policy for all Government departments has been and continues to be, as led by OGC through the Achieving Excellence initiative, that its recommended procurement routes for construction work should be either PFI, Prime Contracting or Design & Build. Other procurement routes are not recommended unless they are shown to lead to better value.

3. LOCAL GOVERNMENT PROCUREMENT POLICY AND PROCEDURES

Generally

This section considers Local government procurement policy generally, and specifically with respect to construction. The policy frameworks, and influences of these are examined in sections below:

- Best Value regime. Compliance with this is a mandatory duty imposed under the Local Government Act 1999
- EC directives. Compliance is mandatory pursuant to the UK Public Procurement Regulations
- Rethinking Construction. Compliance is encouraged by central government but not yet mandatory. It is possible that compliance may be required under the best value regime or as a condition of use of grant sums.
- Proposals for change: Following the Byatt Report and response from ODPM¹⁰, consideration is being given to harmonisation of local government procurement under a national strategy.

Each is considered in further detail below.

Procurement Legislation and Best Value

In UK, legislative controls directly affecting the competitive process have been provided for in local government legislation. The local Government Act 1972 provides that local authorities should set out formal contracting procedures which would usually involve competitive tender. The Local Government Act 1988 expressly requires authorities to give reasons for their procurement decisions and prohibits contract awards based on certain non-commercial grounds.

Authorities attention to brought also to a letter from ODPM to Chief Executives of Local Authorities dated 22 February 2002 regarding use of contractors from Selected or approved lists and how this may operate within the relevant legislation.

<http://www.local-regions.odpm.gov.uk/bestvalue/proc/lgapart2/index.htm>

The Local Government Act 1999 received Royal Assent on 27 July 1999. It subjected most bodies within the local government finance system in England and Wales to a new duty to make arrangements for the achievement of best value in the performance of their functions.

Best value, for the purposes of the Act, was described as securing continuous improvement in the exercise of all functions undertaken by the authority,

¹⁰ Office of the Deputy Prime Minister

whether statutory or not, having regard to a combination of economy, efficiency and effectiveness.

The Act also provided for abolition of Compulsory Competitive Tendering¹¹.

The Act set out those authorities which are to be subject to the duty of Best Value (called 'Best Value Authorities'). This included the newly formed Greater London Authority. For the purposes of fulfilling the general Best Value duty, the Act imposes upon Best Value Authorities a mandatory duty to consult with representative groups of people falling within specified categories. Within the Act a new framework was created for performance measurement. Powers for scrutiny, audit, inspection and intervention by the Audit Commission and others were also added to the Act.

The best value obligations cover all of an authority's procurement activities. It is not construction or project specific. Nor does the Best Value regime or its guidelines contain any reference to central government's Rethinking Construction or Achieving Excellence initiatives. Unlike CCT it does not enforce tendering on local authorities but nevertheless continues the pressure on authorities to seek different and innovative solutions to service delivery.

Procurement and EC Directives

The EC public and utilities procurement regime is designed to regulate the purchasing policies of public authorities and utilities throughout Member States. Its aim is to make the procurement process of such authorities and utilities more transparent and less discriminatory, thus opening up markets to EU wide competition. The procurement regime consists of four sets of EC Directives relating to the award of public works contracts; public supplies contracts; public services contracts and contracts by utilities.

The 'Works' Directive applies to public contracts for works, such as construction works. This was implemented into UK law by The Public Works Contracts Regulations 1991 which came into force on 21 December 1991.

The 'Supplies' Directive applies to public contracts for the supply of goods. This is relevant where an authority seeks to procure directly goods or materials for use in construction or maintenance of its facilities. This was implemented into UK law by The Public Supply Contracts Regulations 1995 which came into force on 21 February 1995.

The 'Services' Directive applies to public contracts for services such as design or maintenance of buildings. This was implemented into UK law by The Public Services Contracts Regulations 1991 which came into force on 13 January 1994.

¹¹ CCT had been required under Part III of the Local Government, Planning and Land Act 1980, Part 1 of the Local Government Act 1988 and certain provisions within the Local Government Act 1992.

The 'Utilities' Directive covers entities operating in the water, energy, transport and telecommunication sectors, which are excluded from the Works, Supplies and Services Directives.¹²

In addition there have been several amending directives:

Directive 97/52/EC (the Public Procurement Amendment Directive) that amended the Works, Services and Supplies Directives with respect to: how threshold values were calculated; the information to be given by a contracting authority to an unsuccessful candidate; the time limit for receipt of tenders; and the requirement for submission of statistical information. This was implemented into UK law by The Public Contracts (Works, Services and Supply)(Amendment) Regulations 2000 which came into force on 21 December 1991.

Directive 2001/78/EC (to be implemented by 1 May 2002) amending the Works, Services and Supplies Directive introducing the mandatory use of standard form contract notices

The procurement regime introduced by the various directive discussed above is broadly as follows:

- The directives apply to contracts concluded in writing by contracting authorities in the public sector which are above certain financial thresholds
- The directives prohibit the parcelling and splitting of contracts in such a way as to avoid the application of the thresholds
- The directives include obligations subject to strict exceptions, to award contracts following a call for competition which has been advertised in the EC's Official journal (OJ) and lay down minimum time limits for firms for respond to such calls to ensure that firms from member states have adequate time
- The directives lay down detailed procedures leading to award of contracts, giving the choice between open, restricted and negotiated procedure (for use in narrowly defined circumstances only)
- The directives give contracting authorities a choice between two award criteria: the lowest price or the 'most economically advantageous tender'
- ECJ case law imposes additional obligations such as the obligation to treat tenderers equally, obligation of proportionality and obligation to supply transparent procedures.

The European Commission has accepted proposals to amend the public and utilities procurement regime. The Consolidated Directive¹³ is to merge the Works, Services and Supplies Directives into one directive. The use of this

¹² Utilities Directives are not considered further in this report.

¹³ Presently in final form and amendments are currently being considered under the co-decision procedure.

'consolidated' directive is intended to promote simplicity, clarity and to ensure that the public procurement regime is, 'easier to understand for everyone who is involved in public procurement either as a buyer or as a supplier'. Under the Consolidated Directive, the use of framework agreements will be permitted in certain circumstances, provided the framework agreement in question falls within the definition set out in article 1(7). Frameworks should not exceed three years, with at least three operators. It also lays down rules concerning: the obligation to consult all parties to the Framework, in writing with regard to each contract to be awarded; time limits for the submission of tenders; confidentiality; and criteria for contract award. The Consolidated Directive is due to come into effect in late Summer 2003.

Contractors who have been excluded from a tender or who have not been awarded a contract may make a complaint to the EC Commission regarding an infringement of procurement law. Dissatisfied tenderers might also recover damages from the authority after the offending contract has been awarded. From *Harmon v House of Commons* the following is evident¹⁴:

- In the case of a works contract, if it is proved that the dissatisfied tenderer would have been awarded the contract if it were not for the breach, that dissatisfied tenderer will recover the costs it incurred in tendering.
- The dissatisfied tenderer can also recover damages for the profit or margin which it can prove it would have recovered from the contract if it had not been for the breach. This would not include sums already recovered as tender costs.
- If the dissatisfied tenderer cannot recover its profit or margin, it may be able to recover damages for its loss of a chance of making a profit on the contract it was not awarded. That chance must reflect the likelihood of its being awarded the contract and the likelihood of making its claimed profit margin.

The specification of a particular product, without any opportunity for contractors to select an alternative, would breach the Supplies Directive, as it is anti-competitive.

Rethinking Construction and Local Government

The Local Government Task Force (LGTF) was established in March 2000 to encourage and assist local authorities to adopt the principles of Rethinking Construction. It is part of the wider Rethinking Construction initiative, and is sponsored by the Department for Trade & Industry. The Rethinking Construction Steering Group oversees its work and helps co-ordinate its work, particularly with selection of demonstration projects, with the Housing Forum, Movement for Innovation and the Construction Best Practice Programme.

¹⁴ Keating Building Contracts, page 440 to 441.

LGTF leads on best practice for local government clients. The LGTF It has close links with other organisations that represent local authorities, such as the local government Association, IDeA, CIPFA and ODPM. LGTF focuses on demonstration projects and the very real improvements that these bring to the construction process. It also publishes advice and guidance to local authority practitioners.

The Rethinking Construction group published in 2001 its report “Rethinking the Construction Client”. This report set out six guidelines arising from a rethinking construction debate held nationally in late 2001. It provides pointers to advice and guidance to help organisations seeking to implement Rethinking Construction principles in their procurement processes, and is intended for public sector groups or those who receive public funding for construction. The guidelines were:

- Traditional processes of selection should be radically changed because they do not lead to best value
- An integrated team that includes the client should be formed before design and maintained throughout delivery
- Contracts should lead to mutual benefit for all parties and be based on target and whole life cost approach
- Suppliers should be selected by Best Value and not by lowest price: this can be achieved within EC and central government procurement guidelines.
- Performance measurement should be used to underpin continuous improvement within a collaborative working process.
- Culture and processes should be changed so that collaborative rather than confrontational working is achieved.

Whilst all of LGTF’s work is no more than persuasive and influential, there are proposals for the rethinking construction principles to be integrated with best value or other local authority procedures

- The Strategic Forum for Construction, in its report Accelerating Change published in 2002, has suggested linking Government funding for construction projects to the application of Rethinking Construction principles. If implemented, this would have a major impact on all recipients, judging from the housing sector where a similar link has already been implemented by the Housing Corporation.
- A sustainable construction action plan for local authorities has been developed: www.wellbuilt.org.uk
- Current CIPFA guidance on construction procurement titled “The Financial Management and Audit of Construction Projects” is to be revised, or new guidance issued, to embrace the Rethinking Construction principles.
- NAO noted in 2000 in its report Modernising Construction that 70% of all publicly funded projects were over time or budget. NAO said “Experience has shown that acceptance of the lowest price bid does not provide value for money in either the final cost of construction or

the through life and operational costs”. The Audit Commission has apparently asked its Best Value auditors to review construction procurement policies.

- Rethinking Construction is to be one of the ten themes identified for round four of Beacon Status¹⁵, according to a statement from Nick Raynsford, Minister for Local Government, in April 2002.
- LGTF working group has completed a review reports titled “Integrating Rethinking Construction with Best Value”. Here, the financial, cultural and legal barriers in local government were explored that might limit development in these fields.

At the time of preparing this report it is understood that guidance is being prepared by LGTF to assist local authorities to maximise the value of construction procurement. This work is welcomed by the Strategic Forum For Construction, in its recent report ‘Accelerating Change’.

Byatt Report and Partnering

In 2000 the DETR and Local government Association invited Sir Ian Byatt to chair a Local Government Procurement Taskforce charged with reviewing local government procurement in England. Their report, titled Delivering Better Services for Citizens, was published in June 2001. In July 2002, the Office of the Deputy Prime Minister published its response “Towards a National Strategy for Local Government Procurement”

Both reports focus on all procurement, not just on construction. The ODPM response report, however, sets out number of significant proposals that will, if implemented, affect procurement policy at local level. These include:

- Formation of a forum to take forward the development of a national strategy for local government procurement.
- Consideration should be given by the forum to creation of regional centres of excellence in procurement, development of standard forms of contract documentation and training schemes. This would help address the capacity issues faced by small councils.
- Unitary and county councils are expected to develop a corporate procurement function to stand alongside finance, performance management, legal and HR.
- Elected members should take a strategic role in securing quality outcomes. This will involve scrutinising procurement processes and monitoring outcomes of procurement.

¹⁵ The Beacon Council Scheme was established in 1999 by the Government to select a number of councils to act as pace setters and centres of excellence. The objective of the scheme is to identify centres of excellence in local government from which other councils can learn. Each year, Ministers from across Government select themes in service areas that have a direct impact on the quality of life of local people. Councils are invited to apply, either individually or in partnership with other councils, under the themes where they can demonstrate that an excellent service is being provided.

So far as partnering is concerned, it is noted that much guidance is now available:

- LGTF guidance “partnership approaches to Procurement”
- The housing forum guide: “procurement through partnering – 20 frequent questions answered”

In addition a LGTF working group has completed a report “Partnership Approaches to Procurement”. This usefully identifies issues pertinent to local government where partnerships are advocated.

Summary

Local government procurement policy works through a best value framework which necessarily requires consideration of EC procurement directives. Under those directives, Authorities commissioning new facilities or engaging contractors are obliged to let contracts for works and services in a competitive framework, must follow carefully defined tendering and award procedures. Specification of a particular good or product for incorporation into the works breaches the directive as it is anti-competitive.

The Rethinking Construction principles do not, by and large, form part of the policy framework. Increasingly, however, links to Rethinking Construction are becoming evident and there is a possibility this may be extended through conditions on use of public funds or grants.

Against all of this, there are proposals for considerable change to the local authority procurement function involving dedicated staffing and development of a national strategy.

4. THE PROJECT DELIVERY PROCESS

Project Stages And Participants

Regardless of the size of the project to be undertaken or of the method used to procure construction of a new facility, a new project should not be commenced without securing professional help. The various stages through which help is likely to be required, and the types of help potentially required, are as follows:

Briefing stage: This primarily involves setting out the business case for the new facility and will require assistance with preparation of designs and preliminary cost estimates. Local planning issues may also arise, as will funding considerations. It would ordinarily be expected that professional assistance would be secured from this early stage. Depending on the size or complexity of the scheme, the client's time involvement in the project can be significantly reduced by engaging a project manager or employer's agent to act on the client's behalf. It is typically at this stage that the procurement route is chosen.

Development of designs: This stage involves development of detailed scheme proposals in consultation with Sport England, local planning authorities and cost and design consultants. A planning supervisor would ordinarily be appointed at this stage to ensure compliance with statutory Health & Safety regulations ('the Condam Regulations'). Specialists may also be required to carry out surveys, deal with party wall or right to light issues.

Procuring construction of the facility: This stage involves selection of tenderers, putting the scheme to tender (or conducting negotiations with one party), resolving tender queries, reporting on tenders, securing funding commitments and letting the main construction contracts. On schemes where two-stage tendering is used, or on PFI schemes, this stage can continue for many months. Professional help is typically needed during this stage to finalise tender documents, advise on tenders and generally handle the process.

Monitoring work as it proceeds: Issues arising during construction can include monitoring the quality of work undertaken, assisting with local planning issues, arranging payments for work done, evaluating necessary variations and claims for additional cost, and dealing with third parties.

Project close-out: this important stage involves ensuring that the facility was built to specification and has secured the necessary licences or tests to facilitate its proper functioning, much work may also be required in settling contractor's accounts, managing rectification of defects and ensuring maintenance arrangements are in place.

Applicants are also referred to the guidance note “Construction Project Management in the Voluntary Sector” published by Sport England which further describes the process and to “Selecting Consultants for the Team: Balancing Quality and Price” published by CIB¹⁶ which reviews tendering and pre-contract issues.

Project Management

Whilst the detailed project management responsibilities may be transferred to an external body, there are potential gains to be made by adopting a consistent set of project management tools rather than reinventing a new set for every project.

Detailed and early consideration should be given to use of a project extranet. This is an electronic project network for tendering, document management and as a project hosting document base. This can store all project files electronically on a single database and provide access to selected files on an individual or organisation basis. Where appropriate, development drawings (as opposed to final drawings) can be made available to other parties so that they may see how the design is progressing and provide any input as appropriate (with appropriate access rights to read and/or amend information). Commercial organisations already provide this service. (Examples are Bidcom and Projectnet). The supply and management of the hosting network – which can be web based – is economic on projects of value over £75,000. Compatibility of information systems is essential to allow the smooth transfer of information.

Consideration should also be given to co-location of all project team members. Thus, project managers might be based on site with contractors.

Design

Good design is essential to achieving value for money. For the purposes of this guidance, design has the following key components, each of which must be addressed appropriately:

- Function of the facility to meet the needs of the users. This should include a detailed assessment of how the users needs may change over time and how the facility will need to be altered to meet those changing needs. This should also address the detailed operation of the facility.
- Design of the entire construction process, addressing how each component will be manufactured, transported and assembled to complete the facility. The maintenance of the facility including details of

¹⁶ Construction Industry Board

how components can be replaced and or repaired should be addressed as should its ultimate disposal.

- Detailed design of each component whether manufactured on site or in a factory.
- Design of the complete facility to address the environment for those that use, operate and maintain the facility, including aspects that impact on their health and safety. This should also address the impact on the external global environment, including the aesthetic appearance of the facility. Health and safety as well as environmental requirements are likely to become increasingly more important with time and hence it would be prudent to consider what the changes might become during the life of the facility.

Clients should consider and specify the outcome that they require rather than prescribing the details of how that outcome might be achieved. As a general rule, the more detailed and prescriptive the description of the facility and its components, the greater the cost will be.

5. THE PRINCIPAL PROCUREMENT ROUTES

“Once a construction project has emerged as the optimum solution, the presumption is that Design & Construct (and where appropriate maintain and operate) and Prime Contracting procurement options will be used because they allow better integration of the supply chain and normally offer better value for money. There would have to be very good reasons for selecting conventional procurement options” (source: OGC Procurement Guide No. 5¹⁷)

Under current government policy, the preferred procurement routes for construction works and capital projects are through Design & Build, PFI or prime contracting. This section reviews these with a view particularly to smaller scale projects. Much of the material that follows is based upon current OGC guidance, and particularly Procurement Guide 5¹⁸.

Choosing a Procurement Route

The primary consideration in the choice of a procurement strategy is the need to obtain overall value for money in the whole life of the service/facility. All of the parties that will be involved in the use, design, construction, operation and maintenance of a construction project need to be involved as early as possible in its development. This can be achieved most easily through the following procurement options:

- Design and Build¹⁹ (and where appropriate maintain and operate)
- Public Private Partnerships
- Prime Contracting
- Framework Agreements.

Traditional forms of construction procurement, where the detailed design is largely completed before the main contractor, sub-contractors and specialist suppliers become involved, limit the opportunities for eliminating wasteful activities and achieving value for money. Under current government guidance, traditional forms of construction procurement should therefore only be used where there is a very clear case that they will deliver better value for money than other procurement routes in terms of whole life costs and overall performance. Some guidelines as to why the Government's recommended

¹⁷ This guidance note is the fifth in a series of ten guidance documents that translate the recommendations made in the Efficiency Unit Report on Construction Procurement by Government into practical proposals for implementation. It addresses the recommendations made in the University of Bath School of Management Agile Construction Initiative report "Constructing the Government Client" (ISBN 0947819614) and the recommendations made in the Construction Taskforce report "Rethinking Construction" (ISBN 1 85112 094 7).

¹⁸ Procurement Guide 5 is to be replaced by Achieving Excellence Briefings. Briefing 6, due for publication early in 2003, will reinforce the key messages about recommended procurement routes (PFI, Prime Contracting and Design and Build) with advice on when to take a particular route and the contract strategy to support the intended outcome.

¹⁹ Sometimes referred to as 'design and construct'

procurement routes may be inappropriate are set out at the end of this chapter.

The choice of procurement route should therefore be made having regard to a variety of factors: the policy framework within which the contract is to be procured; issues arising from a project risk evaluation, and identification of factors that might distinguish project development under a traditional mechanism as being most appropriate.

Design & Build

What is design & build?

In a design and build contract, a supplier is responsible for both the design and construction of the facility. The supplier is likely to deliver the greatest performance benefits to the client through innovation, standardisation and the like, where appropriate output specifications are used.

How does it work in practice?

Generally the employer engages a lead designer initially to prepare outline drawings for planning purposes and compiles an output specification, usually referred to as 'Employer's Requirements'. Tenderers price the work on the basis of those requirements and submit, as part of their tender their 'Contractor's Proposals' comprising proposed contract price, time for completion and proposed management arrangements and specification proposals.

The extent of design work to be undertaken by the contractor is variable. If engaged at an early stage, the contractor will have a larger discretion with respect to design than if introduced later in the process when the design parameters are largely defined. Thus,

- A single contractor might be engaged, on the basis only of a performance specification, to undertake all preliminary design, securing planning approval, detailed design and construction. On this basis the employing authority will need to take particular care with preparation of its specification for the work to be carried out, and of the standard to which the design and construction work is to be undertaken, in order to avoid these being compromised.
- Alternatively, an authority might secure planning approvals and develop the design itself to detailed design stage or make available to the contractor a design template. This does not preclude award of the construction contract on a design and build basis. It merely limits the design work that remains for the contractor to carry out – usually in the form of working drawings and co-ordination of subcontractors and suppliers' designs - as well as construction. When undertaken on this

basis it is common for external design team members originally engaged by the employing authority to be transferred under a novation agreement to the contracting team when the contractor is awarded. Difficulties with novation are discussed further below.

Where an output specification is insufficiently well developed, there is a risk that the quality, design and performance of the completed facility may be compromised. Careful attention to the output specification is required to achieve the required outcome.

There may be some circumstances where the design and construct procurement option should be extended to cover maintenance and also possibly operation of the facility for a substantial period. By including the maintenance and operation requirements within a design and construction contract, the supplier has increased opportunity for adopting innovative solutions that provide greater value for money when considering the whole life costs. Departmental Private Finance Units and the Treasury Taskforce can provide advice on how best to include for maintenance and operation.

Advantages

The principal advantages of procurement under a Design and Build arrangement are:

- Familiarity. In a survey undertaken in 2000 by RICS over 50% of projects were engaged on a design and build basis nationwide. A wide range of both contractors and designers are familiar with managing projects on this basis.
- Several standard forms of contract are available,
 - JCT²⁰ 1998 form of contract for design and build projects which is widely used,
 - GC/Works/1. This is a government standard form (GC/Works suite) which contains sufficient flexibility to allow a contractor to be engaged on a design and build basis. It is available in both single and two-stage tendering versions.
 - The Engineering and Construction Contract²¹ suite which contains sufficient flexibility to allow a contractor to be engaged on a design and build basis.
 - The ACA²²'s form PPC2000, which is a multiparty agreement, might also be a design and build agreement depending upon the timing of a group's involvement with the project.
- It provides a single point of interface for the employer, minimising administration difficulties with payment.
- The lead time for new projects is potentially very short.
- Authorities can choose the extent of design work to be undertaken by the contractor.

²⁰ Published by the Joint Contracts Tribunal.

²¹ Published as part of the New Engineering Contract (NEC) Suite of forms by Institute of Civil Engineers.

²² Association of Consulting Architects

Disadvantages

There are other balancing issues and areas of potential difficulty with design and build arrangements that the employing authority should consider

- The arrangement works best where the contractor is free to develop and proceed quickly with design and construction. Variations, or procedures that require detailed approval and vetting of detailed designs may cause project delays. The cost of variations will typically at cost to the contractor, which may include cost of delays and disruption to other activities.
- The arrangement does not guarantee a maximum price. This is particularly so where the project involves an interface with ground conditions or existing structures.
- The employer needs to retain some design expertise, even where novation of his consultants is planned. This is important for management of design issues, commercial issues and approvals that might arise, and crucial when commissioning and certifying completion.
- Care and expertise is needed when drafting the Specification for the works in order to define building arrangement preferences, design standards and construction standards.
- The novation process can be a source of particular difficulty
 - No standard forms of novation agreement are published with the standard forms of contract for design and build work. Where templates are used, care must be taken with respect to the scope and cover of professional indemnity cover, limitation of liability and responsibility for pre-novation design.
 - Novations need to be specific to the consultant involved having regard to the terms upon which the relevant consultant was originally engaged.
 - Where engaging consultants, the novation arrangements must be set out.
 - Details of consultants terms and novation arrangements will need to be set out in invitations to tender and design and build contract documents to avoid later responsibility, payment and teamworking issues.
 - Care needs to be taken to avoid dual or split responsibility, such as where an M&E consultant, although novated to the contractor, is retained by the employer to assist with commissioning work.
- Where part only of the works is to be undertaken on a contractor design basis, care should be taken to set out responsibility for co-ordination between contractor design elements and with employer specified issues.

Each of these issues can be addressed through retention of specialist expertise.

Public Private Partnerships

What is a Public Private Partnership?

Public Private Partnerships, particularly Private Finance Initiative (PFI) projects, are created for the provision of services and not specifically for the exclusive provision of capital assets such as buildings. For this reason it is preferable to investigate Public Private Partnerships as soon as possible after a user need has been identified rather than leaving it until a conventional construction project has been selected as the solution. The period over which the service is provided is usually between 10 and 30 years. An example would be where a contractor agreed to design, construct and maintain a leisure centre (or collection of centres) for a term of 25 years.

Public Private Partnerships may take many forms of which PFI is the most developed model. Treasury Taskforce guidance and additional material are available on the OGC website.

How does it work in practice?

In practise, the contractor offers to provide a service, which is to make available the certain specified facilities, for a term, so that the configuration of the buildings and their specification is largely a matter for the contractor. It is possible that a Public Private Partnership may result in a solution (provision of services to meet the user need) that does not require a construction project at all.

The typical PFI project involves a complex collection of agreements, including a principal agreement, (between authority and contractor²³), construction contract (between contractor and subcontractors), Facilities Management agreement (for maintenance of the completed facilities) together with loan agreements with banks and a range of collateral agreements and warranties. In view of the long-term commitment involved, many, if not all of the agreements, will be drafted on a bespoke basis involving many months of negotiation involving contractors, bankers, lawyers, insurers, operators and their respective advisors.

Advantages

There is a range of benefits to be derived through securing use of facilities under a PPP/PFI arrangement.

- The entire construction risk is with the contractor. In the event of a cost or time overrun, this will (depending upon the terms of the principal agreement) be the contractor's responsibility.
- The contractor has an incentive to design a facility that will have a low operating cost, or to provide an incentive to provide the lowest operational cost over the long term. This may result in delivery of a

²³ usually a special purpose vehicle

higher specification facility that might otherwise have been expected, particular where there are limitations on capital spend under traditional procurement routes.

- The authority may make significant savings in operation costs, where part of its existing workforce is transferred to the contractor.
- It may be economic for groups of similar facilities, (such as schools or games facilities) spread across many sites to be procured or managed under a PPP model.

Disadvantages

Authorities should be aware that use of PFI is probably uneconomic where the capital construction costs is below £5m. Typical issues for authorities on smaller projects are likely to be:

- The long lead-time for completion of a PPP package compared to capital project work. It will normally take many months to negotiate a completed contract with a contractor.
- Potentially complex drafting is required in order to incorporate specifications both for the facility and its maintenance, revenue and payment arrangements and compatibility of construction contract, facilities management agreement, Project Agreement and credit agreements.
- As PPP packages typically incorporate management of the facility, surveys of existing facilities and their use and staff transfer proposals will require consideration.

Authorities considering use of PPP will need to secure advice at an early stage from a construction consulting firm experienced in acting as technical advisor in this specialist sector.

Prime Contracting

What is Prime Contracting?

The 'prime contracting' arrangement to which government procurement guidance refers is essentially similar to management contracting, an arrangement with which construction professionals are largely familiar. Essentially the prime contractor itself who manages the various subcontractors, or 'works contractors' as they are often known who actually do the design and construction work. Those works contractors may include architects or engineers. Financing usually works on either a straight reimbursable basis whereby the prime contractor is reimbursed the amounts it pays to works contractors plus a management fee. Alternatively the prime contract might include an incentive arrangement, perhaps with the fee on sliding scale.

How does it work in practice?

Under Prime contracting one organisation acts as a single point of responsibility (the Prime Contractor) between the client and the supply chain. The prime contractor needs to be an organisation with the ability to bring together all of the parties (the supply chain) necessary to meet the clients requirements effectively. There is nothing to prevent a designer, facilities manager, financier or any other organisation from acting as the prime contractor.

A key part of the prime contracting route is the development of a whole life cost model before construction commences.

Clients should request that prime contractors provide details of whom all the parties in the supply chain are likely to be when prime contractors express an interest in being selected to tender. It may not be possible adequately to assess the technical capacity of a prime contractor under the EC procurement rules unless a significant number of the other organisations that make up the supply chain are known and taken into account during the assessment.

Advantages

It will be clear, from the nature of the arrangements, that prime contracting is best suited to large, complex projects. It particularly suits a project where there are many variables but where an early start to work is required, thus allowing work to start whilst other sections are still being designed. Those variables may be site acquisition dates (particularly where a development spans a collection of land parcels), re-use of existing structures, complex phasing arrangements or where user requirements are changing frequently, for example)

Disadvantages

The real disadvantages of Prime contracting are:

- No price certainty
- It requires large projects to make this procurement option financially viable.
- Without a very significant financial or other incentive for the prime contractor there is a risk that costs can exceed budgets by an unacceptable and unexpected margin.
- There are few standard forms of contract available: The JCT management contract, and Engineering and construction contract. Several government departments (such as MOD) and agencies have also drafted their own forms.

Framework Agreements

What are Framework Agreements?

Framework agreements (including call-off contracts) with a single supplier or a limited number of suppliers can result in significant savings to both parties. The resource implications for the client of managing more than one framework agreement for each type of work should be borne in mind when deciding whether to award more than one framework agreement.

How does it work in practice?

Framework agreements may cover prime contracting and design and construct procurement routes. They are unlikely to be appropriate for clients that only occasionally have projects. They can be particularly appropriate for maintenance requirements or where an authority (or group of authorities) has a stream of similar projects planned.

Each framework agreement must be advertised and competed for in accordance with the UK Public Procurement Regulations, implementing EC rules.

Advantages

The expectation is that savings will come from the following:

- No requirement for rebidding of each individual project
- Continuous improvement by transferring the learning from one project to another
- Reduced confrontation
- Continuous workflow.

Disadvantages

There are potentially several difficulties that can arise with framework arrangements

- The seemingly guaranteed work stream can result in service delivery to a modest or barely acceptable standard. Authorities can avoid this by specifying quality required, maintaining veto rights over choice of staff deployed to the project, and through benchmarking arrangements. Alternatively frameworks may be on a non-exclusive basis, so that there is always a pool of providers from which the authority can chose.

- The time taken to enter into a framework can be considerable, having regard to both EC procurement compliance and time taken to pre-qualify providers.
- There are no standard forms of framework agreement made available by construction related organisations. Considerable time and effort may have to be invested to secure the framework arrangement required.

Partnering

What is Partnering?

Partnering is not a procurement route in itself but can take one of several forms.

- Multi-project partnering, which is essentially an exclusive or non-exclusive framework agreement. Frameworks are referred to above.
- Single project partnering. This is where members of the project team agree to work to a series of core principles governing their relationship for one project only. Typically this is shown in a separate agreement or charter (the importance of which at law may be in issue).

How does it work in practice?

Initially, the awarding authority preselects firms of known capacity, interviews contenders and chooses a partnering contractor. It then calls upon the resources or value propositions proposed from time to time as the need arises.

The success or otherwise of Single project partnering will largely depend upon how the arrangements are made. The usual purpose of the 'partnering' element is to secure a level of mutuality in the team's relationship and to influence how the project members communicate and manage the project. Recurring expectations under a partnering relationship are that each party will act towards a common goal of timely completion, on budget and to a defined standard. Thus, where a problem is encountered, the team members are expected to discuss its resolution at the earliest opportunity.

Disadvantages

Various publishers of standard forms have dealt with partnering in different ways:

- JCT has published a partnering supplement. Where this is used in conjunction with the JCT standard form of Building contract consideration

should be given to whether the supplement will in fact change parties behaviour.

- NEC. The partnering supplement for the ECC forms (known as X12), like JCT, is designed to work with the other standard forms. In fact, the underlying ECC form contains key partnering style features in any event, such as provision for early warning meetings, particulars with respect to progress reporting, multilevel dispute resolution mechanism which are usefully supported by the partnering supplement points
- GC/Works suite. No form of partnering agreement or supplement is understood to be available.
- PPC2000. This is an integrated construction and partnering contract published by ACA. It is the first of its kind available and requires joint decision-making and each key project contributor to sign the agreement or part thereto. A potential difficulty with the form is that liability for decisions or difficulties arising may be difficult to isolate.

Lump sum contracting

What is lump sum contracting?

This is not a Government recommended procurement route. Under this arrangement responsibility for the project is split between several parties. The employer engages separately the services of designer as required and separately engages, for a lump sum price, a contractor to do the work.

How it works in practice

In theory, the entire scheme should be designed, the designs and specifications put out to tender and tenders selected on that basis, allowing the contractor to build the facility. In practice, tenders are often sought on the basis of indicative designs within a framework that allows revised or developed drawings to be introduced as the project proceeds and that allows variations to the scope of work to be introduced easily. Designers tend toward provision of information to contractors during, rather before, the construction phase commences which can cause difficulties as errors or omissions in the work, services to be done or other arrangements is isolated.

Advantages

The advantage of this arrangement is its simplicity, utilising each participant for what it does best. It also provides an easy mechanism under which changes to the works can be introduced during construction at values that can be calculated with some accuracy.

There are a large number of standard forms of contract available for work to be undertaken on a lump sum basis, either with or without quantities. These forms are noted below.

Disadvantages

The disadvantages are

- Contractors ordinarily expect all construction design to be completed at the tendering stage. Late receipt of design details which are prepared during the course of the works is a repeated cause of complaint by contractors.
- The design work is carried out without the benefit of input or feedback from an existing supply chain. Where contractors or subcontractors are due to provide any design input, especially in the form of fabric, plant or equipment sizing or working drawings, the provision of this data during the construction process can considerably delay progress of the work or cause consequential amendments to detailed designs.
- Responsibility for maintaining the contract within budget depends upon both timely provision of information to the contractor and the absence of any issue
- Contractors or subcontractors have little incentive to solve problems. Typically these are left for the employer and his team to resolve.
- Whilst there are many standard forms of contract available for lump sum contracting, securing compatibility between the contracts awarded to contractor, engineer and other consultants can be difficult to achieve, resulting in potential lacunae.
- In order to co-ordinate all project team members a project manager may be required. The result can mean that the employer has many groups acting as direct reports.

Standard forms available include the JCT minor works form, JCT intermediate form, JCT standard form, Engineering and construction contract and GC/Works/2 form. The PPC 2000 form can also operate as a lump sum contract.

GC/Works/2 (1998) is a standard government form of contract for minor UK building and civil engineering works. Typical values appropriate to this form of contract, when used for normal construction works, would be a minimum of £40,000 and a maximum of £300,000. It is for use when lump sum tenders are to be invited on the basis of specification and drawings only, without Bills of

Quantities, when an Employer's option to require the contractor to submit a schedule of rates in order to value variations ordered.

Where work is of a larger value or of greater complexity the GC/Works/1 (1998) form is available. This is available in a 'with quantities' edition, where Bills of Quantities are to be used, and is also available in a without quantities edition.

JCT published several forms of contract for lump sum work. These include the minor works form (for work of small value at say £30,000 to £150,000), the intermediate form (for work of values at £150,000 to say £700,000) and its standard form for largest projects. Essentially, the minor works form is basic and anticipates completion of work within a short timescale of weeks. The intermediate form is designed to accommodate specification of subcontract work and is for use on standard projects. Where unusual problems are expected, the Standard form controls elaborate project control facilities which are only likely to be of use on larger, complex, projects.

The Institute of Civil Engineers publishes standard forms of contract in a minor works edition; design and build edition and standard form ICE 7th Edition. The comments made above with respect to the JCT forms.

The Joint contracts landscape institute (JCLI) also publishes a standard form that is, in structure, similar to JCT forms and suits particularly work involved substantial bedding and plant potting.

The Engineering and Construction contract is drafted by Institute of Civil Engineers as part of its New Engineering Contract suite. It is published in several versions allowing its use on either a lump sum, design and build or fee contracting basis. The form differs from JCT, ICE and GC/Works forms in that it requires intensive hands-on management of the project particularly in its handling of inconsistencies or errors. It requires extensive use of an experienced project management team.

The PPC 2000 form was published by ACA in 2000 and is unique. It envisages that all key project participants will be committed to the project via a single project agreement. Accordingly, it contains a facility for additional participants to join the team after early signatories. It also contains provision for a partnering advisor to advise the team. Use of this form is thought to best suit projects where considerable repetition is likely, such as on housing projects or where the project team members already have a track record of successfully working together. .

Reasons for departing from recommended procurement routes

Central government procurement routes may not be appropriate for all project types. According to government guidance, the primary consideration in the

choice of a procurement strategy is the need to obtain overall value for money in the whole life of the service/facility.

It is anticipated that some of the factors that may influence choice of a traditional lump sum procurement route in lieu of a design & build arrangement are as follows:

- Where procurement through other routes is not possible or not realistically practicable. This may arise where there are no local contractors available to undertake work of low value on a design & build basis, for instance.
- Where there is an extraordinarily high risk of variations to the scope of work it may be preferable to adopt a lump sum arrangement with the capacity to value variations through tendered rates.
- The existence of risk issues that a contractor might not, or ought not, to price. Examples are projects involving alteration of existing facilities, work to a listed building or work within a conservation area that requires particular approval from planning authorities, or works where site access or set-up arrangements is potentially an issue.

6. TENDERING AND CONTRACT-RELATED ISSUES

Conventional tendering

Regardless of the form of contract to be utilised, contractors can be engaged either by means of a single or two-stage tender process.

The single stage tender period merely involves submission of tenders, tender evaluation and tender award. It requires, for a prompt tender award to be made, an unambiguous tender document from which tenders can be prepared, systematic issue of tender amendments to each tender and transparency in arrangements. It also requires an arrangement for dealing with tender qualifications or errors in tenders. Care is usually taken to ensure that each tenderer is not aware of the identity of other tenderers.

The principal difficulty with this arrangement is its inflexibility, for it provides no readily identifiable mechanism for negotiation with the lowest-priced tenderers where negotiation or discussion of terms is desirable.

Two-stage tendering

What is two-stage tendering?

Under two stage tendering, a contractor is chosen after two stages. First the contractor submits a competitive tender based upon estimated total project fee and overhead costs. Later the contractor works with the employer's design team to calculate the total contract price.

How does this work in practise?

Tenders are sought initially for construction work on the basis of a likely outturn cost and construction period. Typically at this stage a single contractor is chosen on the basis only of the level of overhead and fee that the contractor will expect to earn. The fee will typically be expressed in the form of a mark-up on the value of supplier costs and subcontract works as and when those packages are let.

In the second stage, the tenderer compiles a price following receipt of detailed drawings and specifications in respect of work to be undertaken by subcontractors. The total, which may still at this stage contain provisional sums, becomes the contract sum.

Advantages

The key advantages with a two-stage tendering process are

- The design can be developed during the period when the first stage tender is secured,
- The design team has the opportunity to refine and develop the design, in conjunction with a contractor, to an advanced stage.

Disadvantages

There are several potential difficulties with a two-stage process:

- It is arguably anti-competitive. The procedure may not only breach an authority's tendering regulations (in that stage one involves letting to a contractor before the scope of work is known) but may also require new OJEC notices and re-tendering as detailed designs are finalised.
- The two stage tender procedure can result in a situation where the employing authority is attempting to settle terms and prices with a contractor – at the second stage – in the absence of any completion. This may put the authority at a severe commercial disadvantage particularly where time for completion of the works as a whole is limited and the authority, if it is to keep to its project timetable, does not have the option of changing contractor.
- The procedure may need to be carefully considered in advance and described in the tendering documents in order to avoid subsequent confusion.
- Conclusion of a fixed price, within the second stage, can prove exceptionally difficult. As further details of the scheme are developed, the contractor may seek adjustments to its first stage tender sum to price what are perceived to be areas of risk.
- The period taken to secure a firm price may exceed expectations, as it is largely dependent upon completion of designs by the lead designer and securing prices for work by subcontractors.

Letting the contract

Contract terms and conditions should be signed and executed before commencement of construction work. Particular care should be taken to understand the nature of any tender qualifications and the impact of those qualifications on the contractual scope of work. The contract documents may need to refer to correspondence which has arisen during tendering, or in post-tender negotiations.

If, due to time constraints, a construction contract is to be let before execution of documents on the basis of a 'letter of intent' – a letter in which the employer instructs a contractor to proceed before contract documents are executed – particular care should be taken not to issue such a letter without agreement between the employer and contractor of all contractual terms and conditions. To proceed on any other basis potentially prejudices negotiating strength of the employer and can have unexpectedly adverse consequences for the employer.



EC Harris has prepared this report for Sport England.

The contents of this report are intended as a guide only and advice provided is on a non-specific basis. EC Harris cannot assume legal responsibility for the accuracy of any particular statement. Particular advice should be sought on application of principles to local situations and conditions.

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