

# Projects Brief

November 2009



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## What's New?

The big news for the Devonshires Projects Group since the last Projects Brief was our scooping the Best Advisor category at the LIFT Awards. The award specifically relates to Devonshires' role in acting for the Oldham LIFT Company, Community 1st Oldham Limited, in relation to the Chadderton Health and Wellbeing Centre scheme which financially closed in April last year.

The Chadderton Health and Wellbeing Centre scheme was the first Oldham LIFT development where Oldham Borough Council were lead

Tenant. The development will deliver a state of the art facility and provide joined up health and leisure services at a local level to ensure that the community has access to excellent facilities, including a 25-metre swimming pool, community meeting rooms, a fitness suite and library. The scheme closed in less than six weeks from Devonshires receiving the instruction from Community 1st Oldham Limited to draft and issue the Lease Plus Agreement and related documentation.

team and the wider project stakeholders.

The ceremony took place on 19 March at the Hilton Hotel, Park Lane, London, and was attended by many of the key figures from the LIFT and healthcare markets.

The Award followed hot on the heels of our LIFT team closing another scheme for Community 1st Oldham Limited. Early in March the Royton Health and Wellbeing Centre financially closed. The scheme was the first Community 1st Oldham Limited project that had closed using

“the first Community 1st Oldham Limited project that had closed using the version 5 standard documentation”

The speed of the close was due in large part to the commercial, pragmatic and partnering approach adopted by the Devonshires team. At the heart of this was a willingness by Devonshires to assist the Council's legal team in gaining an understanding of the LIFT documentation. We do not believe that the traditional adversarial approach adopted by many legal advisors to negotiating legal documents is a productive or sensible way of ensuring a smooth legal process to financial close. The Devonshires team, lead by Projects Group Partner Antony Power, therefore sought to establish a partnering ethic with not only the Council legal team but also the Funder's legal

the version 5 standard documentation and will provide a wide-range of services all under one roof. The ground floor of the three-storey building will be home to two GP practices, a pharmacy and information and services to help people stay healthy. Community nursing teams, a dental practice and specialised services, such as podiatry, audiology and minor procedures will be located on the first floor and the top floor will be reserved for office and staff space. The Devonshires team was led by Antony Power who was assisted on banking and finance matters by Julian Barker, a partner in our Banking Group, on sub-contract issues by Andrew Thompson, a partner in the Projects

Group and on property and title matters by James Howard, a solicitor in the Projects Group. This is the first phase of what is hoped will be a two phase scheme with the Council constructing a leisure facility on land adjoining this facility to create a joined up health and wellbeing offer to the community.

Our LIFT Team faces a busy second half to the year with a further eight LIFT projects expected to close within this period as well as potential instructions in relation to Express LIFT bids.

Group Partner, Paul Buckland, assisted by Elen Storey. Duncan Brown and Jonathan Winckworth worked on the property aspects of the project and corporate and banking support was provided by Louise Eldridge and Yeunsan Naylor-Lui.

Devonshires are pleased to announce that the £46 million Stoke-on-Trent and Staffordshire Fire and Rescue Authority PFI Project reached financial close in October. Devonshires acted for Cofely Limited, the services provider and

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In September we worked on the close of the £38 million Basildon Sporting Village PPP project which is the largest sports project in the Thames Gateway. We acted for the leisure operator Sports and Leisure Management Limited who will be operating the facility for the 25 year project term. The project is led by Community Solutions for Leisure and the facilities will be built by Morgan Ashurst. The Village is scheduled to be completed in Spring 2011 and will be a sporting hub, providing modern, ‘state of the art’ facilities. It has been identified as a potential training facility for the 2012 Olympic and Paralympic Games. The Devonshires team was led by Projects

lifecycle contractor to the Bilfinger Berger Project Investments-led consortium Fire Support.

The project will see seven fire stations rebuilt as well as the construction of an additional three stations in areas where the Fire and Rescue Authority has determined there is a need for additional resources.

All stations have been designed with community and state of the art operational facilities. Stations crewed around the clock are also to include fitness facilities that can be used by supervised groups. Community groups will be able to use the facilities and the

newly designed stations will also allow for more community safety activities to take place, such as Student Firefighter courses.

Projects Group Partner Antony Power led the Devonshires team, working with employment Partner Nicola Philp, banking Partner Julian Barker, and assistants Robert Winrow, Yeun san Naylor-Lui, Kirsty Thompson and Hannah Jefferson. Fire Support were represented by White and Case and Eversheds acted for the Authority.

“the £46 million Stoke-on-Trent and Staffordshire Fire and Rescue Authority PFI Project reached financial close ”



Devonshires team accepting Best Adviser award.



# Housing PFI Round 6 and Housing Investment News

The HCA have recently announced ten local authorities who have been successful in bidding for £1.7 billion of Housing PFI credits in Round 6. The bidding round closed in October last year and competition was strong as the HCA received bids from twenty four local authorities, which is reported to equate to over £4 billion of funding.

The HCA looked to allocate credits to those schemes which will deliver transformational change, requiring intervention on a significant scale. Compared to previous rounds the Round 6 schemes have a strong focus on regeneration.

The successful local authorities cover six out of the nine English regions and are made up of seven estate based regeneration schemes and three new build housing schemes. Four out of the ten schemes involve Extra Care Housing which is proving to be a popular scheme type. If carried through the proposals will provide around 4,500 local authority homes.

The HCA anticipates business case development will take up to 12 months with some less complex projects proceeding more quickly.

“ten local authorities have been successful in bidding for £1.7 billion of Housing PFI credits”

Local Authority	Scheme	Type*	Details
Birmingham City Council	Erdington Housing PFI	HRA Estate Based Regeneration	Regeneration involving demolition and mixed tenure re-provision and improvement of existing homes. Council and RTB flats to be de-converted to family homes.
Cornwall City Council	Affordable Housing for Cornwall	Non HRA (Extra Care and General Needs Housing)	Creation of 257 new affordable rented and 186 extra care units on 17 sites in 12 locations across the county. Project will also facilitate 170 shared ownership units and 201 sale units.
Hull City Council	Transformation of Orchard Park	HRA Estate Based Regeneration	Demolition of 1040 homes including 785 Council homes. A further 587 homes to be demolished in advance of the contract. Project will provide 680 new council homes and facilitate further 1020 units for private sale or shared ownership. Contract to cover maintenance, but not housing management.
Leeds City Council	Lifetime Neighbourhoods For Leeds	HRA New Build Housing (including Extra Care)	Demolition of 173 units with 540 extra care units and 280 affordable lifetime homes to be constructed on 20 sites across the city. Services to include repairs and maintenance, housing management, facilities and leasehold management.

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Northampton Borough Council	Northampton East Regeneration Scheme	HRA Estate Based Regeneration	Selective demolition and replacement with new council homes together with refurbishment and remodelling. Also development of additional homes on a mixed tenure basis.
Nottingham City Council	Meadows Housing PFI	HRA Estate Based Regeneration (including Extra Care)	Regeneration involving demolition of 702 homes, refurbishment of 520 council homes, and re-provision of 330 new council homes. In addition 160 flats will be re-converted into 80 family houses. Proposals include replacement of 7 dispersed sheltered schemes with 2 new extra care schemes.
Portsmouth City Council	Somerstown and North Southsea PFI	HRA Estate Based Regeneration	Demolition of 218 homes and replacement with 730 new homes; 533 council homes, 133 for sale and 64 for shared ownership. Council to retain provision of housing management services.
Shropshire County Council	Extra Care Housing	Non HRA (Extra Care Housing)	Provision of 400 new build extra care units all for affordable rent across 8 different sites in the county.

“seven estate based regeneration schemes and three new build housing schemes”

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London Borough of Southwark	Aylesbury Estate Regeneration	HRA Estate Based Regeneration	2 of 4 phases of re-development of Aylesbury Estate. Demolition of 1100 units and delivery of 410 new council homes and facilitation of 546 outright sale and 138 shared ownership units. Overall development to provide 4200 units and 50:50 tenure split. Contract to include full housing management and repair and maintenance services from the outset.
Stoke City Council	Suburban Estates Investment Programme	HRA Estate Based Regeneration	Demolition of 486 existing homes and re-provision of 729 homes on a mixed tenure basis (496 council homes and 233 market sale) and associated community facilities on 13 sites across 6 estates. Contract to include the provision of housing management and repair and maintenance services.

\*HRA: Housing Revenue Account. This is where the local authorities retain ownership of the housing stock and the tenants retain their secure tenancies.

In addition to Round 6 Housing PFI credit allocations the HCA have announced £35 million for Housing Market Renewal Pathfinder areas which equates to 10% of the 2009-2010 allocation.

More recently, Housing Minister John Healey has launched the second phase of the council house building programme which is reported to allocate funding of around £180 million which is in addition to the £1.5 billion allocated under Building Britain's Future housing pledge. It is anticipated that the second wave schemes will be announced later this year with construction beginning on the first of the sites by March 2010.

# Office of Fair Trading Fines Construction Industry for Cover-pricing – What now for Public Sector Procurers?

## Introduction

On 22 September 2009, the Office of Fair Trading (“OFT”) announced its Decision that 103 construction companies have infringed competition law through their involvement in bid rigging activities, in particular cover pricing. Cover pricing occurs where contractors enter a bid but submit a price they know is too high and consequently they are very unlikely to win the contract. The effect of cover pricing can be to restrict the number of genuine tenders and therefore to reduce competition.

The OFT has imposed fines totalling £129.5 million

OFT were public sector tenders subject to the EU Procurement Regulations. There has been concern within the construction industry that public sector procurers would use the OFT’s Decision as a ground for excluding the companies concerned from future tenders.

In response to this and, possibly, in view of the potentially disastrous effect it could have on the construction industry as a whole, the OFT in conjunction with the Office of Government Commerce (“OGC”), has issued an Information Note for public sector procurers. The OFT’s and OGC’s clear recommendation is that the companies concerned

“103 construction companies have infringed competition law”

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on the companies involved. It is important to note that although the findings in the OFT’s Decision relate to the conduct of the 103 named companies, its investigation suggests that cover pricing was a widespread and endemic practice in the construction industry. The OFT uncovered evidence of cover pricing in over 4000 tenders (in both the public and private sector) involving over 1000 companies but had to focus its investigation on instances where the available evidence was strongest. Therefore, it cannot be assumed that the 103 named companies are the only companies that may have engaged in cover pricing.

## Implications for public sector procurers

A large number of the tenders investigated by the

should not be excluded automatically from future tenders on the grounds that they are named in the Decision, nor should they be the subject of similar adverse measures making it more difficult for them to qualify for such tenders.

The OGC’s / OFT’s main reasons for this stance are that the contractors have already been fined for their behaviour and so should not be subjected to further penalties, and it would be wrong to assume that companies not named in the Decision have not also been involved in bid rigging.

Notwithstanding this general stance, the Information Note states that it is ultimately a matter for individual procurers to decide what action, if any, they should take in their own particular circumstances, having taken appropriate legal advice as necessary.

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# Express LIFT Here!

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In January of this year the Department of Health announced the successful bidders for Express LIFT (Local Improvement Finance Trust) framework. As reported in the previous edition of Projects Brief, the Department of Health has been tendering for a framework agreement for private sector entities to bid for new projects under a simpler, streamlined form of LIFT procurement. The original LIFT procurement route was seen by many in both the public and private sectors as being too cumbersome, complicated and expensive in relation to the

in financially closing traditional LIFT projects.

The successful Express LIFT private sector partners are:

- Community Solutions for Primary Care
- Express LIFT Investments Limited (Anagennao Limited/Cyril Sweett/Sutton Harbour Holdings plc)
- Equity Solutions
- Eric Wright Group
- Fulcrum Infrastructure Group
- Odyssey Healthcare (Babcock & Brown/ Ashley House/GSL UK Ltd)
- Prime Plc

“a simpler, streamlined form of LIFT procurement”

size of the facilities being delivered. Many LIFT procurements took years to financially close during which time PCT estates were not being renewed and private sector partners were running up large bidding costs.

The Express LIFT framework comprises 7 private sector partners and will last between 2 and 4 years. The selected private sector partners will have the opportunity to set up new LIFT companies with any PCT that does not currently have a LIFT company. The Express LIFT companies will be procured through an accelerated procedure which is expected to take months rather than years. Particularly significant is that there will be no sample schemes which have caused significant delays

Nine months after the announcement of the Express LIFT framework panel we have still seen only one Express LIFT project officially come to the market although there are now a number of other projects in the pipeline. Cumbria PCT has issued a tender for the formation of a LIFT company. The central theme of the tender is the requirement to revitalise Cumbria's community hospitals with a number of schemes already identified. The eyes of the LIFT and wider health industry will now be on Cumbria to see whether the procurement of the new LIFT company is indeed express. A timely and painless close in Cumbria may convince other PCTs to embark on an Express LIFT procurement.

# Changes to the VAT Zero Rate for Buildings Used for Charitable or Residential Purposes

Supplies involving the acquisition or construction of a new building (or part) intended for use solely for a relevant residential or solely for a relevant charitable purpose are zero rated for VAT provided that the supply is made to a person who both intends to use the building for such a purpose and gives the builder a certificate in a specified form before the works are carried out. If there is a business use of the premises within a 10 year period from the date of completion of its construction

qualifying use of the building (or part) so long as it is fair and reasonable.

This will be welcome news for those involved with projects under which relevant residential use buildings are constructed because to date there has been no de minimis provision at all for these buildings. Thus if accommodation is constructed as residential accommodation for say NHS staff and this accommodation does not qualify as dwellings, it will usually qualify as a building used solely for a relevant residential

“HMRC now recognise that the term “solely” as used in those phrases can incorporate a de minimis margin of up to 5%”

then a change of use charge arises on the person acquiring the business.

HMRC have announced in their Brief 39/09 that they have changed their interpretation of the meaning of the phrase “solely for a relevant residential purpose or solely for a relevant charitable purpose” in relation to this zero rating. Broadly, HMRC now recognise that the term “solely” as used in those phrases can incorporate a de minimis margin of up to 5%. HMRC will now accept that a building (or part) is used solely for the relevant qualifying use if the use of the building (or part) for the relevant qualifying use is 95% or more. HMRC will accept any method used to calculate the

purpose and therefore zero rating will apply. However, if it is intended that some of the time some of the units may be used for hotel type uses (for example for accommodation for visitors or patients’ families under “patient hotel” type arrangements) then up to now this would have prevented the zero rating of the building. However under the new rules, provided that the non-qualifying use is kept within the 5% de minimis a certificate can be given and zero rating will apply.

However, the announced changes will not be so welcome to charities or those involved with projects under which relevant charitable use buildings are constructed. This is because

to date there has been an extra statutory concession (ESC) in force in relation to charitable buildings under which HMRC will ignore non-qualifying use of the charitable building (or part) if that use is less than 10% of the total use. However charities using the ESC must comply with the strict provisions of the ESC which measures the 90% charitable use by one of three specific measurements.

HMRC state that in the light of their change of view, the ESC is no longer necessary and so

and be expected to progress to completion and (in the case of the acquisition of a building) exchange of contracts has taken place and a deposit paid to the Vendor before 30 June 2010.

All this is likely to result in increased costs for those developing charitable use buildings. Many charitable projects in the course of procurement may run out of time for the option to be exercised and unless such projects can be brought within the new rules, they will

“this is likely to result in increased costs for those developing charitable use buildings”

it is being withdrawn on 1st July 2010. From then on charities can only certify use as being solely for a relevant charitable purpose if they can bring themselves within the 5% de minimis. During a transitional period of 12 months from 1st July 2009 charities have the option of either using the existing ESC in accordance with its terms or the new interpretation of “solely” to determine whether they can take advantage of the zero rate. But the choice must be made and the certificate given before the end of the transitional period. HMRC will not consider a certificate to be valid unless (in the case of a supply of construction services) the works have actually started on site before 30 June 2010

not qualify for zero rating. This could prove extremely costly for those projects. Further, under the existing ESC if there is a change of use within the 10 year period no tax charge (as referred to above) arises. This does not apply to the new rules. Any change of use within the period of 10 years will trigger the charge.

The change of view appears to have come without any prior consultation and it is expected that charities will lobby the Government to reverse the changes.

# The Dangers of “In House” Procurement

On 9 June 2009, the Court of Appeal gave its judgement in the case of Brent London Borough Council v Risk Management Partners Limited [2009] EWCA Civ 490. The Court dismissed Brent’s appeal against a finding that it had breached the Public Contracts Regulations 2006 in awarding a contract directly to London Authorities Mutual Limited (LAML), a mutual insurance company set up by various London Borough Councils, including Brent, without the submission of a tender by LAML.

did not apply. It held that, whilst the first condition could in theory be satisfied by the joint control of a group of local authorities, it was not the case here. LAML was found to have a large degree of operational independence, such that it could not be regarded as a department of each of the authorities. Accordingly, Brent lacked the necessary degree of control.

## Implications for Local Authorities

It should be noted that the case was relatively fact specific, and that Risk Management having been invited to tender and having been through

“Authorities will have to balance their need and desire to deliver ever increasing efficiency savings via new pooled service arrangements, with the requirements of the Regulations.”

## The Teckal Exemption

Brent sought to rely on the principle established in the European Court of Justice case of Teckal srl v AGAC (C107/98) which allows for an exemption from the Regulations for the award of agreements considered “in house”, and applies where:

1. the contracting authority exercises a degree of control over the entity to which it awards the contract, similar to that which it exercises over its own departments; and
2. the entity awarded the contract carries out the essential part of its activities with the contracting authority.

The Court confirmed that the Teckal exemption

much of the tender process, before the last minute “in house” award, may well have played a part in the initial finding that Teckal did not apply. However, the Court of Appeal’s subsequent judgment confirming as much indicates the level of care that authorities should take when structuring a new vehicle if the Teckal exemption is to be successfully relied upon - without a sufficient level of authority control, the award of a contract will not be considered “in-house”, so falling foul of the Regulations.

Local authorities will have to balance their need and desire to deliver ever increasing efficiency savings via new pooled service arrangements, with the requirements of the Regulations.

# Free Schools

Last year we wrote about the opportunities for Housing Associations to drive the regeneration and renewal of schools within the communities where they have tenants through the Academies programme. By becoming a sponsor of an Academy, a Housing Association has the opportunity to provide strategic direction for a school and raise aspirations. This includes appointing the head teacher, shaping the curriculum for the school and moulding the culture and ethos of the school.

Housing Associations remain underrepresented amongst the organisations sponsoring

be based on an organisation's skills and leadership and their commitment to working with local parents, teachers and pupils rather than an ability to contribute financially. Under the new Academy sponsorship proposals, being published for consultation in the autumn, sponsor applicants will have to pass a robust but light touch process to demonstrate the leadership and drive to turn schools around – instead of financial sponsorship being required from some sponsors.

There is now a real opportunity for Housing Associations to deliver tangible benefits at

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Academies. A significant reason behind this may well be the £2 million price tag that has been attached becoming a sponsor. At a time when Housing Associations are concentrating on their core businesses, the thought of spending £2 million to enable the regeneration of a school is not very attractive.

An announcement last month by Schools Secretary Ed Balls may change this. The announcement paves the way for the removal of the requirement for a £2 million sponsorship contribution. Mr Balls stated that there will no longer be a financial requirement for new Academy sponsors for schools opening from September 2011. He said the test will now

the heart of their tenants' communities. By regenerating schools and then moulding the culture and ethos of those schools, Housing Associations can give the children within these communities a real opportunity to succeed and a better start in life. In addition, the announcement means there are now opportunities for adding value to bids for tendered local authority regeneration schemes by not only regenerating housing, but also regenerating local schools.

With Academies being part of the education policies of both the current Government and the Conservative Party, the future for Academies looks very bright.

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