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Briefing

Construction (Design and Management) Regulations 2007

Suggested approach on PFI/PPP Projects

The Construction (Design and Management) Regulations 2007 (the "**Regulations**") came into force on 6th April 2007. The purpose of this paper is not to set out the changes made by the Regulations to the Construction (Design and Management) Regulations 1994, but to suggest common approaches to be taken by practitioners which may facilitate negotiations on PFI/PPP Projects.

1. Provisions in Project Agreement

As the Regulations set out the various obligations of duty-holders, it is not necessary to repeat them in the contract documents. However, it is important to:

- (a) identify who is to be the "Client". In this respect, the Approved Code of Practice (**ACOP**) to the Regulations makes it clear that, at the start of the project, the project originators, who will be the public sector Authority, will be the "Client" for the purposes of the Regulations (see paragraph 39 of ACOP). However, it is possible that during the bid stage bidders could be the "Client", either alongside the Authority or as a consequence of the transfer of the roles and responsibilities from the Authority to a bidder. These circumstances may arise, for example, at a point in time when a bidder starts to commission design work in relation to the project (see paragraphs 40 and 41 of ACOP). This is likely to occur during the Preferred Bidder stage with the chosen bidder or even earlier in the bid stage (e.g. during the ITCD stage); which may result in the all the shortlisted bidders carrying out the duties of the "Client" (see paragraph 41 of ACOP which makes clear there may be more than "one client involved in a project");
- (b) identify who is to act as the "CDM Co-ordinator". Following Regulation 14(1) and the guidance set out in paragraph 86 of the ACOP it is clear that this person is intended to be appointed on or before the time when detailed design work commences. In relation to most projects this is during the Preferred Bidder stage, but may, in certain circumstances, be at an earlier point in time in the bid stage. The question follows as to who is to be responsible for appointing the "CDM Co-ordinator"? Where the "CDM Co-ordinator" is to be appointed before the Preferred Bidder stage of a project the Authority is the only practical choice. However, where the "CDM Co-ordinator" is to be appointed during the Preferred Bidder stage the parties have the option as to whether the Authority is to appoint the "CDM Co-ordinator", which is the obvious choice, or the Preferred Bidder is to do so. One difficulty with opting for the Preferred Bidder to appoint the "CDM Co-

ordinator" is that currently it is commonplace for the identity of the Project Company not to be known until the SPV is formed on or around Financial Close; after that time the appointment will invariably be required to occur in accordance with the Regulations. As such, the SPV may have to be formed at an earlier stage than is currently typical for the purpose of appointing the "CDM Co-Ordinator". However, during the bid stage, the Project designed by bidder A may well differ from the Project designed by bidder B, so potentially there could be different "Projects" being designed at this stage. Whilst it is doubtful the drafters of the Regulations intended such an outcome, as each bidder could be regarded as a "Client" they may each need to appoint their own CDM co-ordinator where the bidders' detailed designs are not all submitted to the Authority during the bid stage;

- (c) identify whether or not the "CDM Co-ordinator", where appointed by the Authority, should be novated to the Project Company at Financial Close so the Project Company becomes its employer. Whether or not the Project Company is to agree to a novation in the context of the negotiations of the Project Agreement is dependent on the terms of the CDM Co-ordinator's appointment and the terms and conditions of the deed of novation (including consideration of issues such as the credentials of the "CDM Co-ordinator", limitations on liability, the fees, etc.). Accordingly where the Authority appoints the "CDM Co-ordinator" during the Preferred Bidder stage it would seem prudent to involve the Preferred Bidder in the process and get his agreement to the novation. The CDM Co-ordinator would, in this scenario, have knowledge of the designs of the unsuccessful competing bidders but a confidentiality agreement could overcome concerns. In relation to the drafting of the deed of novation it is important to bear in mind that under Regulation 14(3) changes are permitted to the terms and conditions of the CDM Co-ordinator's appointment. Of course, the parties may agree to novate the CDM Co-ordinator's appointment during the Preferred Bidder stage. One difficulty with this is that, again, it is common for the identity of the Project Company not to be known at this time; the SPV not having been formed;
- (d) identify the Principal Contractor. Regulation 14(2) provides that after the CDM Co-ordinator" has been appointed, the Client should appoint the Principal Contractor "as soon as practicable after the Client knows enough about the Project to be able to select a suitable person for such appointment" (see paragraphs 69 – 74 of ACOP). Arguably, and in contrast to former practice, the appointment should be made during the bid stage so that the duties of the Principal Contractor are carried out throughout the development of the detailed design and not just at the end of that process. Also, note that only one Principal contractor can be appointed at any one time. However, changes in the appointment are permitted (Regulation 14) although ACOP recommends the same Principal Contractor be kept from site clearance and preparation to final completion (see paragraph 73 of ACOP);
- (e) identify at what stage the role of "client" is to be transferred to the Project Company:
 - (i) at Preferred Bidder stage? This is likely to be beneficial for the Authority as it will hold the responsibilities for a shorter period. However, there is always the risk the Preferred Bidder may not be the party who eventually enters into the contract (e.g. if issues arise before financial close and the Authority reverts to a reserved bidder – less of an issue where the Competitive Dialogue process is adopted). Also, the identity of the Project Company may not be known at this stage as the SPV may not have been formed;

- (ii) at Financial Close stage? To date, this seems to be the preferred choice as there will be certainty as to the identity of the Project Company.

The Project Agreement simply needs to provide that the Project Company elects to be the "only Client" and the Authority has agreed to such an election.

2. Client's Agent

Although the role of Client's Agent ceases as at 6th April 2007, Regulation 47(6) states that any Client's Agent appointed before the Regulations came into force may, if requested by and agreed with the Client, continue to act as the agent of the Client for a period of 5 years or until the appointment is revoked or the Project ends (whichever is the earlier). If a Client's Agent continues to act it will immediately be subject to the duties (requirements and prohibitions) as are placed on the Client under the Regulations.

It is therefore necessary to consider all Project Agreements and Sub-Contracts entered into before 6 April 2007 where a Client's Agent may have been appointed and decide if this role is still required.

3. Credit Facility Agreement

Regulation 2(1) expands the definition of the "Client" from the 1994 Regulations to cover any person who in the course or furtherance of a business either:

- (a) seeks or accepts the services of another which may be used in the carrying out of a project for him; or
- (b) carries out a project himself.

Limb (a) above would seem to include a Lender as, with step-in rights, a Lender has security over the Project and could ultimately end up in the role of the Project Company if it exercises its step-in rights. Further, Lenders appoint monitoring surveyors/technical advisers to monitor and comment on the construction of works being designed, developed and constructed by the Project Company.

Consideration should therefore be given to making it clear in the Credit Facility Agreement who the only "Client" is for the purposes of the Project. This should be consistent with the Project Agreement.

4. Hand-over of the health and safety file and construction phase plan

It is usual to require these to be handed over on expiry or termination of the contract but retaining these documents for this length of time could be quite onerous for the Project Company and/or construction sub-contractor.

Consideration should be given, where a Project comprises separate construction phases, to making the requirement to hand-over a copy of the relevant part of the health and safety file and construction phase plan following completion of the relevant phase.

City of London Law Society Construction Committee

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