

Foreword

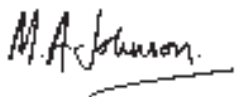
We trust you had an enjoyable Summer break and have returned refreshed to tackle the many partnership opportunities ahead. You will notice a fresh new look to this issue 13. On 18 September we launched our new brand image to mark our fifth birthday. This new look followed very helpful suggestions and feedback gleaned as part of our client feedback survey carried out in May. Many thanks to all those who contributed. The winner of the champagne prize draw was Gavin Milner of Northamptonshire County Council.

Public service reform continues to be a hot topic as we enter party conference season and anticipate the announcements of leadership challenges, the Autumn pre-budget statement and the Comprehensive Spending Review 2007. Tightening fiscal discipline and the continuing focus on public sector efficiency and consumer choice are likely to prove key drivers in stimulating new partnerships and outsourcing opportunities. In this issue, we focus on the growing interest in social enterprise models as a 'third way' of delivering public services. The new Office of the Third Sector was launched in May under the leadership of rising star Ed Miliband. The Treasury has begun a cross-cutting review of how the voluntary and community sector can become more involved in public service delivery. We continue to be closely involved in supporting innovative new models for delivery, including through our work with the Futurebuilders fund, which supports third sector providers to become 'market ready' to provide public services. Find out more in some of our case studies in this issue.

Social enterprise is gaining particular momentum in the healthcare sector, as new practice based commissioning arrangements aim to stimulate new providers of medical services. We report on some of the projects we are involved in. We also take a look at the new procurement procedure 'Competitive Dialogue' and the practical implications for complex procurements. We also have the usual sector round-ups on developments in education, housing, health and social care and public procurement, with contributions from specialist procurement agency, 4ps. In Firm news, we have recently boosted our transaction team with the recruitment of two new team members Oliver Higgins and Peter Hill, and we look forward to introducing them to you soon. Oliver brings particular expertise in social housing, whilst Peter joins us from the London Borough of Redbridge, where he was involved in a broad cross-section of commercial projects. We were also delighted to promote Matthew Wolton to Director in recognition of his great contribution to our continuing success.

As always we welcome your feedback and views on issues covered in this issue and look forward to working with you on partnership projects during the coming year. Thank you for your continuing support.

With best wishes



Mark Johnson, Managing Director



Ed Miliband became the first "Minister for the Third sector" in May 2006

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PfS Appoints New Chief

Partnerships for Schools ("PFS") announced in May that Chief Executive, Richard Bowker, was stepping down at the end of July and moving to a new post with National Express Group plc. On 7 August 2006, PFS announced that Tim Byles CBE had been appointed to replace Bowker. Byles is currently Chief Executive of Norfolk County Council, having previously been Director of Economic Development at Kent County Council. During his time in both of these appointments he was involved in large-scale schools and commercial premises procurement projects. He has worked extensively with central Government in his roles as Chair of the Local Government Taskforce and of SOLACE (the Society of Local Authority Chief Executives), a position he has held for the last four years. He has also served as National Procurement Champion for the DCLG.

Speaking of his appointment Byles said: "I am tremendously excited about the chance to lead PFS and the delivery of the BSF programme. It is a once-in-a-generation opportunity to transform education, something which is close to my heart. We have an excellent team in place, and PFS has already made a big impact. I am proud to be leading the organisation into the future." Byles has also been reported as saying that his twin objectives are to get the early BSF schemes closed, while increasingly

refining the process through learning from previous experience and through greater standardisation.

Observers have noted that this move could signal a more collaborative approach as opposed to the previous prescriptive regime which is claimed to have met with increasing local authority opposition. In the same week as this announcement, PFS confirmed that local authorities with BSF schemes under £60 million would not have to use the Local Education Partnership (LEP) model – a U-turn from its approach set out in previous guidance which made clear that the LEP model should be used in all but the most exceptional of circumstances.

First BSF financial close

On 30 June 2006 Bristol City Council, Skanska and Partnerships for Schools reached financial close on the first-ever Local Education Partnership (LEP). The LEP will deliver the first stage of the city's Building Schools for the Future (BSF) programme, representing some £173m of capital investment.

The LEP, which is set up for a minimum of 10 years, will deliver capital allowing the development of new schools as well as the refurbishment of the city's secondary school estate in a manner that will transform education delivery. The programme will integrate ICT provision into school design for the first time in Bristol at a programme level – £8 million worth of new ICT will be included in the initial projects, offering the real opportunity for personalised learning for all.

This announcement also heralds a milestone for BSF, and brings the national programme into the very real phase of school delivery, while providing the means of addressing the significant challenges facing the education community in Bristol.

Framework Agreements vs LEPs

Derbyshire County Council is at the centre of a parliamentary debate as it tries to convince the DfES and Partnerships for Schools (PFS) that it should be allowed to use its own delivery model to carry out its £250 million Building Schools for the Future (BSF) scheme, which is due out to OJEU next February.

Derbyshire wants to roll out its first phase, worth £77 million, using its existing capital works framework contract. PFS wants the council to use the standard joint venture model, which involves setting up a Local Education Partnership (LEP) with a private sector consortium.

Derbyshire is arguing that, as one of only five councils in England with a four-star excellent rating from the Audit Commission for its services, it is fully entitled to use its existing procurement methods to deliver its BSF scheme. However, recent guidance issued by PFS makes it clear that variant models are not welcome.

Derbyshire County Council currently delivers its schools building programme using a framework agreement that covers all of its capital works. The framework, set up in 2002, runs for five years with an option to extend it to 2010. The framework contractors for schemes over £100,000 are Mansell, Wildgoose and GF Tomlinson.

In the market in general, potential bidders are becoming increasingly frustrated with the delay to the BSF programme, which has seen only one BSF scheme reach close since it was launched three years ago. One said: "I can understand PFS not wanting every council coming up with its own unique model, but when a council has a system that works why not let them get on with it?" Others are hoping the new chief executive Tim Byles, who will replace Richard Bowker in November, will speed up the process by forging better links with local authorities.

PFS recently launched a much more prescriptive regime for local authorities hoping to enter Waves 4 to 6, which clearly discourages variant models.

Academies Making Progress

On 27 July 2006 the Department for Education and Skills (DfES) announced the results of the third annual PriceWaterhouseCoopers (PwC) evaluation into the Academies Programme and changes to the sponsorship model.

Academies were introduced by the DfES in 2000 as a key element of the Government's school improvement strategy. The initiative is focused on raising standards whilst maintaining a strong commitment to social equity and equality of opportunity. It is aimed at turning round failing schools where previous interventions had not led to improvements. Sponsors contribute up to £2 million to the capital costs of building a new school or remodeling an old one with the DfES providing all other capital costs and the ongoing recurrent funding. Academies have independent status, and this is intended to facilitate flexibility and creativity in management arrangements, teaching appointments, and curriculum delivery. Sponsors come from a wide range of backgrounds including business, existing private schools educational foundations and even two local housing associations.

According to Partnerships for Schools, which now has responsibility for procurement of academies, parents are strongly endorsing Academies with three applications for every place for this September and an increase of nearly 30% in the number of places offered in those Academies which replaced weak or failing schools to meet this extra demand. The three brand new Academies – with no predecessor schools – are more than six times oversubscribed.

PwC concluded that, generally speaking, pupil performance at Key Stages 3 and 4 in Academies between 2002 and 2005 has been improving, and often at a rate that exceeds the corresponding improvements in other similar schools. On balance, the evidence over this period suggests that the improvements in pupil performance in Academies, when taken as a group, are better than in other schools with similar characteristics, although the absolute differences are generally small. The report sets out that the improvements are underpinned by a number of factors, including the following:

- Strong leadership focused on raising pupil aspirations
- Innovation in relation to the teaching of the curriculum
- Getting the basics right, such as behaviour, discipline, homework, uniform and parental involvement
- Higher level of resourcing, particularly in relation to buildings, ICT and equipment
- An adequate lead-in time for principals and staff and a phased intake of pupils to allow for planning and induction

The report concluded by making a number of suggestions for the future. The first such set of suggestions relates to the process of implementing the Academies initiative and includes:

- Allowing an adequate lead-in time – Principals should ideally be appointed 18 months, and the senior leadership team 6 months, before a new Academy opens. The DfES should encourage the phasing-in of pupil intakes
- Developing a comprehensive induction programme for sponsors, principals and staff. This induction should clarify the roles, responsibilities and expectations of sponsors and trustees in respect of governance
- Enhancing the process and outcome of new Academy buildings. The DfES should provide additional support and guidance to facilitate smoother project management to ensure the Academy buildings are fit-for-purpose in relation to 21st century learning.

The PwC report can be downloaded from:

www.standards.dfes.gov.uk/academies/pdf/ThirdAnnualPWCReport.pdf?version=1



Academies Framework Takes Shape

Partnerships for Schools announced on 12 June 2006 that fourteen bidders had been shortlisted for inclusion on the Partnerships for Schools national framework for Academies. The framework will deliver Academies, one-off schools and other educational facilities on behalf of local authorities that are not yet engaged with the Building Schools for the Future programme (Local Authorities that are currently on the BSF programme will deliver Academies through their Local Education Partnerships in the same way as other educational facilities). Colin Howell, Partnerships for Schools National Academy Director, stated that interest in the procurement had been exceptional and all of the responses received were of extremely high quality. The shortlisted bidders are: Alfred McAlpine, Amec, Balfour Beatty, Carillion, E.C. Harris, HBG, Interserve, Kier, Laing O'Rourke, Mace, Skanska, Taylor Woodrow, Vinci (trading as Norwest Holst) and Wilmott Dixon.

Case Study:

Innovative Care Campus for Chipping Norton

Our clients, The Oxfordshire Care Partnership ("OCP") are working in partnership with Oxfordshire County Council ("OCC") and Cherwell Vale Primary Care Trust to develop an integrated Primary and Intermediate Care Centre and Care Home in Chipping Norton, Oxfordshire. OCP is a joint venture between leading care provider The Orders of St. John Care Trust and Bedfordshire Pilgrims Housing Association. The combined facility will be a replacement for the existing Castleview residential care home operated by OCP and a replacement facility for the ageing community hospital in central Chipping Norton. This combined model fits well with the Health White Paper's aspirations to bring services closer to patients and to find innovative solutions for community hospitals.

Scheme Outline

The new facility will comprise the following elements:

- A 50 bed residential care home, comprising 36 residential care beds for the elderly (20 of which will be purchased by OCC, while 16 are offered to private fee-payers);
- 14 self-contained intermediate care beds for elderly / other convalescents (all of which will be purchased by OCC / the PCT); and
- A community health facility offering primary and community health care services (typically occupational therapy, radiology, podiatry, physiotherapy, falls and outpatient clinics) with a maternity unit on the first floor.

The intermediate care beds and the residential care beds will benefit from having NHS practitioners on site and there will be opportunities to share services and operating costs between the three elements of the building. The co-location of care services in one integrated centre is likely to become a model for future provision, particularly in the light of proposals in the Health White Paper to introduce healthcare campuses.

Artists impression of new Chipping Norton Facility courtesy of Carless Adams architects



Health White Paper Signals Plurality of Suppliers

In 2005, the Department of Health conducted two major consultations, 'Independence, Well-being and Choice' and a listening exercise, 'Your Health, Your Care, Your Say'. The former asked for views on how social care services could be improved and the latter allowed the public to speak directly to ministers, health professionals, and each other on how improvements could be made to their local services. As a result of these two consultations came the new health White Paper 'Our Health, Our Care, Our Say: A New Direction for Community Services' which was published on 30 January this year. The Paper signals the Government's strategic intention to shift the emphasis of health and social care from acute and intensive interventions, towards community and preventative services. It also recognises how the NHS and social care services can work together and identify how the delivery of these services can adapt to provide individuals with health and social care services they need closer to their homes. Finally, the Paper specifically signposts a significant expansion in the role of not-for-profits or "Third Sector" providers in the delivery of healthcare services.

Bring Services Closer to Home

The White Paper encourages the development of community hospitals and stresses the need to provide a range of services closer to home so that people do not have to travel too far for minor treatment. Hospital services will increasingly be provided within communities. The government is certainly

geared up to move this idea forward - it announced on 5 July that it will commit £750 million for the investment in community hospital facilities. Primary Care Trusts (PCTs) will be invited to bid for the money, which will be used to improve services, convert old acute hospitals and build new community hospitals. This is in line with Labour's manifesto pledge to build up to 50 new hospitals in an effort to "switch about 5% of NHS work from district general hospitals into units closer to people's homes". PCTs will be encouraged to use private sector marketing techniques when assessing what the community wants, before bidding for a share of the funds. However, some sceptical campaigners have argued that this announcement is undermined by widespread closures of old community hospitals.

Greater Role for Not-for-Profits

The White Paper sends out a positive message for not-for-profit providers to build relationships with commissioning teams in PCTs and get more involved in providing healthcare services. The government is looking to open up health and social care services to a wider range of providers so that suppliers are more flexible, innovative and responsive to the changing needs of patients. This explicit recognition of the not-for-profit sector has been further enhanced by the emergence of social enterprises and the government's involvement in supporting these. The government would like to see more health service managers or external organisations, such as charities, facilitating the development of new independent not-for-profit businesses which contract with the NHS to provide services to their locality.

Social enterprises are businesses that deliver goods and services but in pursuit of primarily social objectives. Any surpluses they make are ploughed back into the entity to achieve the same objectives. The government is committed to supporting social enterprises in the economy at large and in the White Paper it has suggested that social enterprise models of service delivery can be a key part of the provider market in primary and community care. It has further demonstrated its vision to integrate these models into the market by establishing a new Office of the Third Sector in May 2006 under the leadership of rising star Ed Miliband. The Office of the Third Sector brings together the work of the Active Communities Directorate, formerly in the Home Office and the Social Enterprise Unit, formerly in the Department of Trade and Industry (DTI). The government has also said that there will be a new Department of Health fund set up next year to assist social enterprises in entering the healthcare market. The fund will help with the development of business models and tackle issues such as access to finance, risk analysis and skills development.

The White Paper signals an exciting and ambitious shift from the way healthcare services have traditionally been delivered. To ensure that this programme is successful and has the desired effect, it is vital that the government continues with its drive to support exemplars of good practice and establish support networks to work through obstacles to change and provides incentives in the form of targeted financial support for innovation.

For more details visit :

<http://www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/Modernisation/OurHealthOurCareOurSay/fs/en>

<http://www.dh.gov.uk/assetRoot/04/13/69/32/04136932.pdf>

Social Enterprises in Health

We are advising a group of entrepreneurial NHS managers who are part of the Surrey Heath and Woking PCT. They are exploring opportunities to spin out their services into a new Community Interest Company which will deliver healthcare services under contract to the new Surrey-Wide PCT, which will be formed in October this year. This initiative fits well with the government's programme to stimulate new providers in healthcare. This is a groundbreaking project and will be the first ever healthcare CIC of this kind. The group is looking to transfer over to the CIC the existing Community Hospital, some 700 employees, together with medical equipment and vehicles. The project has been given the 'thumbs up' by Patricia Hewitt, the Secretary of State for Health, who has said that her team will work closely with the group to tackle obstacles to the transfer. We are delighted to be involved in setting up a new scheme which could be the future direction for the delivery of healthcare services. In a separate development, we are working with Secure Healthcare Limited, another social enterprise as it bids to run innovative health care services on behalf of the Prison Service and local PCTs.

Choosing the Right Structure

As Government seeks to introduce contestability and choice into the provision of primary and community healthcare services, we are seeing the emergence of new social entrepreneurs who are gearing up to provide services under APMS or practice-based commissioning arrangements. A social enterprise is a business with primarily social objectives, whose surpluses are principally re-invested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners. The unique position of a social enterprise – placed somewhere along the spectrum between an altruistic charitable endeavour and an outright capitalist profit-seeker – means that a particular legal form will often be appropriate. The governance arrangements of a social enterprise may often include a greater voice for, and accountability to, service users, employees and other stakeholders than in a traditional corporate model: a feature which increases their appeal to the architects of a patient-led service.

All the literature on social enterprises often uses confusing terminology. Terms such as mutuals, cooperatives, community interest companies abound. Here we attempt to demystify some of the jargon and signpost the factors which influence the choice of an appropriate structure.

To incorporate or not to incorporate?

Whilst there are various forms of unincorporated models for carrying on a business, many of them will not lend themselves readily to a relatively high-risk activity, such as healthcare services. Unincorporated associations, unlimited companies have one principal draw-back: that is that the assets and liabilities of the organisation are synonymous with the participants. An unincorporated venture does not enjoy separate legal personality and therefore any debts which cannot be satisfied from the association's general resources will fall to be met by the management committee, or in some cases, the general membership. Any organisation that wishes to employ people, enter into high value contracts, acquire property, or borrow money will be well-advised to consider an incorporated model which offers limited liability. Lenders may insist that a body incorporates before it can borrow. Incorporation inevitably comes at a price – it introduces greater statutory regulation and transparency over the group's affairs, since information such as accounts must be filed on public registers.

Companies Limited by Shares or by Guarantee

The company limited by shares is a very familiar format for most. The constitutional rules are set out in the Memorandum and Articles of Association. The participants contribute capital to the business and in return are issued with shares, which carry the right to participate in decision-making and the right to receive dividends if the company makes sufficient profit. If the company becomes insolvent, the shareholders can only be required to contribute up to the amount of the shares they agreed to purchase. A share company is a highly flexible format – with the possibility to issue fixed profit (preference) shares, or to weight voting power in favour of certain classes of shareholders. The shareholders usually delegate the day-to-day decision-making of the company to the board of directors, subject to certain key decisions which require the approval of a general meeting of shareholders. The membership in general meeting can hold the directors to account, for example, by appointing or dismissing directors, appointing an auditor and requiring accounts to be laid open to inspection.

The Company Limited by Guarantee ('CLG'), on the other hand, is a slightly odder beast. Traditionally used in non-profit distributing situations, such as tenants' associations, sports clubs or housing associations, the CLG does not have shareholders who contribute capital, but instead has members who each agree to contribute a nominal sum (typically £10) only if the company is wound up leaving any debts. The Memorandum and Articles of a company limited by guarantee will usually have a stipulation that if there are any surplus assets after winding up the company, they will be distributed to the membership. However, if the company was set up to pursue an altruistic purpose, the Memorandum may instead state that surplus assets must be transferred to a similarly benevolent organisation, rather than sharing the spoils (a so called 'asset lock'). Similar to the company limited by shares, the membership may meet in general meeting to exercise certain powers to hold the directors to account, for example dismissing or appointing directors. The relative balance of power between the directors and membership will often be a key issue for a social enterprise. On the one hand, the directors need to enjoy freedom to make speedy commercial

decisions to keep the enterprise on-track. On the other hand, the membership will have an expectation of being consulted on the general direction of travel and certain key issues.

Charitable Status

A CLG which is formed with objects which are drafted as exclusively charitable in nature, may qualify as a charity. The law affords particular privileges to charities, in particular exemption from corporation tax on any surpluses they generate, the ability to reclaim tax on donations given through Gift Aid, exemption from stamp duty land tax and relief from business rates. However, these privileges come at a price: increased scrutiny, additional legal duties for directors who act as charity trustees and a requirement to file returns and accounts with the Charity Commission, as well as with Companies House. Charity trustees must take extra care to ensure that they do not profit personally from, and that their interests do not conflict with, the charity they serve. For this reason, with some limited exceptions, charity trustee board members cannot be paid for their role (except for reimbursement of reasonable expenses). In addition, charities which engage in significant non-core trading activities usually have to set up a separate trading arm to keep their tax privileges.

The definition of charity has its origins in an Elizabethan statute from 1601, which first recognised the four heads of charity: the relief of poverty, advancement of education, advancement of religion and "other purposes beneficial to the community". The fourth limb has been the most fertile territory for the courts over the years to expand the boundaries of charity, in line with changing social and economic trends. Recently, there has been much debate about whether providing core public services is really charitable – or must the charity provide some additionality, beyond simply replacing the State. In a recent ruling, the Charity Commission has clarified that core public service provision can be charitable, if certain safeguards are put in place to preserve the charity's independence and freedom of action. Indeed the Charity Commission justifies this on the basis of a century old precedent which recognises that the relief of general taxation for the public can be a legitimate charitable purpose in itself!

Community Interest Company

The Community Interest Company ("CIC") is a new distinct legal form introduced in 2005. The principal driver for this form of enterprise was the need to create a vehicle which offered donors and philanthropists the comfort that assets and cash devoted to a social purpose could not be sold off for private gain. The CIC was designed as a business model for activities which do not quite qualify as charitable in nature. The CIC can take the form of a company limited by shares, or a company limited by guarantee. The two most important features are firstly, the statutory 'asset-lock', which prohibits the participants from selling assets or transferring cash out of the business, other than on arm's length terms for receipt of value; secondly, the requirement to satisfy (and continue to demonstrate) a community interest test. One of the attractions of this format, in contrast to a charitable company, is that it is permissible to pay directors for their work – which should encourage the professionalisation of boards.

CICs, of which there are currently around 400, are regulated by the CIC Regulator. He has professed an intention to be a 'light-touch' regulator, with his principal interventions being at the time of incorporation, when he has to determine if the proposed business will be carried on for the benefit of an 'appreciable section of the community', and in scrutinising the annual community interest reports filed by CICs along with their accounts. If a CIC is set up as a share company, it may opt to pay dividends to its investing shareholders – but be warned: the returns which investors can earn are subject to a somewhat arbitrary statutory dividend cap – currently 9.5% of the amount paid for the shares. In practical terms this means that if you invest £1000 in shares in a CIC – the maximum amount you can earn by way of dividend would be £95. This might be slightly better than putting the money in a building society account, but it may not be enough to attract philanthropy capital into risky start up ventures in any meaningful volume. Why 9.5% we recently asked a Treasury Minister – but he could not offer any proper justification. Currently CICs currently enjoy no particular tax privileges, although they may be able to persuade their local authority to allow them discretionary relief from business rates. The Social Enterprise movement is actively lobbying Government to introduce tax breaks to stimulate investment in the sector. The Comprehensive Spending Review in 2007 may bring some positive news in that direction – watch this space.

Industrial and Provident Societies

Industrial and Provident Societies (IPS's) have their origins in social philanthropy, self-help and the cooperative movement. Perhaps the most prevalent example of this form is housing associations, of which more than 1,000 are IPS's. Formed under the Industrial & Provident Societies Act 1965, these entities fall into two categories. Firstly, the 'cooperative' mutual model. That is an organisation formed for the benefit of its members, rather than society at large, and which respects the core values of a cooperative. Secondly, the society for the benefit of the community ('bencom') – one which pursues a wider public good, rather than just its members' interests. The second category will often qualify as an 'exempt charity' which benefits from the same tax privileges as a registered charity, but without coming under the regulatory scrutiny of the Charity Commission. However, moves are afoot to change this anomaly in the Charities Bill currently before Parliament.

Members of an IPS benefit from limited liability and usually subscribe for nominal shares in the Society. They must have at least 3 shareholders. Irrespective of the number of shares held, the principle of 'one member - one vote' normally applies to an I&P society. Shares are generally not transferable and therefore do not hold an intrinsic economic value. The members will usually elect or at least approve a board of management. The participants agree to be bound by a set of Rules. The IPS is currently regulated by the Mutual Registration division of the Financial Services Authority. In this regard, it can fairly be described as a very light touch regulator, in that it makes an initial check on the Rules of the Society at the time of registration (for which it charges a handsome fee of over £1,000!) and thereafter requires an annual return of board members and shareholders, but otherwise leaves the participants to their own devices, unless someone makes a complaint. Model rules for IPS are produced by various sponsoring bodies in particular sectors (e.g. the National Housing Federation) and the use of these models reduces the cost and time for incorporation.

One of the drawbacks of this format is undoubtedly that is less familiar creature to funders and investors than a company. In particular, I&P societies are currently not within the ambit of the Companies Acts, which means that useful modernisation provisions such as the statutory indemnity for directors and the abolition of the ultra vires rule in Section 35 of the Companies Act do not apply in full. Consequently, when entering into novel or complex arrangements with third parties, there may be much greater attention focused on whether a proposed course of action is specifically permitted by the Rules (for example the power to borrow money or pledge assets by way of security). In addition, Part II of the Insolvency Act does not apply, which means that the statutory procedures for corporate rescue and administration do not apply – which can cause additional complexity and cost when seeking a loan on secured terms. In response to growing concern about demutualisation and carpet-bagging of profits in some voluntary organisations, the Cooperatives and Community Benefit Societies Act 2003 was passed, which as from 6 April 2006 allows bencoms (but not cooperatives) to apply an 'asset-lock' which prevents any assets or cash from being distributed other than to creditors on a winding up or to another asset-locked body, such as a charity or a CIC.

Conclusions

Ultimately the choice of an appropriate model is likely to depend on an assessment of the following key factors:

- Democratic accountability – how important is it that the governing body of the group is held to account by the wider membership? At one end of the spectrum is a control model where the members and directors are the same people, next comes an accountability model where representatives of wider stakeholders sit on the board alongside executive managers. At the other extreme, the management is completely separate from the governance and board members are elected from amongst the membership group.
- Profit distribution – does the group wish to pay out any benefits to its members or retain them for future investment or community benefit? Profit distribution is not permitted in a charitable company or a charitable IPS model.
- Raising capital – does the business plan require that the group raises significant working capital from shareholders or lenders. If so, this may point to the company format as the one which offers the most flexibility and familiarity.
- Tax status - if the business is likely to generate significant surpluses then charitable status may bring significant tax benefits – but at the price of increased regulation.

Housing Associations as Community Champions

In recent years the Government has been exhorting housing associations to play a greater role in developing the neighbourhoods in which they operate. In an interview in *Inside Housing* (16 September 2005), David Miliband, the Minister for Communities and Local Government at that time, had this to say:



"Housing associations are a commanding and powerful example of what the community sector can do to win loyalty and also to deliver solutions.....They do things in different ways from the government. They do things differently from the private sector. At their best they can correct the mistakes of both".

Although Mr Miliband is no longer the Minister responsible for overseeing the delivery of the Government's sustainable communities agenda, that does not lessen the potential for associations to play a key role.

In his first address to conference at the 2005 annual social housing conference held in Birmingham, David Orr fresh to the role of National Housing Federation chief spoke at some length of his admiration for the Federation's *Inbiz for Neighbourhoods* agenda. He promised that he would make it a priority to develop *Inbiz* and called on colleagues from the sector to work closely with the Federation to develop the scope of this key initiative. The NHF continues to demonstrate its commitment to *Inbiz* and has made it the theme of this year's conference at Birmingham's ICC.

Inbiz resonates clearly with the government's neighbourhood and communities programme. Launched in 2003, the initiative aims to counter negative perceptions and misconceptions of housing associations by encouraging them to exercise a wider neighbourhood regeneration role, and to play their part in tackling residents' liveability issues, irrespective of their tenure. Associations are also being encouraged to work more closely in partnership with other housing associations, local authorities and other key service providers. They will need to be more open and accountable. Being able to demonstrate a willingness and ability to involve residents in their decision-making will be very important. The Government has made it clear that it expects a much greater level of tenant involvement and say over how services are delivered. This drive for greater tenant involvement was given further impetus by the publication of 'Up My Street', the Housing Corporation's report on the role of housing associations in delivering the neighbourhood and communities programme. The authors of the report claim research has shown that there is a strong correlation between tenant involvement in decision making and a greater sense of community spirit.

But what is expected of associations? This will vary according to the resources associations have available. Also the level of stock held in a neighbourhood will have an effect on an association's ability to make an impact. Another obvious question that will need to be asked is, why should associations commit resources in this way? Is it just about winning brownie points from the Government and the NHF? A key driver for the NHF in launching *Inbiz* was the perceived need for associations to improve their public image. In terms of improving the public's perception, there are obvious benefits for associations to be seen to work well with residents and other service providers to improve neighbourhoods. But the authors of the Corporation's report also seek to encourage associations to consider the business case for taking a bigger role in neighbourhood management. They argue that giving a strong commitment to working with others to improve their areas should be viewed as being integral to their core business and the long term gains and should not be viewed just as a risky new venture. For some associations, this will require a new way of working which may take time to bed in but the rewards could be well worth the effort. The evidence suggests that associations are increasingly prepared to embrace the challenges being posed by the government and *Inbiz* agenda.

Housing Focus

The Corporation's report claims that within a year of the launch of *Inbiz* associations of all specialisms, sizes and types throughout the English regions which were together responsible for (i.e. managing and owning) over three quarters of the sector's stock had adopted the three main principles of *Inbiz* which are:

- putting energy and resources into creating places where people want to live;
- investing in a range of services as well as homes;
- working in partnership with local people and organisations

Indeed there has been plenty of activity as more and more associations take on a leading role in regenerating their neighbourhoods.

Touchstone Housing Association (a member of the Keynote Housing Group) was the first housing association in the country to be appointed to lead a neighbourhood management pilot programme, Dunstall and Whitmore Reans. Touchstone has been working with Keynote's Regenerations and Development team and Wolverhampton City Council. The programme is aimed at improving the quality of local services provided in this multi-ethnic inner city part of Wolverhampton. The programme has also involved Whitmore Reans in Partnership which is the leading voluntary sector umbrella organisation in the area. The parties have been working hard and contributing towards the delivery of the Neighbourhood Renewal and Regeneration floor targets in:

- Housing
- Education
- Environment
- Crime
- Unemployment

The partnership has made a concerted effort to involve local residents and customers in the process of change. Touchstone claim that as a result of the initiative voids are falling and demand is rising. Services are improving and the local community is heavily involved in planning investment in the neighbourhood. In this case the benefits to the business case are clear.

Earlier this year New Charter Housing Trust announced their decision to sponsor an Academy school for Tameside. The cost of sponsorship is £2 million, which will be used to help to build the school. The DfES will contribute a further £22 million. New Charter believe that sponsoring an academy is an excellent example of what *Inbiz* can mean and by helping to raise achievement and the ambitions of young people will help to complement the Trust's huge investment in the homes and the neighbourhood.

The announcement by New Charter was swiftly followed by an announcement that the Sunderland Housing Group also intends to sponsor an academy. When announcing the decision Sunderland Housing Group Chief Executive Peter Wallis said: "This is great news and complements our investment in communities across Sunderland".

These are just a few examples of how some housing associations are taking a cutting edge approach to playing a leading role in regeneration. This is a key moment in the development of the RSL sector as the government continues to encourage private developers to compete for grant under the Housing Corporation's affordable housing programme. The proposals for major changes to the regulatory system affecting the sector will also increase the pressure on associations to adapt to meet the new challenges. But for forward looking associations that are prepared to step up to the plate and take on these challenges the future could be full of opportunities.

As everyone connected with the RSL sector will be aware, consolidation is a major issue at the moment with a huge amount of activity taking place around mergers and group structures. For some associations this is the way forward but merger or becoming part of a group will not appeal to all. In the next edition of our newsletter we take a look at the alternatives.

How we can help?

TPP has extensive experience of advising on the creation of new models for delivery of public services in education and children's services, health and social care, leisure and cultural services. We are well-placed to assist housing associations and NDCs with their expansion into community services. Please get in touch to discuss further.

Case Study: Servite Houses: Middlesex First University Student Accommodation PFI

We advised Middlesex First ("MF"), a newly formed Special Purpose Vehicle established by Servite Houses, on a contract with Middlesex University for the provision of student accommodation services in relation to 5 of the University's student Halls. Our team advised MF on the terms of the principal documents, including drafting, negotiating and settling the complex terms. We also prepared and settled the Services Sub-Contract made between MF and Servite and addressed the issue of risk allocation between the parties.

In total, all of the University's 1,916 student homes transferred to MF. The project reached financial close in April 2006. The Halls will be refurbished, operated and maintained by Servite Houses, which set up MF to act as the special purpose vehicle for the project. MF was set up as a registered industrial and provident society with charitable objectives.

Chris Baines, Head of Commercial Services for Servite Houses, said: "We are really pleased with the relationship that has developed during the negotiations and believe that the partnership with the University will go from strength to strength over the decades to come, directly benefiting the students we are providing services to".

The Contract Structure

MF entered into a Project Agreement with the University for 35 years. The University sold 2 of the Halls to Servite Houses who granted a 5 year lease to MF, who in turn entered into a 5 year underlease with the University for the same period. MF entered into a lease and lease-back arrangement with the University for a period of 35 years for the remaining 3 Halls. There was also a TUPE transfer of staff from the University to Servite Houses.

MF also entered into a Management Services Agreement for the same period as the Project Agreement. Under the Agreement, Servite will provide management, company secretarial and administrative services to MF to enable MF to meet its obligations under the principal contracts. In addition, the University and MF also entered into a Facilities Management Agreement whereby MF will provide student accommodation services in relation to a further 3 student Halls owned by the University. The Agreement is for an anticipated period of 10 years.



Procurement Update

Getting to Grips with Competitive Dialogue

Rob Hann, Director at 4ps, the local government procurement experts, explains the new process known as 'Competitive Dialogue'.

A new process for procuring particularly complex projects came into force on 31 January 2006, following a consolidation of laws governing public procurement. The new process is called 'Competitive Dialogue' and contracting authorities such as local councils are just beginning to use the process for the purchase of new schools, roads, social housing, leisure centres, waste treatment plants, social care facilities and other similar projects.

Why Competitive Dialogue?

The EU public procurement regime is designed to promote and encourage transparent and fair competition between contractors in EU Member States.

The European Commission has recently introduced the most significant changes to the regime of the past 10 years. Prominent among them is this new procurement procedure for particularly complex projects.

The diagram opposite shows the key steps in a competitive dialogue procedure.

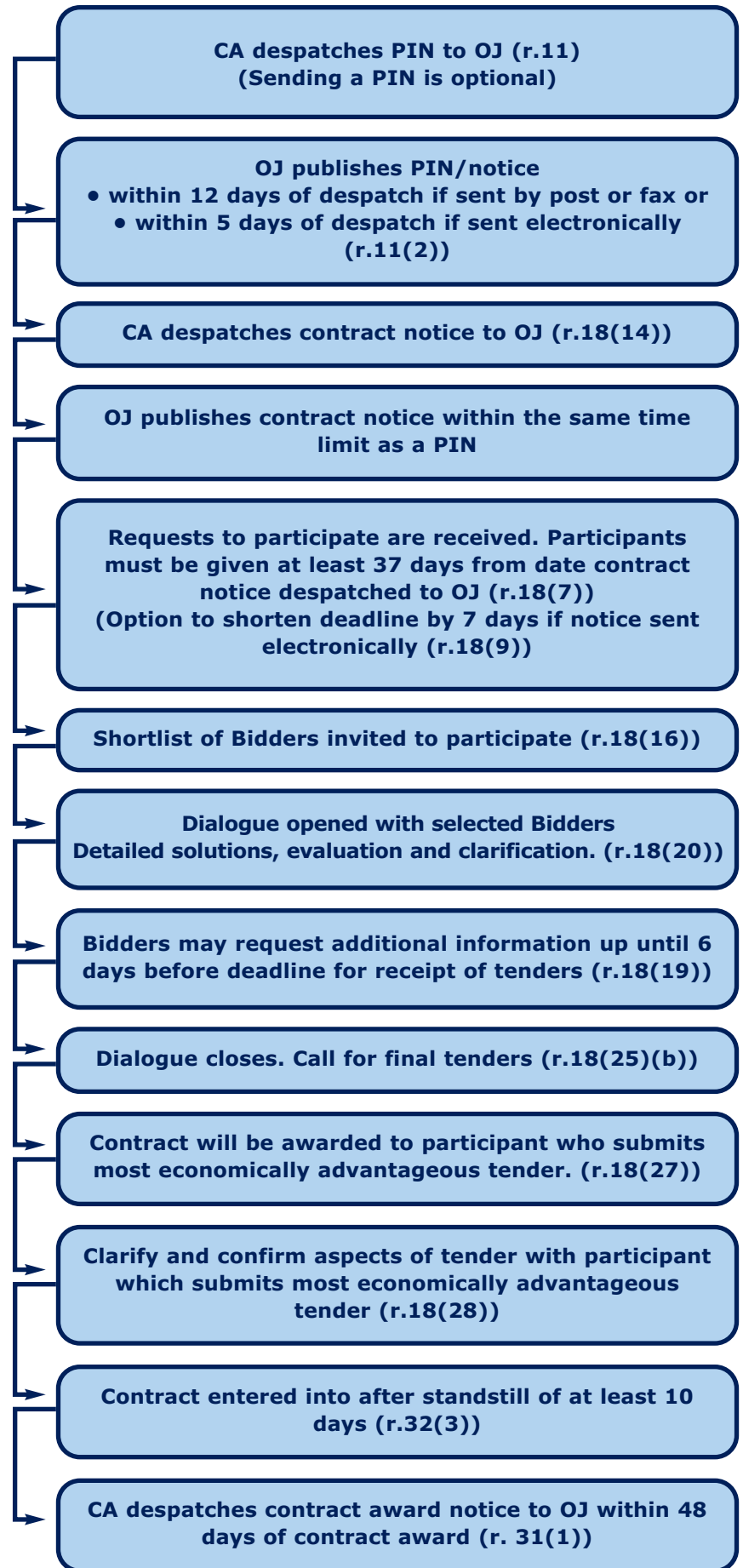
Key:

CA = Contracting Authority
PIN = Prior Information Notice
OJ = Official Journal

How new is Competitive Dialogue?

The competitive dialogue process codifies in law what was already emerging as best practice under the old negotiated procedure; for example:

- Upfront Planning with a clearly defined scope and a well developed draft Output specification before going to market
- Using competition to drive innovation
- Not rushing to Preferred Bidder but probing the bidders' offers whilst still in competition.





Key Implications of Competitive Dialogue

In simple terms, at the beginning of Competitive Dialogue the authority will be expressing the 'what' ie an affordable Output Specification and during the dialogue bidders will be providing the 'how' in terms of service delivery solutions. Whilst there is flexibility within the dialogue phase for bidders to discuss solutions with the procuring authority, the following must be noted:

- After Competitive Dialogue is closed bidders can only be requested to "Fine Tune, specify and Clarify" bids.

Whilst the bidder can be asked to confirm commitments contained in the final tender submission, any change to the bid after the competition stage has closed must not modify substantially aspects of the final tender and must not distort competition or cause discrimination.

- More work upfront

From the public sector side, there will be a shift away from the step-by-step attitude to procurement whereby sometimes procuring authorities rush to the market too quickly without sufficient thought as to the process overall and what they are seeking to achieve at the end of the exercise.

In short, competitive dialogue drives the need for much more work to be done by contracting authorities at front end either prior to going to the market or (at the latest) during the dialogue process. During the process bidders should be encouraged to fully explore innovative solutions to the authorities' requirements. However, in return the authority needs to make clear to bidders that it will properly recognise the confidential elements of any discussions.

Some practitioners have expressed concerns about the impact Competitive Dialogue will have on current practice. In particular, there are concerns that Competitive Dialogue will lead to increased costs for bidders who have to engage in a costly dialogue process without any assurance of success at the end of it. However, more and better quality information, to be disclosed at a much earlier stage in the process, should provide with better foundations on which to base and cost their bids. A more optimistic analysis is that, whilst Competitive Dialogue potentially extends the competitive phase, it should also shorten the closure phase with the overall effect being a shorter procurement timetable.

Advantages of Competitive Dialogue

- The authority will be obliged to put much more effort into the early stages of the procurement, prior to the OJEU notice, in creating draft versions of the main procurement documents and output specification and thoroughly thinking through strategic elements of the project such as the award criteria.
- The discussions with private sector bidders will take place during the dialogue phase, where there is still a competitive element in the process. This ought to promote more value for money solutions for the authority and promote innovative thinking.
- There is flexibility in the process to discuss all the elements of the solution
- The process now explicitly acknowledges that the dialogue can take place in stages during which some bidders may be eliminated.
- A shorter closure phase, post-preferred bidder, with restrictions on the scope of changes which the authority and the preferred bidder can make to the overall commercial deal. This prevents significant deal creep.

Robert Hann is 4ps Director of Legal and Joint Services. He can be contacted on 020 7808 1484

For more information visit:
www.4ps.gov.uk



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Competitive Dialogue – The Issues So Far

There are two main issues which have so far arisen from the introduction of the Competitive Dialogue procedure. The first concerns the discussions which may occur once a final tender is submitted. The second issue concerns the release of confidential information. The competitive dialogue procedure allows contracting authorities and bidders to discuss solutions to problems. There is a risk that bidders may feel that confidential information which they provide may be disclosed to other competing bidders.

Post-Tender Negotiations

Public authorities are allowed to provide for the competition to proceed in stages to reduce the number of bidders. Only once an authority decides it is satisfied with the other stages will it ask for a final tender. The authority may still ask the bidder to "clarify aspects" of its tender or "confirm commitments" which do not "modify substantial aspects" and do not distort competition or cause discrimination.

Contracting authorities can enter into individual discussions with qualifying candidates with the intention of enabling the contracting authority to define the best way of meeting its requirements.

There must be equal treatment amongst all the chosen candidates and no discriminatory treatment (e.g. provision of information). Aspects of the contract may be discussed with candidates so long as this constraint is respected. The contracting authority may not disclose any confidential information or solutions proposed by one candidate to another participant in the competitive dialogue. However, the authority may find it desirable for participants to specifically agree to such disclosure by entering into a suitable agreement at the outset.

Throughout the successive stages of the process, the contracting authority can refine the dialogue with participants until its requirements are sufficiently defined to bring the dialogue to a close. The award criteria can be applied to exclude bidders at each stage in the dialogue, so long as this proposed methodology was clearly signposted in the original contract notice or Information Memorandum.

Once the dialogue has been completed, the contracting authority invites the remaining candidates to submit full and final tenders on the basis of their specified solutions. The tenders must be complete with all required information necessary for the performance of the project. The contracting authority may request further clarification but dialogue is only permissible if it does not impose any substantial new requirements or have the effect of distorting competition or causing discrimination.

Non-disclosure of confidential information

This is an important rule in competitive dialogue since the procedure works around the idea that bidders are primarily competing on the solution they offer. Any information that indicates the nature of a bidder's solution could qualify as confidential information, e.g. know how, innovative ideas, novel financing techniques.

The non-disclosure rule ensures bidders will feel more comfortable being innovative without feeling concerned that their work may be used by the authority to benefit another bidder.

It is possible for bidders to be encouraged to be innovative despite confidential concerns, by giving additional marks for innovative ideas. The authority could also use a confidentiality agreement which would permit certain disclosures.



Getting the best out of Competitive Dialogue

To get the best results from using competitive dialogue, we recommend that

- authorities need to think clearly and thoroughly about what they want to achieve. The scope of project should clearly be defined – i.e. draft a specification.
- consider providing information on similar projects, such as their costs and improvements that could be made
- consider appointing external legal, financial and technical specialists to help draft an outline specification, payment mechanism, draft contracts and key contract performance indicators well before the project reaches the market.
- collect key information about the project, which will affect price and ensure information is available to bidders.
- property aspects could be investigated, ground contamination surveys carried out and planning enquiries made.
- employee and workforce issues should be addressed and a process identified for employees likely to be affected.

Further guidance on the competitive dialogue procedure can be found on the OGC webpage:

www.ogc.gov.uk/documents/competitive_dialogue.pdf

New EU Guidance on Low Value Contracts

The European Commission published on 23 June 2006 guidance on how public authorities should award low value contracts fairly. Often these contracts are not subject to the full application of the EU's public procurement regime, nevertheless the Commission advises that these contracts should still be awarded in a transparent and non-discriminatory manner. Increased competition for these contracts would allow public authorities to choose from a broader range of potential suppliers and obtain better value.

Low monetary value contracts are excluded from the public procurement directives either because they are below the thresholds or because they concern exempt categories of services, known as Part B services. Consequently many public authorities have simply awarded the contracts without any competition. The guidance provides clarification on how the public procurement rules of transparency and non-discrimination apply to these contracts. The Guidance is technically not legally binding, however, it may be likely to have persuasive effect if a dispute is brought before national courts or the European Court.

The Commission's Interpretative Guidance focuses on three main areas:

Judicial protection

The Commission explains how bidders can request a review showing how any decisions made during the award procedure were impartial. Hence, public authorities will need to be prepared to state grounds for decisions and provide a mechanism for challenging decisions.

The aim of the new guidance is to increase compliance by contracting authorities with the principles transparency and non-discrimination, whilst stimulating increased competition for low-value contracts. Public authorities will need to consider in future that they ought to follow a more formal advertising and tender process, even though the contract award is either below the minimum threshold or is a Part B services contract. This will result in more formal tendering processes being undertaken, which will inevitably have an impact on resources and costs for both providers and procurers.

Advertising

The guidance explains how widely a contract should be advertised, the methods of advertising which can be used and what the advertisement should contain.

To meet the EU requirements, there must be publication of a sufficiently accessible advertisement prior to award of the contract. This advertisement should be published by the contracting entity in order to open the contract award to competition.

Contracting authorities have the responsibility of deciding what they feel is the most appropriate medium to advertise their contracts. The decision is made through an assessment of the internal market – i.e. in view of its subject-matter and value and of the customary practices in the relevant sector. For example, if potential bidders are from other Member States, the coverage will need to cater for this. The Commission suggests advertising on the internet, in national journals and in the Official Journal of the European Union with a non-mandatory notice. Local means of publication should only be used for very small contracts.

The European Court has explicitly stated that it is not necessary to publish a formal invitation to tender to meet the requirement of transparency. The advertisement may be limited to a short description of the essential details of the contract to be awarded and the award method with an invitation to contact the contracting authority.

There are circumstances where a procedure may commence without a prior advertisement, but this is only in situations of extreme urgency and where the conditions of the Directives for one of the derogations are met.

The advertisement and accompanying documentation must contain the information that a bidder would reasonably need to make a decision on whether to express an interest.

Contract Award

The guidance describes how public authorities can ensure a fair and impartial procedure when awarding a contract. The award must follow the rules and principles of the EU Treaty. The procedure must be transparent with an objective approach i.e. a non-discriminatory description of the subject-matter of the contract. There must also be appropriate time limits, mutual recognition of formal qualifications from different Member States, equal access for bidders from all Member States, and non-discriminatory description of the contract's subject-matter. Contracting authorities can limit the number of applicants invited to submit an offer, provided it is done in a transparent and non-discriminatory manner.

All steps which the contracting authority chooses to take in awarding the contract must be done in a transparent and non-discriminatory manner, e.g. they may apply objective factors, such as experience of the applicant or size of their business.

For more info visit:

<http://ec.europa.eu/internalmarket/publicprocurement/key-docsen.htm>

Negotiated Procedure Does Not Always Require Negotiation

In *BFS Group Ltd v Secretary of State for Defence* and another [2006] the claimant BFS Group, sought an interlocutory injunction against the award of the contract to the second defendant- Purple Food Service Limited. The contract for the supply of food and water to armed forces was awarded by the first defendant - the Secretary of State, acting through the Defence Logistics Organisation (DLO). The contract was awarded under the negotiated procedure.

The claimants sought an injunction from the court to restrain the Secretary of State from entering into a new contract with any party other than the claimant. They complained that the DLO had acted unlawfully by failing to participate in any negotiation with the claimant, the award criteria had not been applied fairly, and that the DLO had not acted with fairness and transparency.

The High Court declined to grant an injunction, stating that the claimant should have taken action earlier regarding DLO's failure to negotiate. The Court was also very mindful of the effect the injunction would have on the contract commercially. It stated that if an injunction was granted, there would be a risk that continuity of supply may not be maintained. The position of the second defendant was also considered. Should an injunction be granted but the claimant's challenge fail at trial, the second defendant might not be able to provide supply without delay.

This case is a useful reminder of the difficulties that can be encountered by aggrieved tenderers who wish to bring a claim for an injunction and also underlines that there is no obligation for the authority to negotiate as such when using the negotiated procedure.

Firm News

Staff News

Matthew Wolton was promoted in July to Director. Matthew joined TPPL in May 2002 and during his time with us has successfully closed seven major PFI/PPP projects in the education, leisure and ICT sectors. These include the Northamptonshire County Council Grouped Schools PFI project which was closed in December 2005 and is one of the biggest PFI deals in British education with an initial capital investment of £192 million into 41 schools. Matthew has gained a large amount of experience in the projects field and has built good relationships with many of our clients and fellow professionals. We hope you will join us in wishing him every success in his new position.



Oliver Higgins joined our team as Assistant Solicitor in May. He has experience in company/commercial law and property law and has particular experience of housing associations. He is also a part-time Non-Executive Director of Clapham Park Homes, Clapham Park Project & Metropolitan Housing Partnership. This is a regeneration project for the Clapham Park area of Lambeth under the Government's New Deal for Communities (NDC) Programme.



Peter Hill joins our team on 25 September from The London Borough of Redbridge, where he held the position of Principal Solicitor in the Contracts department. Before joining Redbridge Council, Peter worked in the property department of Travers Smith Braithwaite. Peter brings with him a wide array of experience in both commercial and property law.



Two new consultant solicitors

We are pleased to welcome to our team:

John Butler, formerly national head of property at Eversheds until his recent retirement, joins us as a consultant advising on complex property development projects.

Amanda Topham joins us from Hammonds, where she specialised in local government and housing PFI projects.

The Projects Partnership provides high quality legal and commercial advice, training and business information for the development of public-private partnerships including PFI projects, outsourcing contracts, joint ventures, not-for-profit vehicles and community regeneration. We are active in the sectors of education, social care, health services, leisure services, and government accommodation. Our clients include local authorities, service providers, contractors, not-for-profit organisations and funders.

For a no-obligation discussion on how we could assist you with your strategy towards partnership contracts please contact us at the address below.

Events

NHF Conference

We are exhibiting at the National Housing Federation Conference on 20-22 September 2006 at stand A117 and are hosting a drinks reception for clients and contacts attending this event. We would be delighted to see you there, contact Ingrid Blackwood-Belle for details.

Social Enterprises in Health

Mark Johnson will be speaking at the Nexus conference on the 'Future of Social Enterprises in Health' on 25 October 2006. For more details visit www.healthinvestor.co.uk.



Publications

Structures for Social Enterprise - a new guide book from TPP

One of the key decisions that any budding social entrepreneurs or sponsoring authority will need to make early in the piece, is which legal structure to use for the business? There is a bewildering array of possible formats for social enterprise. Each has its own advantages, disadvantages and quirks. We have been fortunate enough to work with many dynamic individuals and organisation in helping to create cutting-edge sustainable social businesses which deliver essential public services. These have been as diverse as residential care, primary healthcare services, disability support, childcare, leisure services, offender management services, community regeneration and renewal. This publication is born out of the continuing thirst for knowledge on this topic from our clients and contacts and the need for a concise guide which can provide a handy reference for the busy executive.

If you would like to order a copy, please email: orders@tpplaw.co.uk

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