



CAPITAL PROJECT FUNDING FREEZE - UPDATE

The scope of the problem

Since our February '09 bulletin on the LSC funding crisis, the true extent of the problems now facing many colleges which have embarked on major projects has become clearer. Currently:

- the shortfall in available funding could be as high as £3bn;
- the total cost of abortive projects could be as high as £200m;
- there is still no certainty that further funding will be made available or, if it is, how much and against what criteria; and
- there is no date by when these issues will be clarified for colleges so that they can make decisions as to the way ahead - whether to abandon their projects, suspend them, redesign them, or plough on.

Sir Andrew Foster's report is urgently awaited and may be ready in advance of the anticipated date of 22 April. However, many staff and governors of colleges doubt that it will adequately explain how much more funding is available, over what period, and against what criteria that funding will be allocated.

Without answers to these questions it is impossible for college boards to take decisions on the viability of their current projects.

Assuming that more funding will be made available, colleges need to know by when. The £110m referred to in the March statement is existing funding brought forward from 2010-11: not new money, but part of the government's planned fiscal stimulus. So knowing when any new funding will be available is key.

So too is knowledge of the criteria against which this funding will be allocated. If one pursued the pure fiscal stimulus approach, the primary criterion would be "ready to concrete pour". In other words, those projects that are on site or about to go on site should be the first to be funded. This approach would certainly help the construction industry, but is it right for the sector? Shouldn't longer-term investment in skills and vocational education take priority over an immediate boost to the economy?

It is also crucial to know if the funding profile will change: is it going to be five years for all projects rather than the current three? And do projects currently achieving BREEAM "very good" now have to achieve an "excellent" rating?

In both cases, some projects awaiting AiD and to which building contractors are committed may suddenly find themselves no longer viable as a result of these changes in methods of evaluation. Indeed, they may have to be completely redesigned.

Our February '09 bulletin covered the many legal and contractual issues that colleges need to consider when deciding whether to postpone or cancel projects. Many colleges will need to make difficult decisions soon, decisions that need to be based on trustworthy information from the LSC and central government. In the interim, there will be different consequences for colleges at different stages of development, relying on different levels of funding support. However, in every case it is important that colleges review their existing contractual arrangements so as to ascertain and manage the risks brought about by the current crisis. So please do refer back to our February '09 bulletin, and contact us if you need further guidance on any of these issues.

Legal action against the LSC

Given the scope of the problems, there has been much talk about the possibility of taking legal action against the LSC to try to recover the sums that colleges have spent to date on projects which now seem unlikely to materialise. The openness with which colleges are discussing such action is a far cry from the sector's traditionally pragmatic acceptance of the inherent unattractiveness of the prospect of suing one's primary funder and regulator.

If legal action is considered appropriate, the most probable avenue of recourse would be through judicial review, with the ultimate aim of seeking an award of damages for the wasted costs incurred to date. Each college will have to consider its own circumstances carefully, but for many, the most likely complaint is that the LSC has acted in breach of a legitimate expectation on the part of the college, based either on the stated policy of the LSC or other representations made by the LSC, that the application for project funding would be successful.

It is understood that the AOC has received advice to the effect that the grant of an AiP alone would not suffice for this purpose. However, some colleges may be able to point to representations that went beyond the AiP. Some have said that they were invited to submit applications for larger, more complex schemes than they would have otherwise done, whilst others have pointed to the fact that they were encouraged to enter into conditional property transactions, on the strength of assurances by the LSC that the funds would be there for these projects. In these cases, colleges may wish to consider whether, for example:

- the LSC's representations created an entitlement to funding on the part of the college that cannot now be denied: this is likely to be very difficult to establish, as most representations will have been sufficiently caveated to prevent such a firm entitlement arising; or
- the representations created an interest on the part of the college, the denial of which triggers a duty on the part of the LSC to proceed in a fair and reasonable way: this may have some merit for colleges who can assert that their specific circumstances warrant treating them differently from others in broadly similar circumstances.

Assuming that a breach of a legitimate expectation can be established, the courts may be willing to award compensation to eliminate the unfairness that has flown from the denial of that expectation. The college would however be under a duty to have taken steps to have mitigated its losses as far as possible, and therefore the steps suggested in our February 09 bulletin in relation to action that could be taken with contractors, property developers and other interested parties should be pursued concurrently with any action against the LSC.

Any college that wishes to contemplate such a claim against the LSC should take legal advice as to its position a matter of urgency, as there are very short and strict time limits for bringing an action for judicial review.

Legal action against the LSC will, rightly, be viewed by many colleges as very much the last resort. For the reasons set out above, establishing a claim could be costly and time-consuming, and as with all litigation there can be no guarantee of success. However, the financial fall-out for many colleges may be such that they have no choice but to at least consider whether there is a legal route to recovery from the LSC.

For an initial discussion, free of charge, on any of the issues raised in this bulletin, please contact:

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This bulletin contains summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.