



EDUCATION UPDATE - THE EFFECT OF DELAYS TO LSC FUNDING DECISIONS

The LSC says that there has been no freeze on funding for capital projects. However, heavy demand, together with the downturn on land prices and interest rates, has led to the need for the National Council to take stock of the capital programme. Applications for both approval in principle and approval in detail have been deferred from December 08 to March 09.

On 27 January the LSC appointed Sir Andrew Foster to lead an independent review into the circumstances that have led to the current position, to assess existing LSC processes and to consider how they can be enhanced to deliver more effective management of the programme in the current economic environment and beyond.

The moratorium on funding decisions, and the delay that will naturally ensue, could present serious difficulties, of both a financial and practical nature and some projects may not be able to proceed at all.

The key impact for colleges currently in the middle of these processes are:

- ||| **Contractual:** the impact on existing arrangements with the contractor, professional team and any other party from whom you are buying or to whom you are selling land.

- ||| **Timing:** major projects coincide with the academic year and a delay even of 3 months can jeopardise that entirely or wipe out any planned contingency.
- ||| **Financial:** there will inevitably be a monetary impact and colleges will be re-profiling their funding models to factor in increased costs.

Colleges whose decisions have been delayed have been contacted by the LSC and those colleges will, no doubt, already be considering with their advisors what steps can be taken to mitigate the effect of delays. If that delay is longer than Spring 2009 then colleges will generally need to consider where that leaves them vis a vis the LSC, set in the context of what contracts and other commitments are already in place.

Set out below are some potential risks to consider and address now:

- ||| Check any agreements that are already in place with consultants and/or contractors. Consider the provisions relating to suspension and/or termination by either party. With many projects on hold, firms of consultants will wish to deploy their staff elsewhere and may struggle to retain the same team.
- ||| Consider your ability (i) to retain/tie in the existing team in the face of delays; and (ii) your ability to terminate any agreement and the financial impact of doing so.
- ||| If you have a two-stage procurement process, check the terms of the pre-construction services agreement to ascertain your rights or obligations with regard to the contractor.
- ||| If there are no express provisions relating to suspension and/or termination, speak to the other party and reach an agreement on how you wish to proceed. Record any agreement in writing.
- ||| Consider the need to re-tender for consultants and/or contractors if the team cannot be/is not retained. You will need to ensure that you comply with public procurement regulations on re-tendering. You may have recourse to the LSC framework agreement which commits all colleges dependent upon LSC funding to engage consultants from a pre-selected framework procured for the sector by the LSC.
- ||| If you need to re-tender and use a different team check that copyright provisions entitle you to use designs prepared by the previous consultants.

- Check the terms of any grants received, for example from a regional development agency. What impact will a delay have on your ability or obligation to repay any grant?
- Check the terms of any funding agreement. Will any delay give rise to an event of default? In light of the economic downturn consider your ability to secure private funding from an alternative source at an acceptable rate.
- Consider the risks of instructing contractors or consultants to start work without having LSC approval in place. Contractors might have to be stood down and in some cases new contracts negotiated.
- If works have already been undertaken at your own risk, such as enabling works, assess the impact of suspending work on health and safety regulations and the risk of damage to completed works. Consider the additional cost of site security and insurance.
- Consider the impact of any delay and the sale price on any agreements for the disposal of surplus land or acquisition of new sites. Will you be able to comply with the terms of the contract? If you cannot, then consider what impact a default might have and talk to the LSC and the other side.
- Check the terms of any development agreement or other conditional contract. Consider the impact of any delay on the expiry of any long stop date or deadline for compliance with a condition.



- Consider the impact of any delay in a funding decision on the timing of the recovery of costs eg: professional fees and/or delays leading to an increased overdraft facility. How will these be funded in the short term? Costs may have to be paid from a different budget which could ultimately mean a poor rating for financial management in ensuing audits.
- Consider the impact of delay on planning consent that has already been obtained or which is currently being processed by the planning authority. Will you be able to comply with pre-commencement conditions and conditions relating to the time for commencement of work? Will you be able to comply with any deadline for entering into a s106 agreement for those consents still being negotiated? Again, consider the impact any delay might have on the project programme.
- Agreements for lease may be used where you are acquiring land on a very long lease following the carrying out of any major construction works. Again, any delay may impact on a longstop

date or deadline or compliance with a condition and the other part's co-operation may be needed to give you greater flexibility.

The LSC hopes to be able to recommence decisions on AiPs and AiDs in March. In the meantime, if you are concerned about the progress of your project and wish to discuss any aspects of it please contact:

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