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# **The disposal of public sector sites by ‘development competition’**

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## **Key words**

Property development, Local authority, Land market, Planning brief, Urban regeneration

## **Type of Paper**

Research paper

## **Abstract**

### ***Purpose of this paper***

A ‘development competition’ is a sale by tender of publicly-owned land with development potential where bidders also submit designs. This research investigated development competitions in England in order to uncover any shortcomings and point to improvements.

### ***Design methodology approach***

First, an interview survey of local authorities in north-east England; second an interview survey with developers in north–east England; third a questionnaire survey of local authority estates officers and fourth an interview survey with London based property consultants.

### ***Findings***

Despite their theoretical attractions, some competitions have problems. Conflict exists between professions and agencies. Development competitions encounter difficulties between developer appointment and construction which may lead to delay or the developer pulling out.

### ***Research limitations***

The data collected is biased in favour of the financial / property perspective. Further research is therefore still required.

### ***Practical implications***

Large numbers of competitions are held in the UK each year. The disposal of sites in this way has become more significant due to the concentration of activity on brown-field land. In future, the need to assemble urban land using compulsory purchase powers is likely to make competitions more frequent. These results, which highlight best practice, will be of interest to all professional people involved.

### ***What is original/ value of paper***

Despite its practical significance, no literature exists on this specific topic. The results reveal delays, disputes and sub-optimal use resources. Further research is needed leading to new official guidance covering all aspects of this process.

## **Introduction**

Public authorities in England<sup>i</sup> hold large numbers of surplus sites and buildings, with development potential, which they wish to sell. The aim of the sale will be either to raise funds and / or to further other aims, such as urban regeneration. A ‘development competition’<sup>ii</sup> is a method of site marketing and disposal that seeks to achieve a balanced combination of these ends. The financial aim will normally be associated with matters such as ‘deliverability’, price and ‘overage’. The non-financial aims include, for example, ‘affordable’ housing, sustainable development, land-use mix

and high quality design. This paper reports on a research project that combined quantitative and qualitative methodologies. In spring 2004 a case study of the use of development competitions in Tyne and Wear, UK was carried out. Semi structured interviews were conducted with relevant officers from all five Local Authorities and with thirteen property development companies with recent experience of competitions (Todd 2004). In the spring of 2004, a postal survey was carried out of UK Local Authority Estates Officers covering their use, experience and views on development competitions. Questionnaires were sent to a sample of 225 Local Authorities, focussing on the largest and most urban. 90 replies were received, at a response rate of 40%. Finally in the spring of 2005, semi-structured interviews were held with leading practitioners in ten London based international property consultancies which specialise in advising both public authority vendors and property developers. Both sets of interviews were recorded and, following transcription, the results were coded into major and minor themes without the use of specialist software. This paper begins with a review of the regulations governing the sale of development land by public authorities in England. The concept of a 'development competition' is then introduced and contrasted with other methods of disposal. The typical procedure for a competition is then discussed from start to finish and associated issues and problems are examined. The strengths, weaknesses and future of competitions are then analysed before a conclusion.

## **Sales of development land by public authorities**

### ***Central Government and Government Agencies***

Surplus land and property is sold by a wide variety of central government departments, public agencies and bodies. These include the National Health Service, Network Rail, Defence Estates, British Waterways, Colleges and Universities. These bodies sell land with the primary aim of raising capital to reinvest in their service or operation. For this reason, while other matters may be taken into consideration, price is normally at the top of their agenda. This may be balanced by a requirement to procure the right to occupy accommodation in the redeveloped property. Under the Government Accounting Rules, public authorities are required to sell for the "*best consideration reasonably obtainable*" which is made up of: -

1. 'market value', as defined by the Royal Institution of Chartered Surveyors (RICS 2003a); plus
2. 'special value', which is extra value above market value deriving from an adjoining owner or other potential purchaser with a special interest; plus
3. the value of any voluntary conditions entered into by the vendor authority, so far as they can be quantified in monetary terms (HM Treasury 2005).

Government departments and agencies are encouraged to register surplus sites on the Register of Surplus Public Sector Land, which is maintained by English Partnerships (EP)<sup>iii</sup>. Once registered, other public agencies often EP itself have a 40 day right to purchase the land at market value. The Register is intended to ensure that wider Government objectives, including housing needs and regional economic and housing strategies are factored into land disposal decisions (English Partnerships 2005a). The most well known recent case of a transfer involved 100 sites covering 1,650 hectares, which were to have been the subject of a public-private partnership between NHS Estates and Miller Homes. In April 2004 these sites were transferred to the ODPM and EP (ODPM 2004). EP is different to many other agencies since its aim in selling development land is almost always to secure regeneration benefits as well as the best price. EP has been given a brief covering promoting affordable housing, prefabricated construction and sustainable development. Having acquired the NHS sites at market value, EP announced its Hospital Sites Programme involving increased numbers of affordable homes likely to reduce re-sale values (English Partnerships 2005b).

The Regional Development Agencies<sup>iv</sup> operate in a similar way but are more concerned to reach employment and land reclamation targets. Both EP and the RDAs work with Local Authorities in the joint disposal of sites where, for example, they provide further land or infrastructure funding. Agencies working in partnership may have different priorities, concerning, for example, the promotion of affordable housing and tensions can arise. This should be anticipated and a 'stakeholder agreement' should be drawn up at the outset.

## ***Local Government***

Unlike most government bodies, a local authority has an ongoing interest in the regeneration of the site and its impact on the wider environment. Under the Local Government Act 2000, an authority has a duty to promote the economic, social and environmental well being of its area. Under the Local Government Act 1972: General Disposal Consent (England) 2003, a Local Authority may dispose of land where: -

1. the sale is likely to promote or improve the economic, social or environmental well being of its area, or persons resident in its area; and
2. the difference between the 'unrestricted value' of the land and the consideration proposed for the disposal does not exceed £2 million (ODPM 2003a).

The technical appendix to the Consent reflects the Treasury rules and the RICS 'Red Book' (HM Treasury 2005, ODPM 2003b, RICS 2003a). The 'unrestricted value' of the land is the 'market value' of the land (RICS 2003b) plus any additional amount reasonably expected from a special purchaser but ignoring the affect of any condition(s) voluntarily entered into by the vendor. In a sale by tender, this will normally be the highest offer made. The 'restricted value' takes into account the capital value of any voluntary condition(s) that can be assessed in monetary terms; this will normally be the amount offered by the proposed transferee (RICS 2003a). Where the difference or 'undervalue' is greater than £2 million the authority must seek prior consent for the disposal from the Department for Communities and Local Government. There is often a difference of aim between a Local Authority's treasury, estates and planning functions. The decision may be influenced by the size of the anticipated sale price and the authority's need for capital receipts. Proposed decisions must be reported to the appropriate Committee(s) of the Authority for official approval by the council members.

## ***European Union public procurement rules***

The European procurement rules apply to contracts for works of a value greater than E5.2m let by public authorities. These procedures break down barriers to trade, ensure a fair and transparent process and give legal rights to an aggrieved bidder. The authority must prepare detailed documents in advance, setting out the nature of the process and contract, including bid evaluation criteria. The invitation to tender must be advertised in the Official Journal of the European Union (OJEU). There may be a short-listing stage involving a pre-qualification questionnaire. Bids must be scored against the stated criteria and feedback given to bidders (OGC 2005). The Public Contracts Regulations (2006) implement the EU rules in England. Although land transactions are excluded from these regulations, there can be circumstances in which they apply, for example where the authority intends to occupy part of the premises created. If there is doubt, a legal opinion should be sought to avoid a potential challenge and consequent waste of time and resources (Drivers Jonas 2005). Some Authorities choose to follow the rules in every case.

## ***Sales by private treaty***

Public bodies are able to sell development land and property by private treaty<sup>v</sup> if they feel that that will provide the best consideration. Case law suggests that competition is not always necessary (Drivers Jonas 2005). The most usual type of off-market sale is to a 'special purchaser'. Where a landowner, of part of the site or of adjoining land, has the intention to develop, then its bid is likely to be greater than any other. Here the best consideration would probably not be achieved by an open market sale. The public authority would have to be convinced that the purchaser could deliver the sale and the redevelopment. In addition, there could be a case of a special type of property with a limited market or a site of marginal viability where there are likely to be only two or three realistic bidders. Since open market bidding for development land provides intense competition and public scrutiny, some developers prefer to buy sites privately whenever they can. Where such a developer indicates that it would not bid publicly, the possibility of a private sale should be considered. Before selling land by private treaty, the authority should take both legal and valuation advice to demonstrate that the best consideration is likely to be achieved.

## ***Sales by formal tender***

In a sale by formal tender<sup>vi</sup> the developer is committed by the bid to exchanging contracts and paying the deposit. It is possible for a public body to sell in this way, but this would only be advisable if its overriding aim were speed of sale and certainty of capital receipt by a set date. For

example, a university might need to raise capital urgently for a relocation project and might not be much concerned with the redevelopment fate of the site. Due to the complexity of development, few developers like buying sites in this way. A formal tender is binding like at auction but does not have the benefit from the bidder's viewpoint of public bidding. The winning bidder may have bid substantially higher than the next highest offer and be unaware of it. This is sometimes known as the 'winner's curse'.

### **Sales by informal tender**

The term 'informal tender' used by estate agents is identical legally to a sale by private treaty by negotiation, since neither vendor nor bidder is bound by the offer and acceptance of the bid. The purpose of such a tender is for the vendor to select a party with whom to negotiate a sale by private treaty. For public authorities the informal tender may have some of the trappings of a formal tender such as set dates, sealed bids and scrutinisers. While such rules help to demonstrate even-handedness and public accountability, they do not bind either party. The advantage of the informal tender is that, in complex development situations, it allows room for further detailed pre-contract negotiation. Interviewees agreed that the vast majority of sales of development land by the public sector are by informal tender.

### **Definition of a development competition**

The term 'development competition' is not widely used or officially defined. To help to produce a clear definition, a table was drawn up that compares sales by private treaty, by tender and by development competition (Table 1.).

**Table 1: Defining a Development Competition**

	Sale by private treaty	Sale by tender	Development competition
Sale by informal tender	never	normally	always
Development, refurbishment or conversion potential	sometimes	sometimes	always
Procurement of public facilities	sometimes	sometimes	sometimes
Evidence of accounts / finance submitted by bidders	sometimes	sometimes	always
Details of professional team submitted by bidders	sometimes	sometimes	always
Short listing procedure	never	sometimes	normally
Supporting information issued	sometimes	sometimes	always
Planning brief issued	sometimes	sometimes	normally
Design proposals submitted by bidders	never	never	always
Price submitted without 'overage' and / or 'clawback'	sometimes	sometimes	sometimes
Price submitted with 'overage' and / or 'clawback'	sometimes	sometimes	normally
Development agreement	sometimes	sometimes	normally
Planning application follows	sometimes	sometimes	always

From this analysis the following definition of a development competition<sup>vii</sup> was drafted and used in the research: -

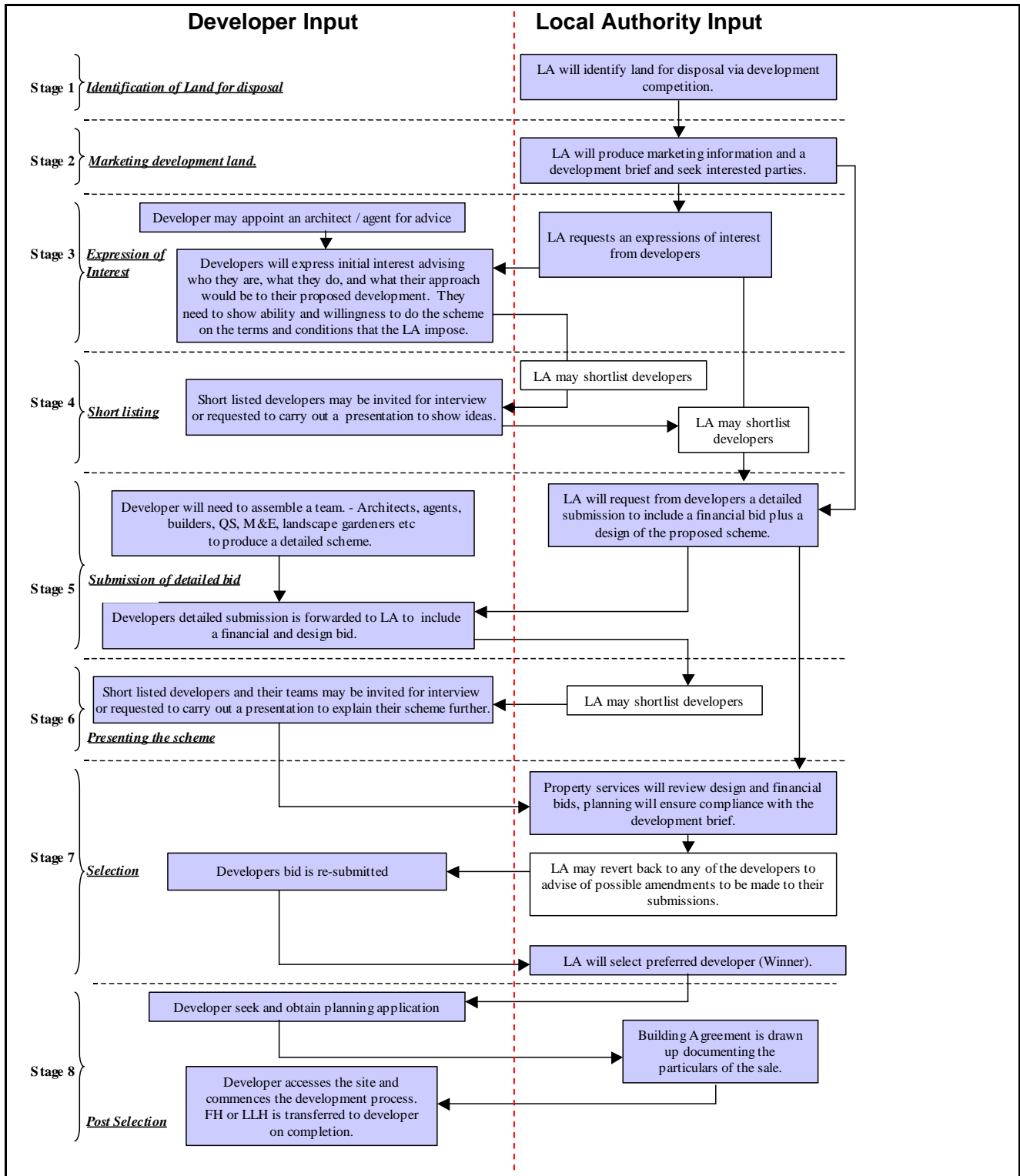
*A sale or other disposal of land, with or without buildings, with development potential. The vendor is a Local Authority, Development Agency, Government Agency or similar public body. The sale is by informal tender though, in addition to price, bidders are required to submit other matters such as design proposals, financial support or track record. Bidders may be issued with a Development Brief and/ or supporting information but the competition is not part of a formal planning application.*

The consultant interviewees all confirmed that this definition accurately reflected current practice.

## Early in the process

A vendor has much discretion over how to set up and manage a competition; however a typical process composed of 8 stages is illustrated in Figure 1.

**Figure 1. The Development Competition Process (Local Authority vendor)**



Source Todd (2004)

### ***Preparation and documentation***

At the outset the public authority must ensure that it has enough time and resource to devote to the process. Small or low value sites should probably be disposed of in another way. A priority for the disposing authority should be to establish a business case with clear objectives and priorities with which all the stakeholders agree. Where two authorities are cooperating on a project then they may need to enter into a formal legal agreement. It is important to ensure that decision-makers, especially political members, are aware of and endorse the clear aims from the outset so that they do not change them later on. The project manager must ensure that all relevant parties have agreed their roles and responsibilities at the outset. It is important to prepare well in advance, since the quantity and quality of bids received depends in part on the quality of the documents prepared. Public land and buildings to be disposed of must be valued in advance by a professionally qualified valuer (HM Treasury 2005 S24.2.4). This should help the sale to be set up so that the proposed development is commercially viable. National Health Service Trusts have been advised to ask for a range of valuations based on reasonable assumptions about uses and markets (Comptroller and Auditor General 2002). The legal title should be clarified before proceeding with the sale to give bidders a secure basis and to avoid possible delays and possible excuses for a bidder pulling out once appointed.

A Development Brief should be drawn up that incorporates a Planning Brief, Supporting Information and an Invitation to Tender. The full brief may not be issued until a short list has been drawn up. Guidance has been issued on how to draw up a master plan (CABE 2004) and a site-specific planning brief (ODPM 1998). A good brief will make clear the authority's objectives while allowing bidders sufficient flexibility to make a creative contribution. The Invitation to Tender should set out the whole process from expressions of interest to short-listing, evaluation and selection, including a firm and realistic timetable for each stage. The Supporting Information should include matters that will be included in an eventual Development Agreement. The list of such matters is lengthy but includes for example, licence to occupy, rights of access and site security. The Invitation to Tender must make clear what form the submission should take. Developer interviewees said that they were not normally made aware of the evaluation criteria. Some consultant interviewees felt that issuing the criteria and /or weightings was good transparent practice that created trust; others felt that pragmatic or optimum decisions are constrained by public criteria that can never anticipate the range of actual bids.

### ***Attracting bidders***

Some developers will not compete under any circumstances. Other developers will be attracted by the commercial opportunity that the site offers which may be weighed against the bureaucracy that the competition involves. Developers are naturally concerned that they will face high abortive costs if they are not successful. However, the more attractive the site is the more risk they are prepared to take. Larger developers will be more able to pass some of these business overheads on to their professional advisers. The vendor will look for a financially strong developer who will be able to bear such costs. Some developers will be willing to pay the reasonable cost of an authority's professional advisers, if they expect that this will lead to a smoother process. Some developers, particularly in the residential sector, may be put off by a scheme that is too complex. Developer interviewees said that they would react negatively to an over-prescriptive brief where the firm 'who could write the biggest cheque' would be selected. They said that they preferred a flexible brief leaving room for creativity. In the commercial sector some developers will engage with a complex scheme, feeling that less competition may lead to greater profitability. Developers like to see a degree of exclusivity and would not wish to see the authority actively promoting another site competing in the same market. The authority's aims for the non-price aspects of the competition must be realistic. The greater the viability of the scheme, the more developers will tolerate non-commercial aspects. Few developers will bid where they see too many demands made by the vendor on a low value site.

### ***Expressions of interest and short listing***

In the first instance it is normal practice to ask bidders for an expression of interest. At this stage a limited amount of information is released to the market. Bidders are normally asked to provide their report and accounts with details of their track record and professional advisers. On this basis and on the number of expressions received, some bidders may be rejected. A number of bidders



are invited to an interview after which a short list is drawn up. The interview may be conducted by consultants and/ or officers or there may be involvement of political members at that stage. The developer needs to convey competence but also enthusiasm for the project. The authority needs to feel comfortable about working with the developer. The short-list must short enough to provide bidders with a realistic chance of success yet long enough to generate real competition. When respondents were asked to indicate a minimum and maximum number, the median scores were 2 and 6 respectively. However, interviewees felt that with a short-list of 3 or less, there is a danger of insufficient competition if one bidder drops out. Similarly with a short-list of 6, some developers will feel that the odds are too long. While circumstances vary, a short list should probably contain 4 or 5 bidders, with 1 reserve.

### ***Final offers***

Once the short list has been drawn up, the remaining bidders are issued with the full documentation for the sale. Final bids include, a financial offer in the prescribed format(s); a fully detailed development appraisal(s); confirmation of funding and the development proposal (layout, plans, elevations, sections, specification). Where these have not been submitted previously, details of the professional team and the track record of the company are also included.

### **The financial offer**

The basis of the bids required should be made clear in the brief. Sometimes there may be a requirement for bids to be made on more than one basis. The bid to purchase the site may be a straight capital sum to purchase the freehold interest. If a long lease is to be disposed of there will be a rental bid or a combination of rent and capital premium and the rent review provisions need to be set out.

### ***'Overage'***

While there is no official definition of an 'overage' provision, it is normally taken to mean an extra sum payable due to increases in the market value of the property. Such payments are very common with residential land sales. Many public authorities include such provisions for fear of criticism that the price paid did not reflect the uplift in the market during the development period, particularly with large schemes. The development agreement therefore needs to contain a formula based on an open book that allows the uplift to be simply calculated. Developers will normally want an overage payment to be reduced by reference to any escalation in construction costs. The clause may involve more than one threshold with different rates of payment. The overage provisions may be split into different land uses, with affordable housing normally being exempt.

### ***'Clawback'***

This is an additional payment conditional upon the grant of a planning permission more advantageous than that originally envisaged in the submitted design<sup>viii</sup>. The development control decision should accord with the Planning Brief though the competition must be seen to be separate from the statutory planning function. Developers will try and sometimes succeed in increasing storey heights or density or altering the land use mix. The Development Agreement will refer to an approved design and permission for deviation from that will be required, subject to an extra payment. In the case of a sale of land at the Royal Brompton Hospital, London the National Audit Office found that, if a 'clawback' clause had been included in the sale, the NHS would have received an extra £6.5 million (NAO 1999).

### ***Fixed price?***

There are a few cases where an authority has offered land at a fixed price, possibly below market value, and then challenged developers to compete on design alone. The advantage of this approach is that it frees developers to produce the best scheme they possibly can. A danger from the authority's point of view is that it could result in bad publicity if a developer, who was not selected, claimed that it could have offered a higher price but was prevented from doing so. 'Clawback' and 'overage' are still applicable even though the initial price is fixed.

### **Evaluation**

Development competitions are not new in practice, having been in use since at least the late 1960s<sup>ix</sup>. Likewise, the literature on planning evaluation is lengthy (Stocks et al 1971). Selection of a preferred bidder may be in a number of rounds depending on the priorities of the authority. A first

round may involve the financial bid alone followed by the consideration of a limited number of designs. Alternatively the first round may be on design only after which a limited number of sealed bids are opened. The evaluation may be managed in the form of a matrix where all the decision criteria are scored and weighted. The matrix should always be bespoke for the particular project and agreed in advance. In the most complex situations there may be up to three rounds with the criteria weighted differently at each stage. The criteria should be made available to the bidders. Whether bidders should be told the weights is a matter of judgment. When judging the criteria, decisions can be either 'yes/ no' or marks can be awarded. Scoring of financial matters can be relatively objective. Where criteria are expressed quantitatively, for example land uses as percentages of total floorspace, scoring can also be objective. Inevitably some criteria, for example design, are subjective and need to be scored carefully, possibly by a panel. However, care should be taken to avoid the criteria turning into a straight jacket, since one of the reasons for a competition is to promote creativity. Each developer has its own ideas, products and partners and a scoring system that appears too restrictive can reduce the number of bidders. Clearly the person(s) responsible for judging each of the criteria needs to be established at the outset. Developer interviewers felt that there were often too many decision-makers, which led to delays. The operation of the process and the reasons for all judgements made must be fully recorded for audit purposes.

Since a competition is an informal tender process, the authority may ask for a final round of bids from say two bidders, which may be on price alone. Alternatively it could ask the highest bidder to alter its design somewhat. Vendors need to be wary of a financial bid that is very much above the tone of other bids. This may be due to unrealistic assumptions. For this reason bidders should be required to submit their appraisals and assumptions, which should be examined in detail by the professional team. The highest price may not be realistic, possibly due to over optimism or perhaps because the developer plans to negotiate it down after selection. As well as price and design the matrix should take account of the bidders' ability to finance and with its professional team to deliver the project. For example where the project involves compulsory purchase, has the developer or its team any experience of working with an authority through that process? Given that neither the design nor the price is absolutely fixed at this stage, the selection process needs to focus upon getting the right partner that the authority is comfortable working with.

### ***Variations on the process***

It is possible to hold a design competition first in order to appoint an architect with whom the successful developer is expected to work. Another variation is that the authority sets out its aims and developers are asked to prepare broad-brush design solutions first together with track record etc. The authority and its advisers then prepare a detailed brief incorporating the best design ideas. The final stage of the competition is about delivering a tight brief and the most important evaluation criterion is price.

### **Post decision stages of the process**

The selection of a preferred developer is not legally binding on either party. There should therefore be a timetable to move as swiftly as practical to a legal agreement. This process concentrates the mind on the detail of all aspects of the development and inevitably leads to some disagreement. With a simple disposal, the contract for sale can be made conditional on planning permission. However, where the vendor has opted for a 'development competition' it is likely that it will seek a greater degree of control over the whole process. A Local Authority vendor may also be the Local Planning Authority but it may still wish to have a greater degree of control over the development outcome.

### ***The Development Agreement***

Greater control for the vendor is normally achieved through a 'development agreement' precedent to either a freehold sale or the grant of a long lease. An advantage for the developer is that it does not have to finance the site purchase though this should, in theory, be fed via competition into the financial bid. Development agreements are complex documents, whose clauses typically include: -

- Prices, including premiums and rents;
- Price related matters such as 'overage' and 'clawback';
- Design and specification;

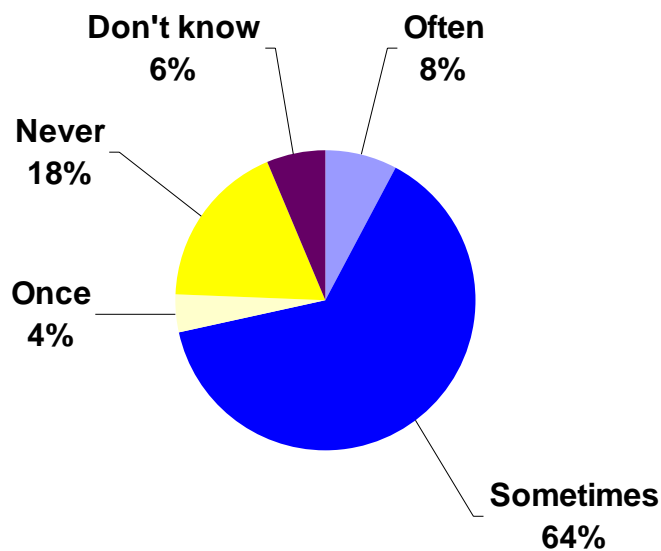
- Responsibilities of the parties;
- Licence to occupy the site;
- Timetable with milestones;
- Warranties;
- Insurance; and
- Satisfactory completion of the works

Agreements must be bespoke documents, negotiated and drafted with the specific site conditions and parties in mind. A deposit is paid on signature, and the developer is then able to raise bridging finance, if required.

**Problems relating to planning**

Developers being motivated by profit will often apply for planning permission for a development of greater value than the design included in the bid. Developers may often cite new planning guidance<sup>x</sup> in support of their application. This should be foreseen and the Development Agreement should be linked to the approved plans and specifications. The Local Authority may be the vendor but the statutory planning decision must be seen to be separate from the sale of land. It is also important to distinguish between a commitment entered into by a developer as part of a ‘development competition’ when purchasing land, and a ‘planning obligation’<sup>xi</sup>. It may be that a different officer(s) will be involved at this stage; there can be local objections and perhaps greater than expected requirements for contributions to highways, schools or affordable housing. A wise developer will consult with all the relevant officers throughout the process. When respondents were asked, “*In the last three years in your authority, was there a problem relating to planning permission or a planning agreement following a competition*”, 72% replied ‘sometimes’ or ‘often’ (Figure 2.). It would appear, therefore, that holding a development competition does not make the planning application process run more smoothly.

**Figure 2: In your authority over the past three years, was there a problem relating to planning permission or a planning agreement following a competition?**

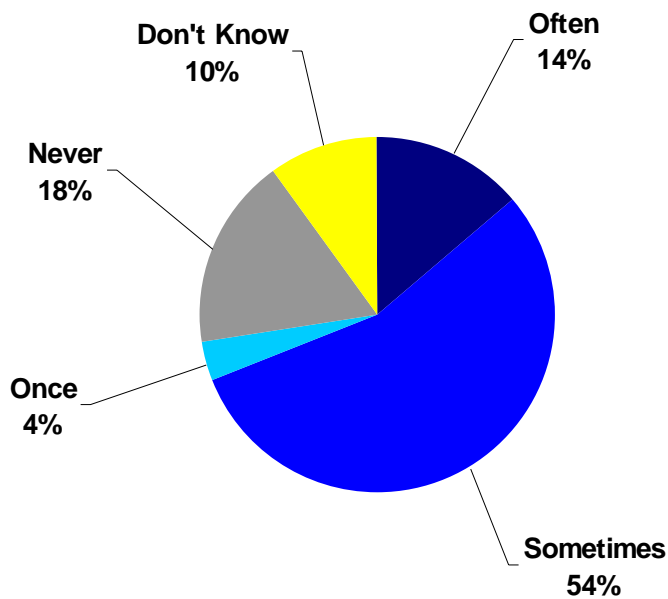


**Problems relating to price**

It is very common for developers to attempt to renegotiate the price or the price formula after selection. Developers like to negotiate and are aware that they are not committed legally. Occasionally a developer may have bid unrealistically high and suffer from ‘winner’s curse’. In

some development companies, the top managers may only consider the project seriously after being selected. In other cases there may be genuine market or funding changes that render the original bid unprofitable. For example, another local competing scheme may be announced, a pre-letting may fall through or a registered social landlord partner may not be able to secure Housing Corporation funds. Respondents to the survey were asked, “*In your Authority over the last 3 years, did a preferred developer seek to renegotiate the terms of the sale?*” 68% of respondents replied ‘sometimes’ or ‘often’ (Figure 3.). The vendor may also seek to renegotiate the terms of the agreement. This could be due to a political change in the composition of the Council, a change of Government policy, the withdrawal of funding or a land assembly problem.

**Figure 3: In your authority over the past three years, did a preferred bidder seek to renegotiate the terms of sale?**



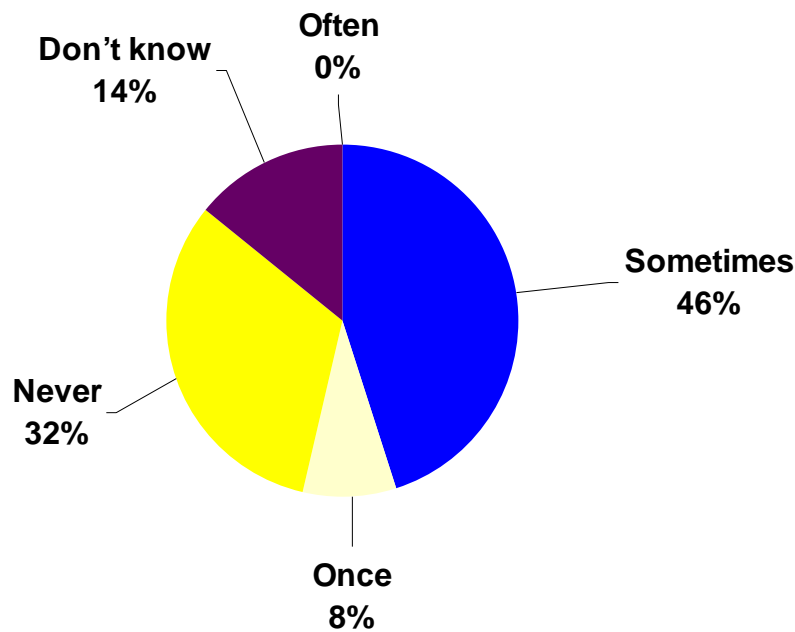
***Problems relating to the site***

The selected bidder may not have commissioned full geo-technical and environmental surveys at the time of the bid. The results of these surveys may prompt a redesign, a price negotiation or both. If the vendor had provided surveys with the documentation it will be in a stronger negotiating position. The vendor should have investigated the title in advance, but the formal legal process can throw up unforeseen issues. The discovery of archaeological remains may not have been expected and this can cause delay, which may affect viability.

***Withdrawal of a ‘preferred developer’***

When asked the question “*In your authority over the past three years, did a preferred developer withdraw following a competition?*” over half of respondents to the survey indicated that this had occurred (Figure 4.). The developer may also face changes unconnected with the specific site, for example, a change of corporate plan, merger or takeover. This may lead the developer to wish to withdraw from project; it may do so or it may seek a pretext or excuse for withdrawal.

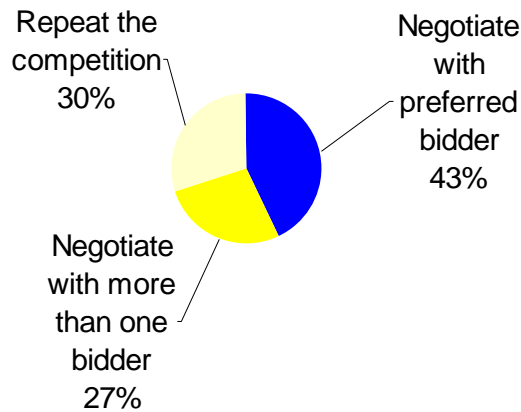
**Figure 4: In your authority over the past three years, did a preferred developer withdraw following a competition?**



#### ***Termination of 'preferred developer' status***

The vendor authority should anticipate likely problems and plan its reactions. Negotiations need to proceed at a good pace and any problems need to be resolved along the way. Where too much time has elapsed and/ or the relationship with the preferred developer has soured, a clear warning should be given that the preferred status is in jeopardy. At this stage the vendor needs to be clear whether it intends to negotiate with an 'under-bidder', though there is no guarantee that the 'reserve' will still be kept. If too much time has passed, circumstances will have altered and the justification for approaching a 'reserve' will be weakened to the point that the competition has to be run again. This will clearly cause much delay and negative publicity. In the Royal Brompton Hospital case, the National Audit Office drew attention to the benefits of holding a further competition where the successful bidder subsequently reduces its offer or the market circumstances are uncertain (NAO 1999). When asked the question, "*If the preferred bidder sought to renegotiate the terms of the sale, what did the authority do*", 43% of respondents answered 'negotiate with the preferred bidder', 27% answered 'negotiate with more than one bidder' and 30% answered 'repeat the competition' (Figure 5.).

**Figure 5: In your authority over the past three years, if the preferred bidder sought to renegotiate the terms of the sale, what did the authority do?**



### ***Satisfactory completion of the work***

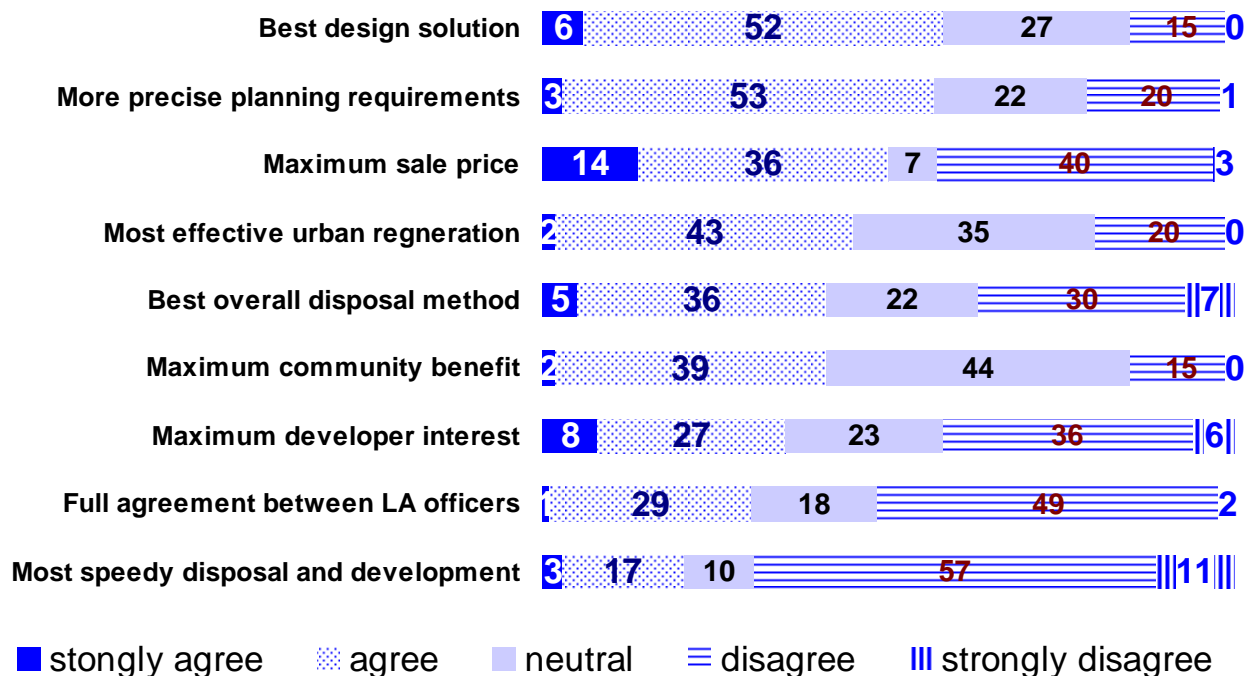
The vendor will normally retain absolute discretion over whether the works have been completed to its satisfaction. The site will not be conveyed or leased until it is satisfied though there may be a provision for mediation or arbitration. In addition, there may be a timetable with other target dates that have to be met.

### **Development competitions, strengths and weaknesses**

Respondents to the survey were asked, *“In your personal opinion, do development competitions tend to result in the following?”* The answers to this series of questions are illustrated in Figure 6. Development competitions, as opposed to sales by informal tender, are established so as to include design issues in the decision making process. When asked about *‘best design solution’* 58% of respondents answered either ‘agree’ or ‘strongly agree’ against only 15% who answered ‘disagree’. This indicates that competitions achieve the desired result of improving design. An associated reason why competitions are set up is to achieve more detailed than normal control over the planning aspects of the project. When asked about *‘more precise planning requirements’*, 56% were in agreement as opposed to 21% who disagreed. This indicates that when a competition is held, developers face more restrictive planning controls than normal. Where design is included in the decision it could be argued that developers have to spend more and can thus afford to pay less for the site. When asked about *‘maximum sale price’*, 50% of respondents agreed as against 43% who disagreed. Reasons for disagreement could be a belief that good design costs no more or that a competition fosters innovation that leads to increased value. One expert interviewee felt that developers in competition put in more effort, which reduced contingency sums and increased bids. The aspect of development competitions that was least admired by respondents was speed. When asked about *‘speed of disposal and development’*, 69% answered either ‘disagree’ or ‘strongly disagree’. This may be linked to other answers about the problems that occur after the appointment of a preferred developer (Figures 2, 3 & 4). Most interviewees felt that competitions take more time and should not be adopted on less significant sites or where time is a high priority. For this reason, apparent slowness may in fact reflect the intrinsic complexity of the site. Interviewees agreed that, when a competition is adopted, expected speed of delivery should be explicitly scored in the evaluation. 51% of respondents disagreed that competitions resulted in *‘full agreement between Local Authority officers’* compared to only 20% who agreed. This probably reflects the difficulty of reconciling design and price issues when choosing a preferred developer. Respondents were evenly split over the question *‘best overall disposal*

method' with 41% in agreement and 37% disagreement. Most of the consultant interviewees felt that a competition was a tool that could be fine-tuned to produce the combination of price and design desired by the vendor. However, competitions are not simple and they can be misconceived or mismanaged.

**Figure 6: Development Competitions tend to result in (percentages)**



## Regeneration, compulsory purchase and competitions

UK urban policy is directed towards the sustainable reuse of brownfield land and redevelopment at higher densities avoiding urban expansion (DCLG 2006). Brownfield sites are often owned by public authorities, which tend to instigate development competitions. In cities and regions where there is a shortage of brownfield land, more redevelopment will be needed to cater for property demand stemming from household and economic growth. Since urban land is often divided into small ownership plots, the private sector finds it difficult to assemble the large sites it needs for economic redevelopment (Golland 2003 p6). The powers of compulsory purchase to achieve comprehensive site assembly rest with the public sector. These powers are different for authorities, agencies and circumstances and that some require planning permission in advance. Local Authorities have recently been encouraged to adopt compulsory purchase more often.

*Used properly CPOs can contribute towards effective and efficient urban regeneration, the revitalization of communities, and the promotion of business leading to improvements in quality of life. Bodies possessing compulsory purchase powers whether at local, regional or national level are therefore encouraged to consider using them pro-actively wherever appropriate to ensure real gains are brought to residents and the business community without delay (ODPM 2003c).*

In order to have a compulsory purchase order (CPO) confirmed the public agency may have to prove that it has the resources to carry out the development. In such circumstances, it may need to appoint a preferred developer before a public inquiry to show its partner has the required funds and is committed. For these reasons, most of the consultants interviewed felt that the number of development competitions is likely to rise in the next few years.

## Conclusion

A development competition is a voluntary process that should in theory be able to reconcile the needs of both parties. However, despite the rhetoric surrounding public-private partnerships, this research has demonstrated that development competitions often hit problems in practice. In

particular, too many developments encounter delays and disputes between the appointment of a preferred developer and the start of construction. Some of these may be the result of inexperience on the part of small authorities which are unused to the process and do not seek expert advice. Other problems may be due to the complex nature of the site and the planning context, rather than the method of disposal. However, despite the difficulties outlined in this paper, public authorities continue to opt for competitions, especially in complex town centre or regeneration situations. Competitions have been held since at least the 1970s and are likely to continue.

Public authority vendors have two aims that must be balanced, firstly to achieve best consideration and secondly to achieve a redevelopment according that best meets planning and other policy aims. For some public sector vendors price will be paramount with the control of redevelopment left to the local planning authority; however, regeneration agencies and local authorities have specific duties concerning the optimum redevelopment outcome for the site. Land is a precious commodity and public authorities find it hard to relinquish control. Land disposal has thus recently become associated with advancing policy agendas such as prefabricated housing, affordable housing and sustainable development (English Partnerships 2005b). Our results point to differing priorities and unresolved tensions between the professional planners, valuers and other officers involved. It is important to ensure that a unified approach is presented by the brief and that this does not unravel during the evaluation and negotiation stages.

All private property developers seek profit and need to buy sites. Though they often complain of the 'red tape' associated with competitions, most developers are prepared to bid. Housing developers, who need a continuous supply of fresh sites, tend to engage with competitions. Commercial developers, who buy less frequently, may be motivated by the challenge and profitability of complex longer-term projects. The developer will normally employ a professional team that is used to working together in its interests. In the post-appointment phase a developer will seek to negotiate advantages over the terms of the Development Agreement and planning permission. This may be characterised as seeking to win back profitability sacrificed in competition to win appointment.

Where the brief places heavy emphasis on environmental or regeneration benefits, developers will reduce their bids to maintain their required profit margin relative to the risks they perceive. The vendor authority will therefore pay for these benefits indirectly and the losers will be either taxpayers or recipients of public services. Those preparing the brief should therefore ask what is special about this particular site that requires enhanced design control or benefits beyond the level normally delivered by the planning and planning obligation processes.

A development competition involves a partnership between the authority and the developer and trust should be established before the appointment. Once in place, the Development Agreement will contain mechanisms for managing the relationship to avoid problems and resolve any disputes quickly. A dispute arising over, for example, changes required to secure a pre-letting can be referred to mediation or arbitration. However, most problematic delays occur before the Agreement is signed. The bid documents should therefore include a firm timetable for progress to the Agreement and planning permission. The Authority should maintain contact with a reserve developer and rules for terminating the appointment should be in place.

This research has revealed some guidelines for good practice by vendor authorities. Development competitions should be reserved for sites whose value or other significance warrants the expenditure of time and resources. For such sites a development brief must be carefully prepared including, for example, site surveys and heads of terms for the development agreement. The brief and the short-listing process should present an opportunity that the market perceives as commercially viable. To protect the Authority, the financial terms should include reasonable provision for 'overage' and 'clawback'. The evaluation criteria, which should be made available, should be capable of being scored objectively yet permit creative alternative interpretations. Attention should be paid to the financial and other ability of bidders and their consultants to deliver the project. Feedback should be given to all bidders to ensure transparency. A timetable should be set out for the period between the appointment decision and the signing of the agreement with



clear rules governing a switch to a reserve developer. The authority should be consistent throughout, particularly between the planning brief and the treatment of the planning application.

While there have been official enquiries into particular schemes and some public agencies have their own internal rules, there is no national published guidance on how to conduct a development competition. Published guidance does exist on related and overlapping matters, for example, on planning briefs (ODPM 1998), master plans (CABE 2004) and economic appraisal (HM Treasury 2005). More extensive research should be conducted, involving all stakeholders, which should lead to the publication of specific official guidance on best practice for development competitions. This would provide direct help to authorities and give more confidence to developers leading to more bids, higher values and improved projects.

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## Endnotes

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<sup>i</sup> This paper covers England only since the legal and governmental context to public sector land and planning is different in Scotland, Wales and Northern Ireland.

<sup>ii</sup> 'Development competition' is a phrase that describes a set of procedures that are widespread in England and Wales. However, it is not officially defined or exclusively used in practice and has been adopted and defined for the purposes of this project.

<sup>iii</sup> English Partnerships is a public sector urban regeneration agency which is funded by and reports to the national government [www.englishpartnerships.gov.uk](http://www.englishpartnerships.gov.uk)

<sup>iv</sup> Regional Development Agencies are public sector bodies charged with promoting sustainable economic development throughout England and reducing regional disparities. RDAs were established in 1999 for nine English regions covering the whole country. They report to and are funded by national government [www.englandsrdas.com](http://www.englandsrdas.com)

<sup>v</sup> 'A sale by Private Treaty' in English law describes a sale of property negotiated privately between a seller and purchaser.

<sup>vi</sup> When selling land by a 'formal tender' the seller asks potential purchasers to submit binding bids in writing by a set date.

<sup>vii</sup> See note two concerning the use of the term 'development competition'.

<sup>viii</sup> The use of the word 'clawback' in these circumstances seems incorrect since in fact no grant has been made.

<sup>ix</sup> For example, the redevelopment of the former town hall on the island site between Cloth Market and Bigg Market in Newcastle upon Tyne UK.

<sup>x</sup> National town planning guidance in England is revised periodically in the form of Planning Policy Statements which must be reflected in the Development Plans produced by Local Authorities. They may also be relevant to individual planning applications or appeals (Department for Communities and Local Government 2006).

<sup>xi</sup> A 'planning obligation' under S106 of the Town and Country Planning Act 1990 is either an agreement made between a Local Planning Authority and a property developer or a unilateral undertaking by the developer. Under such an obligation the developer agrees to restrictions or payments, related to the project, which could not legally be imposed as conditions attached to a planning permission (ODPM 2005).