

THE FUTURE OF STADIUM & ARENA DEVELOPMENT

1. SUMMARY

Although the UK construction market is well versed in the delivery of complex and often world leading development projects, stadia and arenas are uniquely challenging. They are emotive and transformational projects for clients, the contractors who build them, the general public and the media alike. Scrutiny on these projects is heightened and sets the scene for what is always a very visible delivery phase.

In this joint article, Slaughter and May and Gardiner & Theobald consider the key success factors for stadium and arena development delivery in the UK market.

2. LAYING THE FOUNDATIONS FOR SUCCESS

Since the turn of the millennium, numerous stadia and arenas have been delivered in the UK. Although it can be easy to forget the issues of the delivery phase once opening day arrives, a number of these projects have had issues including: (i) struggling or failing to meet the original deadline; (ii) cost overruns; (iii) supply chain insolvencies; and/or (iv) defects, and some of these issues have even ended in difficult and very public disputes.

To avoid the same fate, it is crucial that any stadium or arena development starts on the right footing. There is now, arguably, a limited pool of contractors, sub-contractors and consultants who are willing and able to tender for, and deliver, these projects. Accordingly, any client should be well prepared before approaching the market.

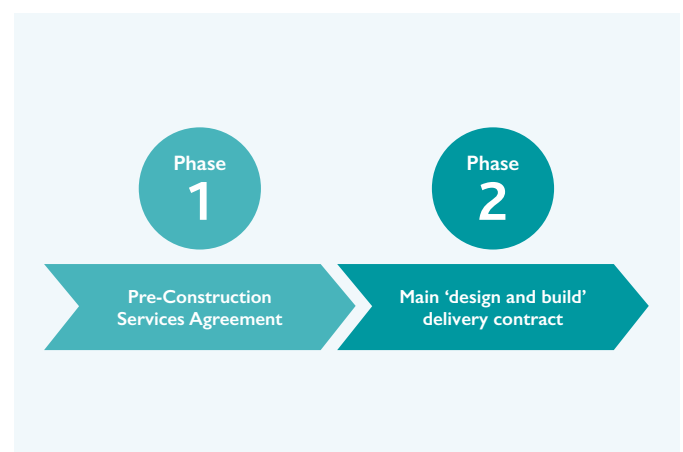
To build supply side appetite in any tender process, careful consideration together with an appropriate time investment is required. Investing in developing a well-prepared tender pack and ensuring a well-run tender process can be the difference between creating a competitive construction tender or very little market interest in the project. First impressions are important and, typically, each project of this nature only really gets one shot with the contracting market. A well progressed design will form the basis of any well-prepared tender pack to allow contractors to establish what is going to be required. A design with too many gaps is likely to attract a lesser market response.

Accordingly, careful consideration, from the outset, of the project delivery team is required. Appointing consultants, contractors and other advisors of sufficient experience, expertise and reputation in the sector is important. While there is no substitute for experience, current market coverage and intelligence on the contractor and sub-contractor market is also essential as this helps to shape the most appropriate procurement strategy for the project in the market. Early advice on buildability and logistics (given the often urban environment) is also important on large scale projects, which can require bringing a construction partner on to the team prior to procuring the scheme. To maintain competition during the tender phase, this may well require a formal, remunerated appointment up to planning.

A procurement strategy, and how it subsequently allocates the project risks across each tier of the supply chain, can make or break a project and, by extension, funder appetite for a project at the beginning of its life.

3. CONSTRUCTION PROCUREMENT – THE CRUCIAL FIRST PHASE




While a variety of construction procurement strategies have been used to deliver stadium and arena projects in the UK market, it is fair to say that a ‘two-stage design and build’ strategy is currently the preferred approach.



In a 'two-stage design and build' strategy:

- the developer will appoint a design team to prepare an initial design and progress with it to a suitable point (usually RIBA Stage 3);
- a tender process is run to appoint a main contractor for the project (with selection based on preliminaries costs and 'OHP' only at this stage);
- the selected main contractor is appointed under a pre-construction services agreement (a "PCSA") to work collaboratively alongside the design team;
- during the PCSA phase, the main contractor completes the design and progressively tenders the sub-contract works packages to arrive at a contract sum; and
- the parties negotiate the terms of the main delivery contract (usually some form of bespoke fixed price contract).

When employed successfully, a 'two-stage design and build' strategy can bring significant benefits for a development:

	GREATER OVERALL COST CERTAINTY The project is priced by a contractor with an informed understanding so the contractor is more likely to commit to a lump sum fixed price
	REDUCED RISK OF DELAY The contractor is more involved in setting the programme and providing early 'buildability' and specialist advice to increase delivery certainty
	INCREASED CONTRACTOR INVOLVEMENT IN DESIGN Specialist input in areas such as MMC and off site manufacture can be incorporated in design, leading to reduced construction risk

At the conclusion of a successful PCSA phase, all parties should be satisfied as to the legal and commercial terms for the main delivery contract and that they meet each of their respective interests so that they are ready to execute the contract and enter into the construction phase.

Alongside any PCSA phase, an astute client may also choose to carry out certain 'enabling works' to further de-risk the project: this may include site clearance/demolition, land reclamation or utilities packages or another element of the works that would be better completed by a specialist contractor, outside of the parameters of the main delivery contract. This approach tends to be viewed favourably by funders and main contractors alike, and the novation of such 'enabling works' contractors to the main contractor should be considered at the appropriate point in time to ensure that the main contractor provides a full 'liability wrap' for the works.

While a 'two-stage design and build' and fixed price lump sum strategy is preferred, this is not always viable when the market is constrained. In this scenario, a 'construction management' strategy is often deployed. While this has been adopted successfully on a number of high-profile projects, it is important to keep in mind that success is heavily dependent on day-to-day risk management and adequate resourcing (both in terms of volume and experience). The additional client held risks and finance considerations associated with package based delivery and bespoke procurement approaches requires careful navigation by the right team of advisors before commitment.

4. CONSTRUCTION PROCUREMENT – THE DELIVERY PHASE

Where the main delivery contract is a 'design and build' style contract, the main contractor will be responsible for the whole of the design and build of the works required to deliver the stadia or arena in accordance with the terms of the contract. While this is not novel in and of itself, stadia and arena projects often have a greater risk profile in respect of their programme and practical completion occurring on time.

Projects are often up against immovable dates of, for example, the beginning of a football season or a concert booked with a high-profile artist. As such, any delay (even where short) may have disproportionate consequences. Given market pressures within the UK construction market, it is often not possible to achieve a position where a delay regime (including liquidated damages) will cover a client's losses in a delay scenario. It is always sensible to consider other mitigants, such as project phasing / sequencing and back up plans (involving, for example, an old stadium where still available) for their practical ability to alleviate these risks.

In our recent experience and where the market dictates that a lump sum fixed price contract for the entirety of the works may be difficult to achieve, we have also observed a trend that main delivery contracts do not always include certain specialist elements of the works (which are best carried out by specialist contractors appointed directly by the client) or the final fit out works (which also allows hospitality areas to be designed later and to the latest trends). This is something that all parties should keep in mind when considering the contract price and programme for any 'design and build' main delivery contract.

5. INFLUENCING 'BANKABILITY'

Most stadia and arena projects are now so large that they require project finance. This means that 'bankability' considerations must be front and centre.

We are often asked what 'bankability' means for any given project. Simply put, a project structure is 'bankable' if lenders are prepared to finance it. Due to the unique characteristics of each stadia or arena project, this will

vary across projects. However, the risk appetite of a credit committee tends to be set by reference to similar projects in the market and project specific factors. In recent years, pressures on the UK construction market have meant contractors have sought to test the traditional risk allocations (particularly in respect of any main contract). However, there remains a mismatch between the risk positions that contractors will accept and those that funders seek to achieve: this is increasing and is something that only an experienced professional team can mitigate.

Ultimately, funders like to achieve as much price certainty as possible, with risks being capable of assessment or analysis and not open-ended. While numerous factors will influence what a funder is prepared to accept, key issues in respect of main contracts often centre around:

- contract price certainty (including provisional sums);
- entitlements in respect of additional costs and delays;
- damages regimes;
- exclusions and limitations on liability (whether financial or in respect of time);
- defects regimes (including in respect of any test events);
- step-in rights / direct agreements;
- performance security; and
- key warranties and indemnities.

To achieve a 'bankable' project, it is essential to set expectations as to risk allocation early, ensure all parties work together to understand and mitigate project risks and create an appropriate and collaborative contracting environment.

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