

# Guide for the disposal of surplus property

November 2005

# Contents

<b>0.0 EXECUTIVE SUMMARY</b>	<b>1</b>
<b>1 INTRODUCTION</b>	<b>2</b>
1.1 Background	
1.2 Role of OGC	
1.3 Purpose	
1.4 Property 'Ownership' / Responsibility	
1.5 Surplus Property	
1.6 Property Disposal and Value	
1.7 The Register of Surplus Public Sector Land	
<b>2 FUNDAMENTALS</b>	<b>6</b>
2.1 Programme and Project Management	
2.2 Centres of Excellence	
2.3 Management & Control	
2.4 Appointment of Advisers	
2.5 Understanding the Challenge	
2.6 Establishing a Strategy	
2.7 Public accountability	
2.8 Appraisal and evaluation	
2.9 Establishing true value of Assets / Liabilities	
2.10 Accountability and audit Trail	
<b>3 THE PROCESS</b>	<b>14</b>
3.1 Establishing Objectives	
3.2 Understanding the Opportunity	
3.3 Disposal strategy	
3.4 Appointing Advisers and agents	
3.5 Reviewing Activities	
3.6 Securing Interest	
3.7 Maximising Disposal Opportunities	
3.8 Agreeing Terms	
3.9 Completing the Deal	
3.10 Conclusion of a contract and settlement – note for Scotland	
3.11 Post project appraisal	
<b>4 DISPOSAL CONSIDERATIONS</b>	<b>21</b>
4.1 Third Party Rights	
4.2 Planning Use / Permission	
4.3 Historic Buildings	
4.4 Former Owners – “Crichel Down Rules”	
4.5 Sitting Tenants	
4.6 Lease breaks	
4.7 Change of Landlord	
4.8 Sharing in Development Value	
4.9 Conditonal Contracts	
4.10 Options	
4.11 Overage / Clawback	
4.12 Ransom strips	
4.13 Works in Lieu of Payment	

- 4.16 Wider Issues - Urban Regeneration
- 4.17 Disposal in PFI schemes
- 4.18 The use of Gateway

## **5 DISPOSAL ROUTE** 37

- 5.1 Internal Transfer
  - 5.1.1 *Freehold / Long Leasehold Property*
  - 5.1.2 *Freehold – note for Scotland*
  - 5.1.3 *Property status*
  - 5.1.4 *Sale and leaseback*
  - 5.1.5 *Private Treaty*
  - 5.1.6 *Subject to contract – note for Scotland*
  - 5.1.7 *Informal Tender*
  - 5.1.8 *Formal Tender*
  - 5.1.9 *Public Auction*
- 5.2 Leasehold Property
  - 5.2.1 *Disposal of long leasehold interest*
  - 5.2.2 *Surrender*
  - 5.2.3 *Marriage of Interests*
  - 5.2.4 *Assignment*
  - 5.2.5 *Internal transfers of leasehold properties*
  - 5.2.6 *Subletting*

## **6 NEGOTIATION, EXCHANGE AND COMPLETION** 49

- 6.1 Preparation
- 6.2 Negotiation
- 6.3 Agreement of terms
- 6.4 Liaison with Legal Advisers
- 6.5 Due Diligence

## **7 VACANT PROPERTY** 51

- 7.1 Vacating property
- 7.2 Mitigating costs
  - 7.2.1 *Rent (if applicable)*
  - 7.2.2 *Uniform Business Rates*
  - 7.2.3 *Insurance (if applicable)*
  - 7.2.4 *Utility costs (water, electricity, gas, etc)*
  - 7.2.5 *Telecommunications*
  - 7.2.6 *Maintenance agreements*

## **8 ADVISERS** 52

- 8.1 Internal Advisers
- 8.2 External Advisers
  - 8.2.1 *Frameworks*
  - 8.2.2 *Specialist Advisers*
- 8.3 Property Advisers
  - 8.3.1 *Internal*
  - 8.3.2 *National & Local*
  - 8.3.3 *Types of Property Advice*
- 8.4 Legal Advisers
- 8.5 Financial Advisers



## LIST OF TABLES AND FIGURES

Figure 1 - Suggested structure for managing the Disposals Programmes	9
Figure 2 - Gateway reviews for property disposal	36
Figure 3 - Disposal Routes and Contractual Release	37

## 0.0 Executive summary

Government is required to manage its estate in the most efficient and effective manner and this will often result in property or land being identified as surplus. This publication guides government departments, non-departmental public bodies (NDPBs), executive agencies and other public bodies on how to dispose of such assets.

Where a public body no longer has a use for a property, it should consider how to dispose of the asset in a way that gives best available overall value for money. In the first instance, public bodies must ensure that e-PIMS (OGC's electronic Property Information Mapping Service) is updated appropriately. It may also require adding to the Register of Surplus Public Sector Land. This enables other public bodies to express an interest in acquiring the asset before it is put on the market by the originating body. If there is no interest, the asset should then be disposed of on the open market. The disposal should be conducted in a proper and effective way, having recourse to appropriate professional advice.

Surplus assets need to be disposed of as expeditiously as possible – within 6 months of being declared surplus for housing and within three years for all other properties, whilst achieving overall value for money for the taxpayer. The disposal process must be clearly documented and managed properly, and there should be a clear audit trail.

This Guide defines “disposal” as; sale on the open market for monetary consideration, releasing or vacating property via administrative transfers to other government departments or agencies, surrenders of leases to landlords or assignments of leases to third parties for the payment of a premium or a reverse premium. Disposal through a PFI contract is outside the scope of this Guide.

Best practice indicates that disposals should:

- be supported by a business plan and property strategy
- flow from a business plan and property strategy
- flow from an event or series of events that generate a disposal opportunity, for example a change in the machinery of government that changes the “de facto” ownership of a property and creates opportunities for rationalisation of property assets.

A property strategy that identifies a number of surplus properties will normally result in a programme of disposals and the setting of:

- clear goals
- objectives
- milestone and final targets
- projected outcomes
- a clearly identified risk management strategy.

Best practice also indicates that public bodies disposing of an asset should:

- seek and procure appropriate professional advice
- operate to a budget and disposal plan
- set milestones, manage risks and report progress in accordance with normal good business practices.

# 1. Introduction

## 1.1 Background

This Guide has been produced by OGC to provide advice on property disposals to the public sector, including central government departments, agencies, non departmental public bodies (NDPBs). It has been drafted against the background of HM Treasury's 'Green Book' titled Appraisal and Evaluation in Central Government (April 2003) and Government Accounting (2000). Both reflect the Government's drive to make central government both more efficient and more accountable for the financial implications of its decisions.

This Guide to the disposal process consolidates the papers and memoranda issued since the last revision of the PACE Estates Services Guide was published in 2001. Consequently, this Guide supersedes the previous guidance in respect of the property disposal process. It should be read in conjunction with HM Treasury's Government Accounting (2000) and the *Green Book (2003)*.

The principles set out in this Guide are consistent with those of Government Accounting (2000) and the *Green Book (2003)*:

*"The Government holds property interests as it requires accommodation from which it delivers its services and undertake its function of administering the Country's affairs. It is not the Government's policy to dispose of its estate as a matter of principle. However, the Government does have a responsibility to the taxpayer to maximise efficiency and effectiveness in the management of the estate that may result in surplus property being identified."*

Government Accounting (2000) sets out the overall framework and principles:

*"Once surplus assets have been identified, they should be sold as quickly as possible subject to value for money considerations".<sup>1</sup>*

*"In most cases, it should be possible to dispose of properties satisfactorily within three years"<sup>2</sup>*

The *Green Book (2003)* adds to this by providing that:

*"Departments have a duty to dispose of property surplus to requirements within three years and should not hold land speculatively."<sup>3</sup>*

Government Accounting (2000) also states that central government departments, agencies and NDPBs are required to maintain appropriate systems of control over the disposal of assets.<sup>4</sup>

This Guide reflects OGC's guidance on best practice in project and programme management and the OGC's initiative to encourage all central departments to establish 'Centres of Excellence' in order to improve the delivery of projects and programmes. It also reflects good practice lessons learned in both government and the private sector.<sup>5</sup>

<sup>1</sup> Government Accounting 2000, paragraph 24.2.1.

<sup>2</sup> Government Accounting 2000, Annex 24.2 paragraph 2.

<sup>3</sup> The Green Book 2003. Annex 3 (Land & Buildings) paragraph 28

<sup>4</sup> Government Accounting (2000) Paragraph 24.2.3

<sup>5</sup> Project/Programme Management Centres of Excellence Information Pack published by OGC in Feb 2003

## 1.2 Role of OGC

OGC works with central civil government as a catalyst to achieve efficiency and value for money in commercial activities.

OGC provides guidance and expertise to support the successful delivery of procurement projects and other forms of commercial activity.

As part of that role, OGC supports government departments in managing their property assets through co-ordinating and rationalising demands for property or disposing of surplus assets, both buildings and land, and through co-ordinating government property market activity. An on-line property information mapping system of government property occupations (ePIMS), developed by OGC, underpins this support.

OGC also has a portfolio of surplus properties that it is actively disposing of either via lease surrender, assignment, or administrative transfer to another department. Its experience and expertise in disposals is reflected in the advice offered in this Guide.

OGC also provides a range of publications, events and consultancy services to help the public sector in disposals and other property strategy and asset management activities.

## 1.3 Purpose

This Guide is intended for the whole disposals team, from SROs, Programme Managers and Project Sponsors to Project Managers and their teams of Case Officers who are required to manage and implement the disposal of surplus property. It provides:

- a systematic process for dealing with property disposals
- assistance in determining the best means and methods for disposing of property assets
- a methodology to ensure 'due process' is adhered to when considering disposals such that decisions taken will stand up to public scrutiny
- a common approach to disposals making best use of experiences gained to date to deliver best value for money.

The Guide is divided into two sections. Section 1 comprising Chapters 1 to 4 is mainly intended for SROs and Project Sponsors who are responsible for developing and delivering disposals programmes and projects in line with strategic and business objectives, and who are responsible for proper governance and accountability of disposal processes. Section 2 comprising Chapters 5 to 8 is aimed mainly at Project Managers and Case Officers who are tasked with the day to day management and progress of disposal projects and who need to be well informed 'intelligent customers' in order to ensure that the disposal generates the best value outcome.

## 1.4 Property 'Ownership' / Responsibility

Each central government department, executive agency and NDPB (referred to hereafter collectively as 'departments') is responsible for and must account for the property it occupies and holds for its own use. In that context, each public body is said to 'own' its own property.

Wherever and whenever a department occupies property there must be a legal basis upon which it can do so. That basis will comprise a legal interest in the property. In central government the legal title to land and property is held by the First Secretary of State, departments do not individually have the ability to own land in their own right, however, for the purposes of this Guide an 'owning department' is taken to be the one which has possession of and responsibility to account for the interest. The background to property asset ownership in central government is explained in more detail in OGC's Guide to Deeds and Sealing, updated by Information Note 20/2000.

In this sense 'ownership' can refer to any interest in a piece of property. Such interests can include:

- a freehold interest
- a leasehold interest
- a licence to occupy
- a right to accommodation and services under a PFI contract
- a right of way or easement over property in the ownership of either another department or a third party
- any other legal interest in or pertaining to property ownership.

In addition, this Guide will refer to those instances where departments occupy premises under a Memorandum of Terms of Occupation (MOTO) as defined in the Civil Estate Occupancy Agreement (CEOA). The MOTO is not a legally enforceable agreement. In these circumstances, while the occupying department, 'the Occupier', agrees to bear the costs of ownership of the property it occupies and agrees to abide by procedures that govern the ending of a MOTO, the 'owning department for the purposes of this Guide remains the Holder.

### 1.5 Surplus Property

Surplus property is property that the 'owning' department identifies as surplus to its requirements. Such property can comprise either a whole property or a part of a property.

Each department is accountable for its property transactions and should have developed its own property strategy, based upon its projected requirements. These requirements should in turn be based upon its strategic and operational business plan that set out its operational projections and resource requirements for at least the next three years.

A department's strategic plan will often identify change requirements that may result in some property assets becoming surplus to requirements.

### 1.6 Property Disposal and Value

***Although the term 'disposal' tends to imply a sale on the open market for monetary consideration, it can also mean 'releasing' or vacating property, including internal transfers to other departments.***

There may be occasions when an interest in property has no sale value, or even a substantial negative value. Such instances could include:

- a lease, either with a long or short unexpired term
- a licence to occupy.

Leases often have no realisable financial value since they require the payment of rental for the right to occupy space. However, in a rising market rental values may exceed the rent reserved under an existing lease and it may be possible to secure a premium from an assignee for the right to occupy space at a rental that is below that available in the open market.

In a falling market, departments should be aware that the sale value could be nil. It is also possible that a disposing department may itself need to pay a premium to an acquiring body (i.e., a reverse premium) in order to transfer the responsibility to pay a rental that is in excess of that available on the open market.

In either respect, the quantum of the premium payable will depend upon the rent reserved under the lease, the open market rental and the terms and conditions of the lease. It may also be influenced by the age and physical condition of the property.

A similar situation may arise if a department wishes to surrender its lease to the landlord. In such cases, the benefits of relinquishing or transferring ownership may comprise reduced revenue costs in terms of rents, insurance, maintenance or service charges. It may also be relevant to consider any impact on management and resource costs as well as the risks of unexpected expenditure.

A property disposal may also occur where a department's interest in property changes. For example, should a department surrender its leasehold interest to the landlord and then take a new lease in the same property, the surrender will in effect form a disposal, with the new lease forming an acquisition

Section 5.0 (Disposal Routes) refers to these methods of releasing property and outlines the issues associated with them.

### 1.7 The Register of Surplus Public Sector Land

A department wishing to dispose of a piece of land or a building should enter details on to the Register of Surplus Public Sector Land for a period of at least 40 working days before the site is marketed.

Assets to be entered on the Register are defined, as "vacant land or buildings or property that is no longer required for the purposes of the public body". In addition, assets which are to become surplus by a specified date can also be included where the information is known. Assets held on a leasehold interest of less than 99 years should be excluded.

Departments are free to assess whether the assets they hold are no longer needed to meet current or future operational objectives and so are surplus. In addition, a department may remove sites from the Register if it changes its assessment and decides that the asset is no longer surplus.

If no other government bodies express an interest in the asset, the owning department can then place the asset on the open market for sale.

The process of entering assets on the Register is set out at Government Accounting<sup>6</sup>. English Partnerships (EP) has also set up a Help Desk to provide a single registration contact<sup>7</sup>.

Other "surplus" property should, in the first instance, be registered on ePIMS<sup>1</sup> via OGC, or notified to OGC, and made available for other departments' use and should only be disposed of in the open market if there is no such need.

<sup>6</sup> Government Accounting Annex 24.1

<sup>7</sup> Contact s at date of publication: Helpdesk 01908 353907: Further information available from Helen Stone, English Partnerships, Central Business Exchange II, 414–428 Midsummer Boulevard, Central Milton Keynes MK9 2EA; tel: 01908 353907, e-mail helenstone@englishpartnerships.co.uk.

## 2. Fundamentals

### 2.1 Programme and Project Management

Best practice indicates that property disposals should be properly planned and that disposals should normally originate from one of the following:

- identifying opportunities through business planning and property strategies
- an opportunity arising that fits with the planned business plan and property strategy
- an event or series of events that generate a disposal opportunity, e.g. a merger or devolvement of a department that changes the 'de-facto' ownership of a property or creates opportunities for rationalisation of property assets.

A property strategy that identifies a number of properties as being surplus to requirements will result in a programme of disposals that may or may not be combined with rationalisation, restructuring, relocation and business change activities. Within each programme of activities aimed at bringing the estate to a specified position within a given time period, there will be a number of discreet but inherently linked projects. Each project, whilst planned and appraised on its own merits and in the context of its own situation, will form part of a wider programme aimed at developing the estate in line with anticipated operational requirements. A department's programme should be supported by:

- clear goals
- objectives
- milestones
- projected outcomes
- identified measurable benefits
- a risk and issue management strategy.

Programmes should be managed in line with OGC's guidance on programme management contained in *Managing Successful Programmes*, available through OGC's website<sup>8</sup> or service desk<sup>9</sup>.

### 2.2 Centres of Excellence

The programme and project management structures appropriate for property disposals, described in this Guide, are intended to follow OGC's general guidance on programme and project management, and accord with the Centres of Excellence Initiative outlined in the Centres of Excellence Information Pack published by OGC (August 2003).

'Centre of Excellence' is a collective title for a set of essential functions required to support the successful delivery of an organisation's portfolio of programmes and projects. Every department must have a centre of excellence because:

- they must improve the delivery of departmental programmes & projects, in line with the Reform and Delivery Agenda and other initiatives
- Cabinet has agreed that this is the approach to be adopted and it is consistent with wider good practice in both government and industry.<sup>10</sup>

<sup>8</sup> [www.ogc.gov.uk](http://www.ogc.gov.uk)

<sup>9</sup> 0845 000 4999

<sup>10</sup> Centre Of Excellence Information Pack v3.1 (published by OGC)

The Centre of Excellence should have a remit covering all the programmes and projects of the department, its agencies and NDPBs coming under its aegis. It is required to meet minimum requirements of:

- upward reporting to the management board
- outward involvement with Whitehall and beyond
- inward assistance to the department to provide assurance about project achievability and practical support for SROs, project and programme managers and delivery teams.

The Centre of Excellence in a department is likely to have the role of ensuring that all projects, including property disposals, are undertaken in line with best practice principles of programme and project management. It is in this context that this Guide proposes that property disposals be undertaken in accordance with OGC's project and programme management best practice guidance. This guidance can be accessed through the Successful Delivery Toolkit on OGC's website. OGC's consultancy services are available to advise on how this guidance can be implemented in relation to a departments own projects and programmes.

### 2.3 Management & Control

A disposal strategy should be derived from the department's property strategy, which in turn is derived from its business strategy. Where the disposal strategy requires several disposals, where disposals need to be linked or where there is significant risk and/or dependency on other projects and programmes departments should establish a disposal programme with an SRO and dedicated Programme Board to steer the delivery of the strategic outcomes and benefits. Individual disposals would be managed within the programme and projects or activities. Generally, and especially where individual disposals are complex and/or high value, disposing bodies are recommended to establish an SRO and dedicated Project Board to steer delivery of the disposal project.

Departments are recommended:

- where appropriate to scale value and risk, to set up a disposals programme with appropriate programme governance to manage a portfolio of related disposal projects and activities
- to treat individual disposals as projects and to nominate a Senior Responsible Owner (SRO), disposal Project Sponsor and disposal Project Manager for each project
- where appropriate to scale value and risk, to establish dedicated Project Boards to steer individual disposals.

Where it is appropriate to establish a programme of disposals it is recommended that;

- a Senior Responsible Owner (SRO) is appointed who is accountable for the programme of disposals project and its budget
- a Programme Board is established that is chaired by the SRO. The Board will act as an advisory body to the SRO, who will have the responsibility and authority for decision making
- a Programme Manager is appointed who will be responsible for the day-to-day detailed management of the programme of disposals, reporting directly to the SRO and interfacing with the individual disposal projects through the Project SROs or Project Sponsors.

Individual disposals should be managed as projects and it is recommended that for each project:

- a Senior Responsible Owner (SRO) is appointed who is accountable for the project outcome and its budget. Where a disposals programme has been established it may be appropriate for the Programme Manager to act as the project SRO
- a Project Sponsor is appointed who will report to the project SRO and whose role will be to act as the single client interface and the focal point for day-to-day management of the programme
- a Project Manager or Case Officer is appointed to manage the individual property disposal project on a day-to-day basis, reporting to the Project Sponsor.

Even in small scale disposals where the disposal does not form part of a programme of disposals, it is recommended that the SRO accountable for the disposal establishes an adequate project management control structure through which the disposal will be dealt with. It is also suggested that this includes consideration of appointing a suitable project manager / case officer who will be responsible for the day to day detailed management of the disposal, reporting directly to the SRO. In these cases the roles of SRO and Project Sponsor can be combined, or the roles of Project Sponsor and Project Manager/Case Officer can be combined depending on circumstances.

A budget and programme plan should be established that covers the whole programme of disposals as well as for each individual disposal that forms part of it. Where individual disposals are reliant upon other activities, such as relocations, acquisitions or other disposals, these should be built into the critical path of the overall project programme.

Decisions should be taken by SROs, advised by the Programme or Project Board but not by an external consultant – external input should only be to provide the evidence that may lead to a decision.

The Project Sponsor should be the driving force behind a disposal project and make sure that momentum is maintained throughout the process. The Project Manager for the disposal should:

- identify and agree with the SRO the key criteria for the disposal
- identify latent value
- identify key dates and key tasks required to enable the disposal to occur
- with the SRO establish a Disposal Project Team, having identified who should be party to the decision making process and who the key stakeholders are
- with the SRO identify the roles and responsibilities of the Project Team members including if appropriate appointing the Case Officer
- appoint appropriate advisers
- undertake or commission an appropriate appraisal of the disposal.

Figure 2-1 sets out the structure adopted by OGC to manage the programme of disposals for surplus property within the civil estate.

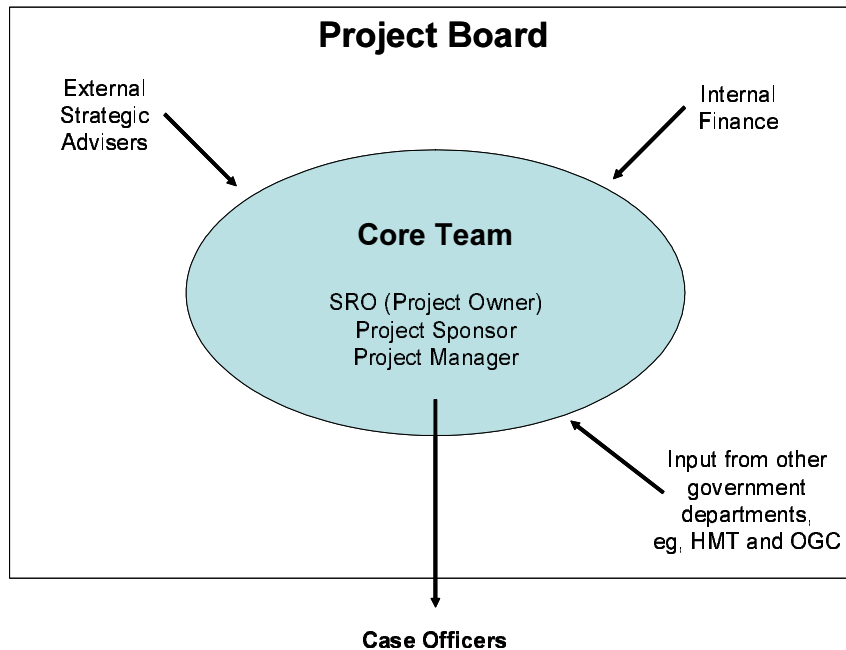


Figure 1 - Suggested structure for managing the Disposals Programmes

#### 2.4 Appointment of Advisers

The Project Sponsor should, as part of setting up a project, consider and identify what advisers, if any, will be required. Potential advisers will include:

- Property advisers
  - Strategic disposal advisers
  - Valuers
  - Managing agents
  - Selling agents
  - Building surveyors
  - Structural surveyors
  - Planning consultants
- Financial consultants
- Conservation advisers (where the property falls within listing regulations or has special historical / architectural interest). The Government Historical Buildings Advisory Unit (GHBAU) may also need to be involved
- Legal advisers.

Most, if not all, of the recommendations and decisions that Project Managers and Case Officers make will need to be justified and properly evidenced. Property matters can be both complex and specialist. It is important to take appropriate advice in advance of taking decisions that could have significant financial implications for the department and, therefore, for the taxpayer.

#### 2.5 Understanding the Challenge

The key challenge is delivering value for money for the taxpayer / Exchequer in any transaction to dispose of surplus property.

A second challenge is to identify enhanced value that can be obtained from the property. This may include considering the property as part of a wider estate issue, such as part of a rationalisation programme.

A third challenge is, once property is declared a) surplus by the disposing department and b) available for disposal in the market, to ensure a complete disposal process resulting in the property being disposed of at the best possible terms.

Further, all disposals should be undertaken expeditiously whilst achieving value for money. The challenge is to obtain the balance between timeliness and benefits in monetary terms.

SROs and Project Sponsors should take time to explore all aspects of the potential disposal and in particular should have a clear understanding of:

- |                              |   |
|------------------------------|---|
| <b>Title</b>                 | <ul style="list-style-type: none"> <li>■ Ensure that all the facts regarding title and resultant disposal options are known and that any anomalies have been explored prior to taking the interest to the market. This will avoid unnecessary delays and may avoid the collapse of a transaction if not known until legal formalities are being dealt with. A formal report on title should be obtained, identifying any encumbrances or other interests in the property that may affect a disposal.</li> </ul> |
| <b>Costs and liabilities</b> | <ul style="list-style-type: none"> <li>■ The current costs associated with the property, including Uniform Business rate, energy costs, service charges, maintenance and repairs.</li> </ul>  |
| <b>Use and potential</b>     | <ul style="list-style-type: none"> <li>■ The interest held may have alternative more valuable uses that may need to be explored before going to the market;</li> <li>■ Explore planning issues including planning guidance and local development control;</li> <li>■ Understand potential planning obligations</li> <li>■ Where relevant consider obtaining outline planning permission</li> <li>■ Where relevant include a planning brief as part of disposal documents</li> </ul>                             |
| <b>Value / liability;</b>    | <ul style="list-style-type: none"> <li>■ What value or liability is to be disposed of and at what level does the SRO expect to dispose of it? SROs and Project Sponsors should be aware of the value of the interest in the prevailing market and have developed a methodology through which any potential interest can be developed into a value for money deal or at what point an alternative purchaser needs to be identified.</li> </ul>   |
| <b>Markets etc;</b>          | <ul style="list-style-type: none"> <li>■ SROs and Project Sponsors should gain an understanding of the market that the disposal is reliant upon i.e., is it rising or falling strong or weak and consider the marketing plan accordingly to maximise the potential of meeting disposal targets.</li> </ul>  |

## 2.6 Establishing a Strategy

The strategy for a programme of disposals should reflect the department's property strategy, which is a function of the department's strategic plan.

Surplus property is to be disposed of quickly, but before doing so a number of issues must be dealt with, for example:

- the department should be sure that the subject property is the most appropriate property to sell and that releasing a different property and maximising utilisation of the subject property is not a preferable option (this should be considered in terms of location; value to be released; space utilisation and cost reduction)
- perhaps the subject property could be released to another department as an internal transfer – thus obviating the need for that department to search for and acquire another property
- How will a disposal link to the department or organisation's Operational Strategies? (think longer term especially where expansion plans form part of the strategy).

It is essential to liaise with OGC to ensure space is not required by another department and to ensure that the property is registered ePIMS

## 2.7 Public accountability

The Case Officer should be certain that sufficient checks and audit trails are put in place to ensure that value for money will be achieved.

## 2.8 Appraisal and evaluation

Each property disposal must stand up to scrutiny and appraisal in accordance with the requirements of the *Green Book (2003)*. This means that the consequences for the Exchequer as a whole as distinct from only the disposing department, and the risks accruing across government, need to be addressed.

The *Green Book (2003)* emphasises the importance of careful and rigorous appraisal in connection with significant or material projects. As property related projects, such as disposal, generally involve significant capital and revenue funds the focus on appraisal will be relevant.

An appraisal should consider wider property requirements and not simply the price that might be realised on disposal of the identified asset. Appraisals should consider whether better value for money might be returned through making better use of the asset and disposing of another asset less suitable to the overall requirements of the disposing authority.

Evaluation of a disposal should demonstrate that value for money considerations have been taken into account and balanced against the benefits of a timely disposal. In addition, evaluations should take account of the *Green Book (2003)*'s requirements in respect of property evaluation as set out in its Annex 3.

In circumstances where the scale of a project warrants a post disposal appraisal it will need to show that a full cost benefit analysis was undertaken and that all costs and liabilities associated with retaining the property and with disposal have been considered as well as the benefits accrued.

The appraisal will also need to show what consideration is given to special matters such as:

- Listed building status
- heritage issues
- environmental issues
- political or community related matters.

A due diligence exercise should be undertaken to ensure that all issues have been considered and that the resultant arrangements represent both value for money and best value for the department.

When preparing the business case for the disposal and developing the business strategy, the Case Officer should consider the possibility that the property will not sell prior to vacating it. An assessment should be made of what that will mean in both practical and financial terms should be made as part of the project appraisal and risk assessment. These matters are dealt with in section 7.0.

### 2.9 Establishing true value of Assets / Liabilities

A potentially surplus property can be assessed in terms of several criteria:

- annual energy costs
- annual maintenance expenditure forecasts
- annual rental; insurance and business rates
- backlog maintenance
- facilities management costs – cleaning; security; etc
- fitness for purpose – this is a qualitative assessment that can be considered in terms of service delivery
- holding costs
- opportunity cost i.e., where surplus property can be reused and other expensive property can be disposed of
- service charges; and
- value / cost of disposal – a net present value / cost can be estimated to represent a property's 'true' value or cost. A positive net present value indicates that a positive receipt is likely, after taking into account cost savings and future expected 'replacement' costs

Departments should take care to consider the resource accounting and budgeting implications of effecting a disposal<sup>11</sup> and should work as necessary with its finance department.

A property asset may be recorded in a department's books at a value that does not represent disposal value. This '*Book Value*' may be the depreciated initial acquisition cost or previous valuation figure. Department's should be aware of any difference.

Departments should also be aware that effecting disposals might crystallise a surplus or a '*book*' loss. This aspect of property disposal should be given careful consideration especially in respect of specialist buildings, which may have been written down from a historically high cost basis. For example, a specialist building such as a Court may fall into this category and disposal may produce a surplus or book loss, which has to be passed to or covered by the Treasury. This should be discussed with department's own finance departments at the earliest opportunity.

<sup>11</sup> Further guidance is available at Government Accounting paragraphs 23.3, 24.1.6 and 24.1.7 and at Resource Accounting Manual ([www.resource-accounting.gov.uk](http://www.resource-accounting.gov.uk)) paragraph 8.10.

Although a property may have been identified as surplus, there may be an alternative property, the disposal of which may generate a better total net present value if the subject property is retained and utilised more economically or efficiently. This would form part of a wider consideration of the department's estate and property strategy, and should include researching ePIMS to identify situations whereby the department can work together with other departments in order to create maximum return and efficiency.

Departments are advised to use professional valuers to determine the value or liability of a surplus asset<sup>12</sup> and should then use a liability model to bring together the various criteria for assessment and produce cash flow forecasts to enable analysis. The OGC Property Model is an example that can be used for this purpose

### 2.10 Accountability and audit Trail

Quality control audits should be undertaken on disposal to ensure value for money solutions have been pursued and that best practice methodology has been followed. Departments should be able to justify their alternative approaches by demonstrating the merits of the chosen disposal over alternatives.

All disposals should be undertaken in accordance with government requirements for propriety, transparency and value for money. Accordingly, therefore, the manner in which disposals are managed should stand up to appropriate scrutiny.

Maximising proceeds may not be the sole determinant of value for money. Other value for money factors includes chances of a successful outcome and the impact of the disposal on other public sector occupiers. The benefits, which are expected to result from the disposal, must be clearly identified. If assets are sold at less than best consideration reasonably obtainable<sup>13</sup>, the department may need to report this to Parliament as a gift<sup>14</sup>. The value of the gift will be the difference between best consideration reasonably obtainable and the amount received. It is likely that in many cases, the report will take the form of a note to the department's accounts.

<sup>12</sup> See also Government Accounting, paragraph 24.2.4

<sup>13</sup> For definition of best consideration reasonably obtainable, see for example, Government Accounting paragraph 24.2.6

<sup>14</sup> Government Accounting Ch 25

## 3. The Process

### 3.1 Establishing Objectives

Departments should identify and establish clear objectives for the disposal of any property. These objectives should align to the broader objectives of the property strategy and business strategy. Where a disposal is part of a wider disposals programme the objects of the disposal should support and contribute to the objectives of the programme. Examples of objectives may include:

- whether timing is of the essence, for example, to sell or release the subject property by a specified date
- whether the disposal is part of a wider change programme, for example, to dispose of a number of properties as part of a programme to relocate the functions into one alternative property.

The department should consult with all stakeholders and SRO should agree objectives with appropriate senior managers prior to initiating a disposals project. The disposal project business case should be tested through OGC Gateway™ Review 1 prior to approval to proceed with the project.

### 3.2 Understanding the Opportunity

All involved need to fully understand the scope of the project. Each individual disposal may form part of a wider programme of disposals aimed at achieving the goals and objectives set out in the department's property strategy. As with most projects, the disposal will be expected to meet a number of success criteria associated with:

- time – the disposal may need to complete within a specified time scale to fit in with other disposals, acquisitions or relocations that may be taking place;
- budget – the department will be looking to achieve the best consideration reasonably obtainable, subject to any relevant constraints; and
- quality – this will refer to the disposal being undertaken expeditiously and in accordance with approved practices.

### 3.3 Disposal strategy

A clear strategy for each disposal should be established at the earliest opportunity. This may rely upon the advice of professional advisers or alternatively may be revised following receipt of their advice.

Open market sale may not always be the most appropriate method of disposal and consideration should be given to other possibilities, such as:

- an internal transfer;
- assigning a leasehold interest;
- disposing of a property and leasing back part of that property; or
- other arrangements that could achieve the department's objectives, for example subletting in order to create conditions favourable to subsequent disposal.

Should open market sale be the preferred approach, there are various options available such as private treaty, tender and public auction. Each of these should be considered in the context of the type of property being offered for sale, the nature of the market for that type of property at the time of sale and any specific issues or special characteristics associated with the property.

When formulating the disposal strategy, the department should take into account the variety of considerations set out in Chapter 4 and the different disposal routes available, as set out in Chapter 5. These should then be applied to the subject property and, in consultation with property and legal advisers, a disposal strategy should be developed that is most likely to enable achievement of the goals and objectives of the disposal.

In doing this, the department should consider the following elements:

- the tenure or interest in the property to be sold and any specific characteristics associated with that interest, such as restrictive covenants or length of term;
- the department's situation in respect of the property, such as whether it has sole occupancy and can offer vacant possession;
- whether there is or could be a special purchaser<sup>15</sup> for the property;
- any opportunities for realising latent value, perhaps through a marriage of interests or by obtaining planning consent for a change of use;
- what constraints exist due to planning restrictions or the buildings characteristics (it may be listed or have an unusual structure); and
- any other considerations that may affect the ability to effect an expeditious and value for money disposal.

The Project Manager/Case Officer should consult with the department's property advisers in the context of these considerations to develop the most appropriate strategy for disposing of the subject property or releasing the accommodation.

A clear and robust strategy based upon considered assumptions and conclusions and supported by the advice of property and legal advisers can then be developed for approval, which may involve an OGC Gateway<sup>TM</sup> Review if the size and nature of the disposal warrants it.

The resultant disposal strategy should include a consideration of the following:

- timing - identifying a desired disposal time and an estimate of lead times required to achieve that;
- pricing the market - taking valuation and agency advice to establish the likely realisation value achievable;
- determining whether either of the above (price and timing) could be improved by undertaking any minor works to the subject property;
- identifying the most appropriate disposal process (private treaty; tender; auction; etc);
- identifying marketing and advertising avenues;
- considering the impact on the local (and general) property market if a large number of properties are to be placed on the market at the same time or in close succession;
- whether the market will perceive how much the department needs to sell the property, thus influencing the price; and
- ensuring that the Project Team understands the disposal strategy and maintains the momentum to complete the process.

The disposal strategy proposed should provide a clear framework setting out the approach to be taken and the justification behind that proposal. The disposal strategy could be tested through OGC Gateway<sup>TM</sup> Review 2 prior to approval to proceed with the disposal in accordance with that strategy.

<sup>15</sup> Special Purchasers - potential purchasers that may be prepared to pay more than the general market due to a special interest that they may have in the subject property, for example the owner of an adjacent property or the occupier of accommodation in the same property

### 3.4 Appointing Advisers and agents

Ideally, the Project Manager/Case Officer should have access to framework agreements (Reference 8.2.1) held between departments and external advisers and/or agents for this kind of work – this may apply to any of the categories of advisers referred to in Chapter 8.

As an alternative to the department's own framework agreements, the department may refer to the framework agreements held by OGCBuying.solutions<sup>16</sup>. OGCBuying.solutions has framework agreements with a variety of consultants and contractors that may be able to provide the appropriate advice. The framework agreements can be used to appoint a contractor directly or to run a mini competition whereby framework incumbents are invited to provide details of the service that they will provide in response to a requirement and at what price.

If specialist advice is required that is not available from a supplier on either the department's framework or that of OGCBuying.solutions, the department may need to undertake a procurement in accordance with the best practice procurement requirements.

For fee levels exceeding OJEU thresholds advisers or agents may need to be appointed by tender process in accordance with departments procurement rules and the usual value for money considerations. The Project Manager / Case Officer should identify whether the subject disposal will warrant this process. A check should also be made to establish whether an OJEU would need to be issued to invite expressions of interest or tenders from advisers or agents.

If agents or advisers are to be invited to tender, whether on a formal or informal basis, the Project Manager / Case Officer should ensure that the procurement process accords with the department's own procurement rules, including that:

- a tender is prepared
- the appointment is advertised in appropriate places or selected suppliers are invited to tender
- the tender process is set out in the tend invitation, with notes about roles and responsibilities
- the receipt of tenders is appropriately co-ordinated, with an impartial person in the department's procurement department overseeing the process if necessary to ensure that it meets requirements.

The Project Sponsor should liaise with the department's Head of Procurement to ensure that a proper process is carried out.

The department's Head of Procurement may wish to check, amongst other criteria, that any advisers or agents appointed adopt good practice processes, as evidenced by ISO9001 / ISO9002 certification.

When agreeing terms with an external adviser or agent that is not on a framework agreement, the department should consider how the fee arrangements could be structured so as to encourage a high level of performance.

<sup>16</sup> see [www.ogcbuyingsolutions.gov.uk](http://www.ogcbuyingsolutions.gov.uk)

### 3.5 Reviewing Activities

The Project Sponsor should review regularly the progress of the project. Regular reviews should be made of:

- the activities that have been undertaken
- the activities that are to be undertaken
- roles and responsibilities
- risk identification and mitigation
- reports made and approvals to be obtained
- likely success of the project.

An option appraisal exercise should have been undertaken as part of the business case development to ensure that all appropriate scenarios were considered and that a value for money approach is to be taken. Options may need to be reviewed throughout the project as circumstances change (especially changes in market conditions) to ensure that the chosen strategy still offers value for money.

It is recommended that the broader programme of disposals that results from the department's property strategy should be the subject of OGC Gateway<sup>TM</sup> Process. Whether or not an individual disposal project is subject to the formal OGC Gateway<sup>TM</sup> Process depends on its scale and Risk Potential Assessment<sup>17</sup>, however, whatever the scale, peer review principles should be applied and the progress of each disposal should be tracked through a programme of regular reviews.

### 3.6 Securing Interest

Once a disposal strategy has been approved, the Project Sponsor and Case Officer will be responsible for ensuring implementation of that strategy.

Disposal agents and legal advisers should be clearly briefed on the targets to be achieved, the processes to be undertaken and the roles and responsibilities of everyone involved with the disposal.

Disposal agents should be encouraged to chase all enquiries and be motivated to achieve a sale. Methods used to ensure this occurs include:

- requiring regular progress reports
- the use of performance related fees.

Agents can be expected to advise on the likely market(s) that should be targeted and how they propose to undertake the marketing process. Agents can also be expected to advise on advertising methodology, as well as advertising costs so that a budget can be agreed for advertising and marketing activities.

Agents should be encouraged to identify any special purchasers and target them.

Once a potential purchaser has been identified and has shown some interest, it will be reasonable to expect the selling agent to follow through with any interested potential purchaser with the aim of achieving a disposal.

If more than one potential purchaser is identified, then it is important to maintain interest even after an acceptable offer has been received. By maintaining a level of market tension the department's position can be protected in the event of the sale not proceeding.

<sup>17</sup> see Chapter 4 and [www.ogc.gov.uk](http://www.ogc.gov.uk) for further guidance on the OGC Gateway<sup>TM</sup> Process

### 3.7 Maximising Disposal Opportunities

Markets for property may depend upon a number of factors. These may include:

- potential occupants of the property in its present use
- potential occupants of the property for a different use
- potential investors looking to secure a suitable tenant
- a different government department
- Local Government
- Quangos and NDPBs, etc.

Departments, their advisers and their agents should review the market sectors and segments within those sectors that it is marketing in order to attract interest for the property. For every property there may be a wide variety of potential purchasers and a broad overview of the different possibilities should be undertaken before focussing on just one target market.

The success of this stage in the process can be tested through OGC Gateway<sup>TM</sup> Review 3. If all avenues have been explored and the market thoroughly tested for interest approval can be sought from the SRO to proceed to the next stage of identifying preferred buyers and agreeing terms.

### 3.8 Agreeing Terms

Negotiating agents and representatives should receive a clear brief in respect of what terms will be desirable, acceptable and unacceptable. This should form part of the initial brief given upon appointing selling agents.

In order to ensure that offers are passed through to the department in an appropriate and timely manner, a reporting and decision making process should be clearly mapped out, with delegated authorities known. This will enable agents to represent the department in an informed manner so that misunderstandings can be avoided, thus creating greater certainty for the disposal process.

The legal advisers' role must also be clear and instructions given at appropriate times in respect of contract preparation and the conveyancing process.

In cases where the department is letting or sub-letting property, the department's property advisers should undertake the negotiation of lease terms, with regular reporting and consultation being undertaken. It is important that lease terms are drafted with care, as they will bind the department throughout the term of the lease. For example, whether the letting is to benefit from protection under the 1954 Landlord and Tenant Act (Part II) will affect the department's ability to regain vacant possession in the future and will need to be negotiated.

The negotiating agents and representatives must collate sufficient knowledge about any proposed purchasers, assignees or tenants in terms of:

- track records and intensions
- their commercial standing (including availability of funding for the particular transaction)
- risk assessment
- certainty of success
- potential repercussions of their acquisition.

Once a disposal process reaches the stage of contractual negotiation and exchange, it will be important that the likelihood of a successful completion should have some certainty.

Appropriate research by agents to assess the capacity of the purchaser to complete the acquisition will enable the department to assess the level of risk associated with that purchaser.

In addition, should a disposal be made to purchasers that are then found to be taking part in illegal or immoral activities, it will likely result in a high level of scrutiny being levelled at the department. This is an additional reason why the selling agents should undertake appropriate research on a potential purchaser's background and capacity to purchase.

### 3.9 Completing the Deal

When a purchaser has been found and terms have been agreed, there are still a number of activities to be undertaken in order that the disposal should be successful.

Legal advisers usually handle the process of exchanging contracts and completing the disposal. A process of reporting and checking on progress should be put in place to ensure that this process can run smoothly.

The Case Officer should track the progress of the process and ensure that the key activities are undertaken in good time. These will include:

- obtaining the necessary approvals and signatures that will enable exchange to take place, allowing for the lead times associated with this
- arranging for financial sign off to be obtained and monies to be transferred at the appropriate times
- if the disposal is a lease assignment or subletting, consent may be required from the superior landlord and a lead time may need to be built in to the programme for this, as well as any associated costs that should be built into the project's budget.

A lease or sub lease will need to be 'engrossed' and a rent collection process set up.

A risk assessment of the 'deal' should be undertaken, together with a risk management exercise to identify issues that will require attention in order for the disposal to complete satisfactorily.

It would also be prudent at this stage to undertake a due diligence exercise prior to absolute commitment to a transaction to ensure that:

- the disposal has followed 'due process' and all matters pertaining to it have been diligently dealt with
- the proposed purchaser, assignee or tenant will be 'suitable', i.e. that they will be able to complete the acquisition and meet future commitments and liabilities
- the disposal represents value for money in terms of the price achieved and benefits gained.

The success of this stage of the process and readiness to proceed to final completion can be tested through OGC Gateway<sup>TM</sup> Review 4. This Gateway Review will help to satisfy the SRO that all necessary checks have been completed and that the terms and conditions agreed will generate best value for money for the department.

#### **Conclusion of a contract and settlement – note for Scotland**

Conclusion and settlement of property transactions take a slightly different form in Scotland compared to England and Wales. Following agreements of the terms of the missives the contract is concluded by the legal advisors and at that state becomes binding on both parties.

In the case of freehold disposals there is often a delay between completion of a contract and settlement, normally 14 to 28 days, to allow the conveyancing to be completed. However in relation to a leasehold disposal, the settlement often occurs contemporaneously with conclusion of the lease, with execution of the lease by both parties taking place shortly thereafter.

Upon settlement of a freehold sale the purchase price is payable by the purchaser. In the case of completion of a lease a first rental payment is also made provided the rent is paid in advance and there is no rent free period at the commencement.”

### **3.11 Post project appraisal**

Following the completion of the disposal, a post project appraisal should be undertaken to assess the success of the project and take any lessons into future disposals. The post project appraisal will focus, amongst other things, on:

- the success of the disposal, in terms of the price achieved, the value for money represented by the disposal and the timeliness of the process; and
- the process itself and the manner in which the disposal was managed.

OGC Gateway™ Review 5 reviews the post project appraisal processes and for programmes, the extent to which expected benefits are being realised.

## 4. Disposal Considerations

Having identified specific property as being surplus to requirements and appropriate for disposal, there are a variety of factors and considerations that may impact upon a sale.

In this section some of the key factors and considerations affecting a sale are considered. Their impact may be small or they might be quite significant. They include:

- age and condition
- architectural or historic interest
- clean title
- contamination
- demands from other parts of government
- established planning use
- exit costs
- Government policies
- Identification of special purchasers
- Issues of public concern
- obligations to freeholders or former owners
- potential planning use
- tenure
- third party rights.

Departments should consider all of these issues, even if this transpires to be a process of elimination, as the implications may be both legal and ones of public concern.

SROs should also ensure to the following is undertaken:

- adequate legal due diligence to establish confirm clean title or to discover any relevant legal facts or constraints pertaining to a property. Time should be taken to ensure that the title over the property is clean and that the disposal is permissible under the terms of any lease that might exist. There should not be any debate over the title or the interest being disposed of nor should there be any legal obstacle to undertaking the planned transaction. Checks should include investigation into any potential impact of the Crichel Down rules (see 4.40 et seq.)
- a physical due diligence aimed at reconciling the legal position to what is actually occurring on site and to identify such matters as contamination, party walls etc.
- a financial due diligence including the establishment of the book value and financial consequences to a department if a disposal is undertaken.

Failure to undertake sufficient checks at the outset may result in protracted negotiation, increased costs and the potential collapse of a transaction. Undertaking early due diligence will provide an opportunity to remedy any issues identified before the property is taken to the market thereby avoiding as far as might be expected the potential of a collapsed transaction

### 4.1 Third Party Rights

Many government occupations include restrictions on the use to which the property may be put or who might be permitted to occupy the accommodation.

Time should be taken to ensure that it is possible to offer the property to third parties especially those from outside of government. Note there may be limitations to restrict occupation to actual government departments, which can preclude occupation by other public sector bodies such as NDPBs, local authorities or public services etc.

#### 4.2 Planning Use / Permission

Planning is a complex area. In addition to the advice offered here further guidance on planning matters can be found in OGC's Estates Services Guide – England and Wales Edition 3 Revision 2 (2001), and Estates Services Guide – Scotland Edition 2 (2000). This guidance does not seek to replace specialist professional advice and SROs should not attempt to tackle planning issues without the support of a competent planning adviser.

For sites with planning or development potential, the disposing body should liaise, or ensure that its agents liaise, with the local planning authority (LPA). Where large and/or sensitive sites are involved, the disposing body should consider consulting the local Government Office (GO). Close liaison with both the GO and the LPA is essential for departments with large land holdings, or who are considering longer-term disposals, so that their disposal programmes can be properly coordinated and integrated with the regional planning and development plan processes. This will also help to achieve a programmed series of disposals and avoid placing too many major sites on the market at the same time, thus depressing the price.

As a rule, properties can only be used within the planning use for which it has permission. For example, a property that has an accepted existing use as an office cannot be used for residential purposes unless planning permission is first obtained.

In many situations, the value of a property is affected by the use to which it can be put. A change of use, however, may increase a property's disposal value. A Case Officer should consider whether such a change of use would have a positive effect on the property's disposal value and, more importantly, whether such consent could be obtainable.

In essence, planning permission is required for any 'development', which is defined in s.55 of the Town and Country Planning Act 1990 as the carrying out of :

- building, engineering, mining or other operations in, over or under land or
- the making of any material change in the use of any buildings or other land.

Where a department has surplus property that it considers has development potential, it can apply in advance of disposal for planning permission through the normal planning process under section 299 of the Town & Country Planning Act 1990 whereby the appropriate authority in relation to any Crown interest may enter into an obligation to:

- a) restrict the development or use of the land in any specified way
- b) require specified operations or activities to be carried out in, on, under or over the land
- c) require the land to be used in an specified way
- d) require a sum or sums to be paid to the authority on a specified date(s) periodically.

A planning obligation may only be entered into by a deed which:

- a) states that the obligation is a planning obligation for the purposes of Section 299
- b) identifies the land in relation to which the obligation is entered into
- c) identifies the appropriate authority who are entering into the obligation and states what the Crown interest in the land is
- d) identifies the planning authority by whom it is enforceable.

Government has not in the past been legally required to obtain planning consent for changes of use or development to property in its ownership. However, some provisions of the Planning and Compulsory Purchase Act 2004 when brought into operation will remove the Crown's exemption from the Town and Country Planning Acts. It would be therefore be prudent to obtain a Certificate of Lawfulness of Existing Use or Development (CLEUD) or Certificate of Lawfulness of Proposed Use or Development (CLOPUD) from the LPA when a property is identified for disposal and the best consideration obtainable is for the existing use. This will avoid future issues arising should the property not have the appropriate consent for the use to which it is to be put upon disposal, even though that may be the same use which the department had adopted.

Should the LPA refuse a Certificate of Lawfulness of Existing Use or Development (CLUED) or Certificate of Lawfulness of Proposed Use or Development (CLOPUD), a procedure exists under which the department can appeal to the Secretary of State responsible for planning matters, currently the Deputy Prime Minister.

Departments should take advice from their planning advisers to ensure that the appropriate procedures are adhered to.

When considering any development, investigations should be made into the property's planning history to establish that the use to which it is currently being put and the existence of any buildings are lawful. Although the department may not require planning permission by virtue of its status, it is likely that, if the property is to be disposed of, a purchaser will require consent, so consideration should be given to obtaining the requisite planning permission.

It may also be desirable to obtain planning permission for a particular use in order to maximise the sale price. This could speed up the sale process and secure offers that are not subject to planning permission.

Obtaining planning permission, either for a change in use or for building works, may involve a significant lead-time. Outline planning permission is normally sufficient to establish the extent of development potential.

However, professional advice should be sought as to whether, within the context of the property, the planning background and potential as well as the timeframe within which a disposal is expected to complete, as to whether to pursue full planning permission with reserved matters or outline permission should be secured. Care should also be taken to ensure that the need to secure listed building consent or conservation area consent has been fully covered.

Planning uses are categorised by the Town and Country Planning (Use Classes Order) 1987. This groups similar types of use within a single category. Changes of use within each sub-category are deemed not to constitute development. The Order also enables certain moves between uses without the need for planning permission.

SROs and Case Officers should be aware that some government occupations are '*Sui Generis*' that is to say it has a use that does not fit into defined use class as set out in the 1987 Order. If *sui generis*, any change in use will require planning permission. It should be noted that government use is not necessarily *sui generis*.

Case Officers should determine which category the property falls into under the Use Classes Order so as to assist in deciding whether consent for a change of use would be required. Reference to the Town and Country Planning (General Permitted Development) Order 1995 will also give assistance in determining permissible development that can take place without the express need for planning permission.

Case Officers should also consider what would be the best route to obtain the optimum planning consent. In some cases there may be advantages in commissioning external planning consultants to undertake the application process. Alternately, if the disposal is to be subject to planning consent it may be beneficial for the prospective purchaser to undertake the application process. These alternatives should be considered carefully before a final decision is taken.

In order to determine whether a change of use, or a physical development, would improve the disposal value or the disposability of a property, it would be necessary to obtain valuation advice.

This would provide the department with values for the property with existing use and if consent for alternative uses were to be obtained.

It would also be important to assess the likelihood that planning consent for a change of use could be achieved or that consent could be obtained for development. External professional advice may be required for this purpose.

An appraisal should be undertaken to determine the costs and benefits of applying for planning consent prior to disposal. Whilst an enhanced planning consent can increase the disposal value of a property, there may also be a cost in terms of lead time, which, in turn, may work against the department achieving its strategic or operational objectives.

Departments should consider the three main options available for obtaining planning consent:

- a) to seek planning consent itself or agree a Planning Brief with the Planning Authority
- b) to sell to a purchaser who would agree to obtain planning under a contract with the department and where the department shares in the developer's success
- c) to sell without any planning consent and possibly to put in a clawback to share any windfall planning gain the purchaser secures.

A department should normally seek planning themselves where it is judged that they are at least as well placed as a third party to obtain the optimum planning consent.

Consideration should be given to working with a purchaser to obtain planning consent where a department determines that market conditions warrant it or where it judges that it lacks the necessary skills to do so on its own even with high quality specialist advisers.

Treasury guidance states land should normally be sold with the benefit of planning permission if it has potential for development<sup>18</sup>. However, this will not always be appropriate. Where securing an alternative use will not add to value or if there is some doubt as to which use would generate the best disposal terms, it may be preferable to dispose of the property without the benefit of planning consent. In these cases, departments may wish to include some 'clawback' provisions into the terms of sale to share in any planning or development gain. These are discussed in paragraph 4.11 below.

<sup>18</sup> Government Accounting 2000 Chapter 24

The ODPM provides on its web site a comprehensive set of guides in respect of the planning system, when one needs planning permission and the process of obtaining it. A brief description can be found in the document *Planning Permission: A Guide for Business*<sup>19</sup>.

### 4.3 Historic Buildings

Buildings of historical or architectural interest may be listed as such by government, which may affect future development opportunities for these properties.

The disposal of historic buildings and sites should be handled carefully if government policies regarding their protection and conservation are to be complied with.

The criteria upon which decisions are made regarding the disposal of historic buildings and sites are different from those used in other disposals. The Department for Culture, Media and Sport (DCMS) published *The Disposal of Historic Buildings – Guidance Note* in June 1999. Full guidance on the care of historic buildings in government ownership is given in *The Care of Historic Buildings and Ancient Monuments: Guidelines for Government Departments and Agencies (1998)*. This has been recently updated by DCMS in a document entitled *Protecting Our Historic Environment: Making the System Work Better*, published in July 2003.

Case Officers should check whether there are any listings attached to the subject property.

The key points to consider in disposals are:

- before deciding to vacate an historic building, the feasibility of adaptation and alternative use should be considered
- most older buildings, with sensitive adaptation, can give long-term cost-effective service
- in making financial assessments of alternative options, full account should be taken of the costs of responsible disposal, including any potential costs and risks incurred in maintaining and protecting the building if it becomes vacant
- all surplus historic buildings – and particularly those that are vacant or only partially used – should be disposed of expeditiously, which may point to particular methods of disposal
- methods of disposal other than open market sale by auction or competitive tender may need to be considered, where these will increase the chances of securing appropriate ownership and use of historic buildings
- in cases of town planning uncertainty, departments should ensure that they assess any potential for realisation of development value by a purchaser, and safeguard the taxpayer's interest by use of clawback, covenants or other means, where appropriate.

If the property is listed or is of particular historic relevance, departments should take specialist professional advice as to the effect that this might have on disposal possibilities.

### Former Owners – “Crichel Down Rules”

Surplus land, which was originally acquired compulsorily or under threat of compulsion, may need to be offered back to the former owner or the former owners' successors under the Crichel Down rules (The Rules). Government Accounting (2000) reminds departments of ensuring that they act as appropriately in accordance with the Crichel Down rules. The current Rules were published by ODPM in Circular 6/2004 on 31 October 2004. Copies are available from ODPM.

<sup>19</sup> [www.planning.odpm.gov.uk/guide/index.htm](http://www.planning.odpm.gov.uk/guide/index.htm)

The general rule is that if departments wish to dispose of surplus land to which the Rules apply, they should give former owners or their successors first opportunity to repurchase the land, provided that it has not been materially changed in character since acquisition. A material change in character for example would be a change from agricultural land to housing. Temporary buildings are generally regarded as not a material change. Other exceptions and the relevant time horizons are set out in the Rules.

Disposal to former owners under these arrangements will be at a price reflecting current market value (including any development value), as determined by the department's property advisers.

Case Officers should note that observance of the Rules is strongly recommended for departments although not statutory.

Case Officers should determine whether the property was originally acquired under a compulsory purchase scheme or under the threat of compulsion. 'Threat' means only that the body acquiring the property had the powers to make a compulsory purchase order if it had wished: no explicit threat to serve a notice is required. For the majority of authorities, most property would have been acquired by or under the threat of compulsion. A threat of compulsion will be assumed in the case of a voluntary sale if a power to acquire the land compulsorily existed at the time unless the land was publicly or privately offered for sale immediately before the negotiations.

Research should therefore be undertaken to establish the history of the site. If the property was in fact acquired in this way then the Officer should take advice from property and legal advisers. SROs and Case Officers should be aware that decisions made in respect of Crichel Down Rules may be subjected to Judicial Review.

The Crichel Down Rules will also apply to properties acquired under the statutory blight provisions. This is where the value of property has been adversely effected by planned development of adjoining/adjacent property and a statutory notice issued by the owner obliging the developer of the adjacent/adjoining property to purchase the subject property at full market value. (*Ref ESG 4.1.24*)

#### **4.5 Sitting Tenants**

Surplus property earmarked for potential disposal may contain tenants or sub-tenants benefiting from security of tenure. Occupation of a small area of an otherwise potentially self-contained property, or of a vital area such as a reception hall, may have an effect on the disposal.

If disposal with vacant possession is preferred, and advice from property professionals may be necessary to determine this, then it may be necessary to negotiate with the tenant for a surrender of the lease(s). This may be time consuming and costly as tenants have substantial rights to security of tenure under the Landlord and Tenant Act 1954 (unless specifically contracted out in the lease). This is a complex area and professional advice should be obtained from property and legal advisers at least one year before disposal is planned so that the appropriate action can be taken.

Disposals of tenanted property should ideally be timed to coincide with a landlord's lease-break option or with the end of the lease to maximise the chance of obtaining vacant possession.

If vacant possession can not be obtained, or if the tenant(s) occupy a large proportion of the property, it may be necessary and sometimes preferable to sell the property with a sitting tenant

in place. Much surplus government property is older, poorer quality offices that could be difficult to re-let once they become vacant. The presence of an established tenant could make the property more desirable to potential purchasers because the rent payments cover costs and provide an investment income. In addition, a vacant property can deteriorate quickly and thus lose value.

It is important to seek advice in order to identify:

- how the disposal value will be affected by this situation (valuation advice)
- whether vacant possession is required and how this can be achieved (legal advice)

The presence of sitting tenants should influence the strategy relating to a property and its place within the portfolio. Decisions as to whether to or not to try to regain vacant possession prior to sale should be taken as early as possible. For Crown owned freehold property the decision should take into account the relative value of the property as an investment or for development.

In some instances, where the acquisition is for investment purposes, a prospective purchaser may prefer to acquire the property already let to a third party. This will be a function of why the purchaser wishes to acquire the property and what the market conditions are for subsequent letting. The department's selling agents should be able to advise accordingly on this matter.

In cases where the department itself holds a lease from a commercial landlord it may sometimes be preferable to surrender the lease to the landlord rather than try to dispose of it to a third party so as to remove the possibility of any claims under privity of contract. Advice from the department's property advisers should be sought to establish whether this is the case.

Case officers dealing with properties in Scotland should note that the provisions of the Landlord & Tenant Act 1954 (Part II), which provides security of tenure to commercial tenants, does not apply in Scotland. This can have a significant effect on disposal decisions. Alternatively, if the department owns the superior interest, it will be able to obtain vacant possession more easily when the tenancy expires, which may affect value and ability to sell.

#### 4.6 Lease breaks

Where the department occupies a leasehold interest in the property identified as surplus, a review of the lease should be undertaken to establish whether there are any break clauses that would allow the department to surrender the lease. Provided a break clause is exercised correctly and there are no severe rental penalties, it may be possible to vacate a property with no further liabilities.

Particular care should be taken when exercising break options that any *conditions precedent* in the lease has been complied with. Failure to fully comply with all aspects of a *condition precedent* may invalidate the service of a break notice. SROs and Case Officers should be aware that there is no de minimus threshold applied to *conditions precedent* and the smallest non-compliance may render a break notice invalid if challenged by the landlord. (Ref ESG 2.7.3)

It should be noted, however, that unless contractually excluded, operation of a break-clause will trigger a reinstatement or dilapidations liability and departments should take this into account when considering this option. Any lack of repair arising from inadequate performance of a repairing covenant is referred to as a 'dilapidation'. 'Reinstatement' is a liability to reinstate property or landlords fixtures and fittings to a condition prior to any alteration during the term of the tenancy. (Ref ESG 2.2.10 & ESG 2.8.5)

There may be a number of benefits achievable by exercising a lease break, particularly where the rent payable is above market value as in such a situation it may be difficult to assign the lease on the open market.

If the department intends to exercise a break clause in the lease, notices will need to be served as required by the lease terms and also by statute, for example, the Landlord and Tenant Act 1954 (Part II). The notices will also need to be served in specified format and within specified time periods. Failure to adhere to these requirements can result in the department being unable to exercise the break.

Officers must take advice on these matters from property and legal advisers. Failure to adhere to landlord and tenant legislation can result in significant issues arising. Advice should also be taken in respect of any reinstatement or dilapidations liabilities as operation of a leasebreak does not negate such liabilities but these can often be negotiated with landlords on a number of bases.

Break clauses may provide departments with opportunities to negotiate with landlords the existing lease terms, such as user clauses or rental levels. A landlord may prefer to revise downwards a rent rather than be faced with a void period should the department decide to exercise the break and vacate the premises.

Exercising a break clause can also enable a department to relocate into another government held property that has otherwise been declared as surplus, should that fit with its property strategy.

#### **4.7 Change of Landlord**

When a new landlord acquires the superior interest in a property where a department is the leaseholder, it creates potential opportunities. The new landlord may be prepared to consider a surrender of the department's leasehold interest, or the creation of a longer lease that would potentially make a disposal easier for the department.

Much will depend on understanding why the new landlord has acquired the property. Whilst it may be that the new landlord is considering the investment value of a property let to a government department, a change in ownership may create opportunities that the department could take advantage of.

The department should seek advice from its property advisers as to the potential implications of a change in landlord when such an event occurs.

#### **4.8 Sharing in Development Value**

If a property has latent development value, there may be opportunities for the department to benefit in the event of a disposal. Prior to disposal, therefore, as part of the appraisal process, the department should obtain professional property advice on the matter of potential alternative uses and the impact on value should planning permission for those uses be obtained.

Where land has potential for development it should normally be sold with planning permission for the type of development that will maximise sale proceeds. However, if the property has development potential but there are reasons why obtaining planning permission might be problematic it may be advantageous to set up a joint venture with a developer or with the landlord / tenant. In such a situation it might be possible for the department to benefit from any

development gain achieved by the developer, either as a result of planning consent or as a result of development.

Situations might arise whereby a developer could benefit from acquiring the department's property, or interest in a property, because ownership would enable it to create additional value by using it as part of a larger development, that is, it becomes a 'special purchaser' who may be prepared to pay more than market value. This is known as a marriage of interest (Reference 5.2.3) In such situations, the department should take advice from its property advisers in order to establish what potential might exist for the department to share in the developer's venture. The department's role would depend upon the interest it held in the property (freehold, leasehold) and the significance of the subject property in the context of the potential development.

In these circumstances, departments should consider the need to protect their position in order to be able to demonstrate that, when considering costs, timeliness and risks of the transaction the best value has been obtained for the tax payer. Departments may also wish to put in place measures that will enable them to share in any subsequent increases in development value in order to satisfy the requirements of public accountability.

Departments may also, from time to time, be under pressure to make early disposals of property. Such pressure may make it necessary to consider disposal in situations where there is a lack of clarity in relation to future development potential, and/or in poor market conditions where the competitive element is reduced.

These can be complex areas of negotiation and appraisal for which professional advice should be sought. However, it must be remembered that departments always remain responsible for their actions.

### **Conditional Contracts**

As a general rule sale contracts should be kept as simple as possible. This will help to minimise the costs of negotiating a sale and reduce the risk of putting off purchasers through the inclusion of complex contract terms.

In some cases, however, completion of the sale of a property may need to be dependent on certain conditions being met, an example being the grant of planning consent. Two of the commonest ways of dealing with this situation are conditional contracts and options. Conditional contracts do not become binding until some event takes place (*conditions precedent*), or alternatively are terminated on the occurrence of some event (*conditions subsequent*). Offers that are made for a property 'subject to contract' may also be subject to planning consent, soil survey, site survey, etc. This means that exchange and/or completion of contracts will be conditional on resolution of the issue(s) of particular concern. For example, if the contract is conditional upon planning consent being obtained, the sale will not complete until a satisfactory consent has been received.

The inherent problem of a conditional contract for the vendor is what happens when a condition is not satisfactorily resolved from the point of view of the purchaser, for example, where the planning consent, which eventually emerges, is subject to unacceptable conditions. In such circumstances, which may occur some considerable time after the contract has been completed, the contract conditions may not be satisfied and the disposal may not proceed at all. Alternatively the purchaser may proceed but wish to adjust the terms, including the price, to reflect the problems

Contracts may specifically allow for the purchaser to withdraw or for adjustments to the terms to be made. However, this is a very complex area open to malpractice and must be carefully controlled.

Contract negotiations can become very complex and time consuming in relation to such provisions, particularly where the transaction itself is complex. As a general rule, departments should, try to avoid situations where conditional contracts may be required. Efforts should be made prior to disposal to minimise the extent of any conditions. For example, where feasible and practicable, planning permission should be obtained prior to a disposal. Wherever possible an unconditional bid incorporating overage of clawback provisions should be favoured over a conditional one. This ties in with the considerations on planning outlined in section 4.2

It is important to make sure that any conditions that are attached to the disposal are explicitly stated in the contract for disposal. The term *conditions precedent* should be clearly stated in the contract and in all correspondence with the prospective purchaser regarding the disposal. The department should be certain that its legal advisers incorporate into the disposal contract any conditions that attach to the disposal. In addition, the negotiating agent should ensure that all negotiations are undertaken on the premise of *conditions precedent*.

#### 4.10 Options

An option is the right of one or both parties to a contract, if they so wish and if the circumstances are covered by the terms of the contract, to exercise a right to do something or require the other party to do something in the future. However, the Crown does not usually grant options and this course is not recommended.

An option can last for a specified period of time and can take effect when a predetermined set of circumstances arises. An example might be where a prospective purchaser requires time to obtain planning consent or is awaiting certain local infrastructure to be completed before being able to acquire the property. In such a circumstance the department may wish to secure the disposal and grant an option with a fixed time limit.

In cases where the land would not easily be sold, perhaps due to the planning situation, or to other local conditions, or where obtaining planning consent is by no means certain and could take some time to obtain, a purchaser may undertake to obtain planning permission in return for some discount on the market value of the land.

Such an option might therefore set out the area of the land concerned, the length of the option period and the price at which the option could be exercised. It may also set out who would be responsible for the costs of obtaining planning consent and, if successful, for installing the infrastructure for the site. In some cases the purchaser may make an initial payment to the vendor to reflect the fact that the purchaser has been given an exclusive opportunity for a given period of time within which to gain planning consent.

Departments should note that in granting an option they lose control of the planning and disposal process for as long as the option exists. Since the Crown does not, generally, lack the resources to clarify the planning position on a property itself the need for an option should be avoided wherever possible, for example by obtaining planning permission prior to disposing of the property.

There are other types of options that may, however, be of use to the selling department. For example, departments could agree an option to purchase all or part of a new building on pre-agreed terms. This could be beneficial in enabling acquisition without competition in the market whilst revealing the purchasing developers expectations as to value. This last can be useful in informing negotiations about overage. Departments should take advice from their property advisers on these issues, as there may be important effects on value. Legal advisers should also be consulted before entering into discussions about an option arrangement.

Options can arise where a disposal would not be straightforward and there might be little market demand for the subject property. In addition, they might arise where a developer is attempting to assemble land for development or in the case of town centre schemes.

Options often rely on a trigger event occurring to enable the option to be exercised. In such cases the agreement must set out clearly what the trigger event is. Clarity in these situations is vital if the option is to be enforceable (by either party). If the disposal priced is to be affected by the trigger event, then the calculation process must also be expressed in the contract with complete clarity. Specialist advice may be required in these matters.

#### 4.11 Overage / Clawback

As stated above sale contracts should as a general rule be kept as simple as possible. However, departments may be advised in certain circumstances that a property is (for whatever reason) not being sold with the benefit of the best planning permission reasonably obtainable, or that market conditions or other factors are such that it would be appropriate for the department to share in development profit.<sup>20</sup>

In such situations the principal contractual mechanisms used to seek to recoup either all or a proportion of such potential increases in value are known as 'overage' or 'clawback' clauses. These terms tend to be used interchangeably, but the definitions set out below may be helpful.

'Overage' is the term used for claiming back an element of improved development value where, for example, there is a general uplift in the market, or where the market value of the end development is not known at the time of sale.

'Clawback' is used to refer to claims for all or part of windfall gains resulting from, for example, the purchaser obtaining planning permission for a change of use, or a greater volume of development than anticipated by the planning permission obtained prior to disposal.

Examples might include:

- where it is difficult to gauge the commercial potential of a property that has been used for a purpose peculiar to the public sector
- where a retailer may have a better chance of obtaining consent for a supermarket than the department
- where a developer is able to improve upon a planning permission already obtained by the disposing department
- where the disposal is of a listed building
- in sensitive areas, where the attempt to obtain planning permission for development would be prejudicial to national planning policy.

<sup>20</sup> Note that departments must be aware of Government policy and the need to liaise with the necessary planning authorities to minimise the need to rely upon clawback provisions and to be aware of when changes to planning use and therefore value may be relevant.

Clawback/Overage provisions are, however, difficult to enforce. Reasons include:

- difficulty in monitoring the value of the property when it no longer belongs to the department
- agreeing the increase in value that is due to the agreed event
- ensuring that payment of the uplift is protected.

There are contractual and other devices that can be used to attempt to enforce the payment of the uplift in value. However, clawback/overage clauses are specialised and give rise to complex legal issues. Therefore disposing bodies should seek property and legal advice at the outset on the advantages and disadvantages of the potential courses of action if the use of a clawback/overage agreement is unavoidable. This should include an assessment of the effect of a clawback/overage clause on the sale price. The effect can be explored by inviting offers with and without clawback/overage provisions.

Similarly to option agreements, the calculation process to be applied to the clawback should be clear and explicit in the agreement to avoid issues arising should the trigger event occur.

Departments should note that clawbacks usually diminish over time until they 'expire' and the purchaser is able to dispose of the property without reference to the department. Professional advice should be obtained if departments are planning to include clawbacks in disposal contracts, particularly with respect to the period involved as this must not exceed 80 years, and arrangements have to be made for monitoring over the whole period.

As well as putting clawback provisions in the disposal contract, it is possible to attach them to the title in the property.

#### **4.12 Ransom strips**

Some properties and pieces of land may have inflated values due to their impact on surrounding property values. An example would be a strip of land that would provide an access to a larger potential development site to the rear. Without the strip of land, and therefore without suitable access, planning consent for development of the land behind the strip may not be available. This would increase the value of the strip due to its disproportionate effect on the overall value of the land at the rear.

Should such a situation arise it might create an opportunity either to dispose of the property for a price above expectations or provide an opportunity to enter into a joint venture in respect of developing the adjoining property.

Local agents should be aware of potential schemes in the locality of the subject property and should be asked to advise accordingly.

#### **4.13 Works in Lieu of Payment**

Where a vendor is disposing of property as part of a rationalisation exercise, it may be that smaller replacement facilities are required or that other works such as new buildings, new highways, landscaping etc. are needed as a part of an improvement exercise. In this case, it is possible to require a purchaser to provide these works as part consideration for the property. Any proposed works in lieu of payment should be thoroughly examined at the option appraisal stage to ensure the maximum value for money for the taxpayer. The works required should also be clearly specified in any marketing package in order that there is competition between bidders in relation to procurement of these works.

Where works in lieu of payment are being considered as part of a disposal/ rationalisation exercise it is important to seek advice from property advisers.

#### 4.14 Scotland

There are some aspects of property law and processes that are different in Scotland compared to England and Wales. Where relevant, these have been noted as part of the text of this Guide. Readers may refer to additional guidance in OGC's Estates Services Guide – England and Wales Edition 3 Revision 2 (2001), and Estates Services Guide – Scotland Edition 2 (2000) which reflect the differences in property law. These guides do not however seek to be a substitute for specialist professional advice.

#### 4.15 Guidance on Property Valuation

Formal guidance on property valuation is provided within RICS Appraisal and Valuation Standards (*The Red Book*) which is produced by the Royal Institution of Chartered Surveyors (RICS). It imposes mandatory standards on chartered surveyors, and members of the other professional bodies that adopt it, for the majority of valuation work. *The Red Book* sets out the bases upon which valuations should be made, identifying what might be acceptable assumptions, and uses Market Value as the base for current day valuations. The most recent edition was published in 2003 and chartered surveyors are bound by its rules.

Information about *The Red Book* is available from the RICS and is explained on the RICS web site<sup>21</sup>.

#### 4.16 Wider Issues - Urban Regeneration

Departments should be mindful of the Government's commitment to sustainable development and environmental considerations when developing land.

The ODPM has charged English Partnerships (EP) with a strategic role to find and assemble land, especially brownfield and publicly owned land, for sustainable development.

To this end, EP is developing a comprehensive national strategy for brownfield land. This starts from a detailed understanding of what brownfield land is available, making full use of the National Land Use Database (NLUD), which identifies 66,000 hectares of previously used land capable of redevelopment. The strategy will cover how best to bring sites back into use, especially in growth areas

Departments should register surplus land with EP (please refer to 1.7).

Departments should consider whether a property would fall into the category of a brownfield or greenfield site in need of development and notify EP accordingly to establish whether the site would fit into known programmes for urban regeneration.

Departments should be aware if it is planning to dispose of a property that encompasses contaminated land. This may occur on brownfield or greenfield development sites and prospective purchasers should be advised of the situation.

<sup>21</sup> www.rics.org

#### 4.17 Disposal in PFI schemes

Property disposals may be effected by transferring interests held into larger transactions such as Private Finance Initiatives (PFI) or Public Private Partnerships (PPP). In such cases it must be ensured that the disposal process itself remains fully transparent.

Disposing departments need to secure value for money transactions. Careful consideration needs to be given to the price of the risk transfer that is being sought.

Successful PFI transactions place risks with the party best able to manage those risks. This does not mean the transfer of all risks to the private sector partner. In certain circumstances it may be sensible and desirable for the public sector to retain and manage risks that the private sector prices too highly.

Departments considering the transfer of assets to form part of the service provision or as surplus properties need to be aware of the value, or liability, of the interest it is seeking to transfer before entering into any negotiation. The value / liability should then be compared directly to the value / liability that is reflected through the proposed PFI charging mechanism.

Where the comparison does not show a value for money solution it is suggested that further negotiation is required or that the risk is too expensive to transfer. If negotiation does not produce a value for money solution it a traditional disposal may deliver the value for money solution.

Government Accounting ANNEX 24.4 provides further guidance on the disposals in PFI schemes and further assistance in this type of transaction can be provided by HM Treasury 4ps, Private Finance Unit or Partnerships UK teams.

#### 4.18 The use of Gateway™

The OGC Gateway™ Process (*trademark/caps*) has been adopted as mandatory in most central civil government departments. This means that new procurement projects in central civil government should be subject to the OGC Gateway™ Process. In some organisations similar peer review processes are used.

The OGC Gateway™ Process examines programmes and projects at critical stages in their lifecycle to provide assurance that programmes remain strategically justified and that projects can progress successfully to the next stage. It is designed to be applied to Acquisition programmes and projects that procure assets and services but the process is equally applicable to property disposals.

When using the Gateway™ process, the SRO must use the Risk Potential Assessment (RPA) tool to determine the level of risk associated with the programme or project, should identify the key 'decision points' at which approval will be necessary and should build Gateway™ Reviews into their programme or project plans. SROs should contact their Centre of Excellence/Departmental Gateway co-ordinator where they have one as soon as a requirement for review is established, otherwise contact the OGC Gateway™ team direct. OGC's guidance available through the OGC website or service desk offers further and more detailed advice on how to use the OGC Gateway™ Process. Figure 2 – Gateway™ Reviews for property disposal on page 35 illustrates the stages of disposal programmes and projects when Gateway™ Review might be helpful, and gives the following key decision points.

The key decision points outlined are as follows:

- OGC Gateway<sup>TM</sup> Review 0 Review of department's property strategy that has identified surplus property resulting in a programme of disposals. OGC Gateway Review 0 applies only to programmes and is repeated periodically throughout the programme to ensure that it remains justified in terms of the department's property strategy and business strategy.
- OGC Gateway<sup>TM</sup> Review1 Review of business case for a project to dispose of specific property assets and expected outcomes, and how these contribute to the programme objectives or strategy objectives.
- OGC Gateway<sup>TM</sup> Review2 Disposal strategy; activities required to achieve disposal; consents required.
- OGC Gateway<sup>TM</sup> Review3 Review following marketing of property and negotiation of disposal terms.
- OGC Gateway<sup>TM</sup> Review4 Final evaluation prior to exchange of contracts and completion of sale.
- OGC Gateway<sup>TM</sup> Review 5 Evaluation of outcomes and benefits achieved through disposal and review of lessons learned from the project

Some disposals are not part of larger disposal programmes and may be considered too small in terms of either value or cost savings to warrant application of the OGC Gateway<sup>TM</sup> Process. In these instances, the Project Sponsor SRO can use the OGC's Risk Potential Assessment Tool to help assess which type of Gateway<sup>TM</sup> Review is appropriate.

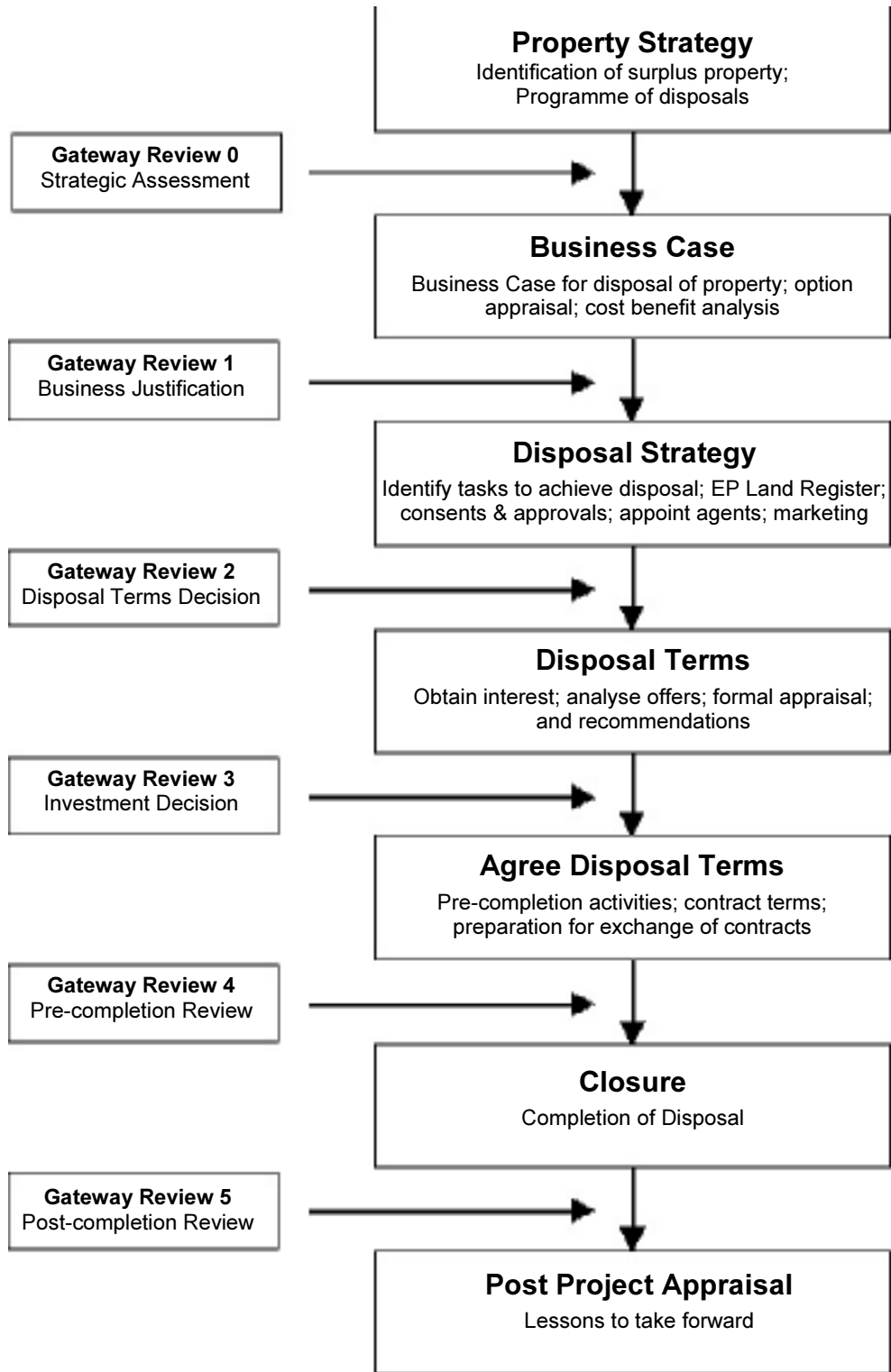


Figure 2: Gateway Reviews and Property Disposal

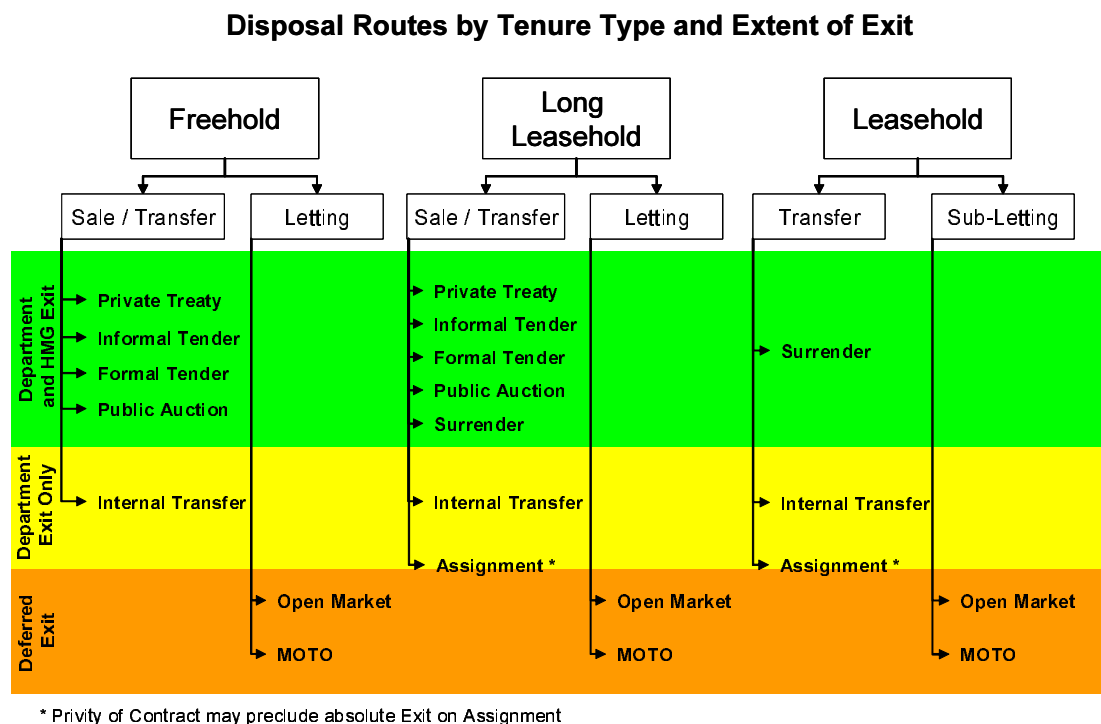
## 5. Disposal Route

### Section 2

37

The diagram below summarises the disposal routes available to departments and also highlights the extent of release from contractual liabilities on department and government levels.

Figure 3 - Disposal Routes and Contractual Release



#### 5.1 Internal Transfer

Where departments identify property as surplus to requirements, they should in first instance advise OGC via e-PIMS and then place the property on the Register of Surplus Public Sector Land before offering it for disposal on the open market. The principals behind the Register are described in 24.3 of Government Accounting and how it operates is set out in annex 24.1 therein. It is possible that another department will wish to acquire property similar to the property identified as surplus. By notifying EP and placing the subject property into the Register such an interest can be identified. A valuation will then be required in order to establish the price to be applied to the transfer.

Transfers between departments are at market value, to be certified by a qualified valuer. Government Accounting (2000) chapter 24.3 gives guidance on the transfer of assets between public sector bodies.

Internal transfers do not need to be tested in the open market. The open market valuation certificate will be sufficient to satisfy requirements of achieving best value in the disposal.

The acquiring department will be expected to pay at the point of acquisition rather than effect a paper transaction at the end of the financial year.

### 5.1.1 Freehold / Long Leasehold Property

Freehold property is owned, not occupied under any lease agreement nor is rent paid to a superior landlord. It may be disposed of by sale or by means of an inter-departmental transfer to another department, or it can be made available to be occupied under lease or Memorandum of Terms of Occupation (MOTO) as defined in the Civil Estate Occupancy Agreement (CEOA).

If a property is held on a freehold basis there will be no superior landowner whose permission is required in order to dispose of it. This is subject to there being no restrictive covenants applicable that would prevent or encumber the sale. A legal check should therefore be made to ensure the freehold is unencumbered and can be sold freely.

An example of a restrictive covenant might be where the deeds provide that the property must be used for a specified purpose or, alternatively, that it cannot be used for a specified purpose. Such covenants may have been included in the original sale documents to ensure that the character of an area is retained.

Another example might be a clawback clause, which has been referred to above.

Departments have the option to dispose of a freehold property either by sale of the freehold interest or through letting on lease, either as a method of retaining an interest or as a prelude to future disposal. Such reasons should be clear from the business case and should be reviewed in an OGC Gateway<sup>TM</sup> Review 2 undertaken prior to the disposal strategy being finalised.

Long leasehold properties can usually be treated in a similar fashion to a freehold property. However, the ownership is nonetheless a leasehold arrangement where a superior interest holder exists. When disposals are being considered care should be taken to ensure that any obligation other than to pay a ground rent are clearly understood and are adequately dealt with in any transaction.

A long leasehold interest can have a disproportionate effect on the value of property when compared to a freehold interest dependent upon its exact terms. Inevitably, leasehold interests trade at a discount and there may be marriage value in combining the freehold and long leasehold interests. Conversely a freehold interest subjected to a long lease at a low rent may have a value far above its theoretical investment value. When dealing with these interests Case Officers should always give consideration to buying out the reversion.

Departments should take advice on these matters from their property advisers.

### 5.1.2 Freehold – note for Scotland

Officers dealing with properties in Scotland should note that the term 'feehold' is used instead of freehold when referring to property that is owned in perpetuity and not held under any leasehold agreement.

### 5.1.3 Property status

When determining whether to dispose of a property by private treaty or informal tender, departments should take advice from their selling agents as their awareness of the market conditions can assist greatly in identifying the most appropriate disposal route.

The choice of disposal route may be influenced by a property's 'status'. A property may be available for sale:

- with the benefit of vacant possession
- under occupation by a single tenant
- under occupation by two or more tenants
- under part occupation by a single tenant.

Advice will be required to ascertain the most appropriate disposal route for the property, together with costs and lead times associated.

A property's status will have an impact on the value attainable by a sale in the open market. For example, in certain markets a freehold property for sale with the benefit of vacant possession may attain a higher disposal price than one that is let. However, a property let to a single 'high quality' tenant is more likely to attract interest and a higher price as a sound investment. It should also be noted that a property let to two or more tenants may attract higher levels of risk and management issues, thus reducing its investment value in the open market. Professional advice will therefore be required to consider the varying impact of a change in a property's status prior to disposal.

A department should consider whether the property's status ought to be changed prior to disposal. It may be possible to vacate the property or that a number of interests can be 'married' together in order to increase a property's attractiveness to the market. Where the property is let, it may be possible to re-structure the leases to improve a property's marketability.

In some instances, it may be preferable to negotiate with the tenant for a surrender of its lease(s). This may be time consuming and costly as tenants have substantial rights to security of tenure under the Landlord and Tenant Act 1954 (unless the lease is specifically contracted out). Case Officers should check whether the lease contains any break clauses that could enable the department to obtain vacant possession prior to disposal. This is a complex area and professional advice should be obtained from property and legal advisers in good time to enable any appropriate action.

#### 5.1.4 Sale and leaseback

In cases where a property is held on a freehold basis and a department wishes to retain its use, either whole or in part, there may be a case for disposing of the freehold interest and taking a leaseback. This can serve a number of purposes, such as:

- releasing capital in return for an annual revenue expenditure
- maximising the benefit of a vibrant market when realisation value may be high
- reducing the amount of space occupied by taking a lease back on only part of the premises, either for a short time or in the long term.

There should be a clear business reason for taking this approach and a business case should provide sufficient justification for the SRO to be able to give approval to proceed. Not only should a sale and leaseback represent best value for money, but it should also appear in the department's spending plans.

In some instances, a purchaser may be prepared to pay more for a property if there is a guarantee of a government tenant taking immediate occupation, even if that is only for a short or medium term (say 3 – 10 years). If this fits in with the department's property strategy then such a form of disposal may be advantageous to the department and, therefore, to the tax payer also.

### 5.1.5 Private Treaty

This is the method most widely used in the UK. Vendors make it known that a property is for sale, usually through agents who circulate particulars of the property to potential purchasers. Once a potential purchaser has expressed an interest, terms of sale are negotiated. Private treaty relies on an element of goodwill on both sides.

The main characteristics of a sale by private treaty are:

- the timescale for completion of the transaction is not fixed until exchange of contract
- offers are made 'subject to contract'
- offers are not all received at the same time
- it is usual for the asking price to be quoted.

Departments should ensure that throughout the marketing process the property is fully exposed to all potential purchasers to ensure genuine competition. There is therefore the potential for private treaty negotiations to extend over a considerable period of time, either because the purchaser has valid concerns regarding the physical nature of the property or its legal status or for other reasons, for example, that the purchaser is also interested in another property. The drawback of a private treaty sale for a vendor is that negotiations can extend over a considerable period of time and the purchaser can pull out of the negotiations at any point during that process prior to exchange of contracts.

The steps involved in a private treaty transaction usually include the following:

- openly advertising the property for sale, either through an agency or directly in appropriate publications
- specific markets can be targeted through a choice of advertising media
- taking offers from interested parties
- Identifying preferred offers, which may or may not be based on the financial levels of the offer
- managing offers – keeping bidders interested when they are not the 'preferred' bidders, i.e. when there is a better offer but the deal is not yet confirmed.
- Negotiating disposal terms
- Agreeing terms, obtaining approval, proceeding with legal transaction process.

Although private treaty is the most commonly used method of property disposal in the UK, the process can be open-ended and doesn't always end in a successful disposal. The informal tender approach, referred to below, can provide a greater level of certainty whilst often offering similar widespread marketing opportunities. There may also be difficulty in demonstrating a full and open competition was undertaken in disposals via this route.

The aim of the process is to maximise interest for as long as is possible before the market begins to test the level of asking price.

An example where a private treaty approach might be acceptable would be where a sitting tenant expresses an interest in purchasing the property and was prepared to pay more than the market value. In such an instance a suitably qualified valuer should give written assurances that the price offered is significantly higher than market value. In very rare cases a concessionary sale may be made to a heritage body (such as the National Trust). In such cases the department's Accounting Officer and the Minister should be prepared to defend the sale, and Treasury approval should be sought. Government Accounting (2000) Annex 24.2 paragraph 11 gives advice about how to treat sales of property at below market value.

### 5.1.6 Subject to contract – note for Scotland

In England and Wales, property transactions need to be made in writing. However, under the terms of the Requirements of Writing (Scotland) Act 1995, a contract may be created unintentionally by an exchange of letters. Care should be therefore taken in Scotland to ensure correspondence or verbal statements are not deemed to form part of a contract.

### 5.1.7 Informal Tender

An informal tender is similar to a private treaty sale, except that with an informal tender, the property is marketed for a set period of time and at the end of that time the marketing is drawn to a close by a best offers date. In this way all the offers are received at the same time and on a comparable basis, enabling the vendor to look at a number of bids simultaneously and make a judgement as to which bid to accept.

The vendor is not usually obliged to accept the highest, or any, bid. Offers received will, however, still be 'subject to contract' and there is the risk that even where an offer is accepted contracts may not be exchanged or the sale completed. However, provided a number of offers are received, there will be an element of competition, which is of assistance to the vendor in subsequent negotiations.

In an informal tender, bids are usually invited from selected parties, subject to contract, which in turn will be subject to outstanding issues being sorted out – such as planning permissions, or details of proposed development schemes. Bids can also be invited publicly.

The vendor should keep the underbidders interested so that a strong negotiating position is maintained. Informal tenders frequently result in sale to one of the underbidders after higher bidders drop out.

Informal tenders tend to be used in cases where there are either some issues associated with the disposal that makes either a Private Treaty or a Formal Tender sale difficult, or where demand is likely to be restricted due to the nature of the property to be sold.

### 5.1.7 Formal Tender

Formal tender is a useful method of disposing property but care needs to be taken to ensure that the property has been given the fullest exposure to the market. Formal tenders tend to be used in order to create certainty in terms of time-scales and also to create a 'level playing field' for all prospective purchasers. In a formal tender the 'Conditions of Sale' i.e. the contract terms, are sent out with the sales information and prospective purchasers have to return the entire document, including the conditions of sale, signed and enclosing a deposit cheque. The vendor then normally has a set period within which to make a decision on the bids received. When a bid is accepted, however, and the deposit cheque banked, a contract has been concluded.

There are, however, a number of disadvantages associated with formal tenders. These tend to focus around the time and expense that prospective purchasers must expend in order to submit a tender. Prospective purchasers are aware that if they submit an offer enclosing a deposit cheque, there is a chance that their offer will be accepted and that their deposit cheque could be cashed. They will therefore have to carry out detailed investigations into the property prior to submitting an offer without knowing whether they have any real chance of acquiring the property.

Because of this, unless the market is very strong for the property on offer, the number of bids likely to be received will generally be less than if a property was offered by way of informal tender or private treaty. This reduces somewhat the element of open competition generated.

Like informal tenders, this method enables a disposal date to be set and, provided there are some willing buyers who submit tenders, it creates a level of certainty about the disposal.

This method of sale is not however recommended for use in a weak market, or where there are elements of uncertainty in relation to any aspect of the sale package. In a formal tender it will usually be appropriate to set a closing date.

Formal tenders also require very specific preparation in order to facilitate the receipt of tenders. These will include:

- property and legal advisers should draw up the 'Conditions of Sale' and tender documents
- the selling agent/property adviser should advise on the reserve price, which, should be set as close as possible to the appropriate date
- the property should usually be sold to the highest bid above the reserve, although consideration should still be given to lower bids
- if the highest bid only marginally fails to clear the reserve price, then advice should be sought from the property adviser (and any independent valuer, on large sales) as to whether it should be accepted
- bidders' credit worthiness and source(s) of finance should be thoroughly checked prior to accepting any bids.

SROs and Case Officers should appreciate the usefulness of Formal Tender to secure Best and Final Offers in other disposal routes.

#### 5.1.9 Public Auction

Sale by public auction is one of the preferred methods of sale. This is because it is usually quick, certain and demonstrably fair. However, auctions require specialist skills. Case Officers should ensure that suitably qualified professionals are appointed if an auction disposal is to be pursued.

There are a number of circumstances where one might dispose of a freehold property at a public auction. Examples might include:

- residential estates, farms or other properties where there may be a special user
- small, commonplace investment properties such as tenanted houses or high profile disposals where there is sufficient interest generated to draw a large number of serious potential purchasers
- for the sale of secondary commercial properties where traditional methods of marketing might not attract sufficient interest
- where one needs to show that the highest price has been achieved for a quick sale, such as where a mortgagee has defaulted.

A clear advantage of this method of disposal is that when the hammer comes down a contract has been exchanged. This focuses everyone's minds, as there is no time to re-consider.

This method does, however, have some disadvantages and should be used with care. For example:

- auctions will not achieve the best price if there is insufficient interest or there is not competition within the sales room on the day

- similarly auctions may only produce a best price £1 more than the second bid, which is not necessarily the best price achievable
- potential purchasers may not have adequate time to undertake sufficient investigations prior to sale and they are therefore more likely to be cautious in their bids
- failure to sell a property at auction can have a blighting effect on the property
- some potential purchasers dislike auctions and will not therefore bid
- auctions can also be expensive.

When preparing for a disposal by auction preparation must be meticulous. Conditions of sale should be published with the auction prospectus. It is vital that the auction is sufficiently advertised and that the property has sufficient exposure to the market. The auction prospectus must be as accurate as possible as a sale following incorrect auction particulars or misstatements may lead to a recession or price abatement if the purchaser litigates.

Departments and advisers may decide upon a guide price to assist potential purchasers. This should not be confused with the reserve price, which is confidential between seller and auctioneer.

The selling agent/property adviser should indicate whether there should be a reserve price on the property. If there is to be a reserve price this should be set close to the time of the auction.

If a bid is accepted during the auction then the prospective purchaser must lodge a deposit cheque at the time. Completion follows according to the conditions of the sale issued with the auction prospectus.

Professional property advice should be sought to establish whether an auction is the most appropriate method of disposal.

Selling agents must ensure that auction particulars are accurate and, in addition, legal advisers should be instructed to draw up conditions of sale in advance of advertising the auction.

## 5.2 Leasehold Property

### 5.2.1 Disposal of long leasehold interest

In many respects, a long leasehold interest can be sold as if it were a freehold interest, providing it possesses capital value. The capital value in a long leasehold interest primarily exists as a result of the rent passing under the lease being significantly lower than open market rental value for the premises, with such a differential continuing for the term of the lease.

As with all leasehold interests, a disposal in the form of assignment to a third party may not completely absolve the department of all liabilities due to issues of privity of contract (see guidance below on assignment of leases).

### 5.2.2 Surrender

If a leasehold property is identified as surplus but there is no break in the near future, it may be possible to negotiate a surrender of a lease. This will be more attractive to a landlord in a strong market where it will be easy to re-let at a higher rent. In a poor market, however, it may prove hard to re-let and if a department can be held under privity of contract, a landlord is unlikely to agree to surrender the lease without suitable financial compensation.

A surrender premium should be explicitly in full and final settlement of all further liability under the lease and thus any dilapidations liability will need to be assessed and addressed. Landlords are under no obligation to agree to a surrender and therefore surrender premiums can be several times the annual rental when the prospects of re-letting the premises to a financially secure tenant are slim.

There may be situations where the value of the freehold interest with vacant possession exceeds the combined value of the freeholder's interest and the department's leasehold interest. In those circumstances the unexpired term may hold a special value to the landlord that will be released by 'marrying' the two interests together and it may be possible to obtain a premium from the freeholder in return for a surrender. Conversely, there may be a negative value and the Dept may need to pay a 'reverse premium' in order to terminate the lease prior to its natural expiry.

It will be important to obtain valuation advice on this matter to ascertain which category the property falls into – one where there may be a receivable premium or one where a premium will become payable.

If the department needs to pay a 'reverse premium' in order to surrender the lease, it may wish to consider how best to minimise the level of the premium. Common methods include:

- subletting on the best terms achievable
- entering into a Memorandum of Terms of Occupation (MOTO)/lease agreement with another department prior to negotiating a surrender. (The other department should be made fully aware of intentions and be agreeable.)

In certain circumstances it may also be possible to combine such activity and negotiations with the landlord to secure the surrender of the existing lease and the granting of a new interest to the ingoing occupier that better matches the objectives of the parties. Note that this type of negotiation can assist landlords to maintain income or to facilitate redevelopment.

Where a department has difficulty in making a capital payment for surrender, it may be attractive to both parties for the department to continue with a series of annual payments instead. Advice from property advisers would be required to negotiate the correct level of payments.

Professional advice should be sought to establish what, if any, liabilities there will be for dilapidations.

If a landlord has not previously been interested in a surrender, the department may wish to identify circumstances when a fresh approach might be appropriate i.e., the property has been sold to a new owner, the landlord's business may be in trouble etc.

### 5.2.3 Marriage of Interests

A marriage of interests can occur either by a leaseholder acquiring the superior interest (freehold, headlease, etc) or by a freeholder or superior leaseholder acquiring the interest below. Although not technically a disposal route, a marriage of interests can enable an enhanced disposal value to be achieved, either directly or indirectly.

A department may wish to consider whether it would be interested in acquiring the superior interest or, if it is the freeholder, acquiring the leasehold interest from the tenant. The key question is whether so doing would create a more valuable asset that can then be sold or divided up at a later time.

The concept of 'marriage value' is important when considering leasehold disposal options. Where a landlord accepts a surrender of a lease and is willing to pay a premium it is because the freehold interest is worth more when there is vacant possession than when it is subject to the lease. This is not always the case, as referred to in the previous section, but where the rent is below market value, or where the property has development potential it is likely that there will be value to be gained from the 'marriage' of the two interests.

Departments should be aware of the 'marriage value' when agreeing surrender terms with the landlord and professional valuation advice should be sought to identify what, if any, latent value exists.

If the department is the leaseholder, it may be able to acquire the freehold or head-leasehold interest from the landlord, thus 'marrying' the two interests as a precursor to disposal. This option requires a greater investment of resources than other options, but it also offers flexibility and, ultimately, better returns if the property is skilfully managed and disposed of. Alternatively, the landlord might agree to a joint disposal programme in which both interests are marketed and disposed of at the same time.

Acquiring the freehold would also give a department the flexibility to dispose or sublet part only of the property, change its use, effect an internal transfer or undertake improvement works (prior to either disposal or letting). It may also be used as part of a strategy to release the department from an onerous situation and enhance the value of the property interest to be sold.

When considering the future of property identified as surplus, it is important to consider all of these options and require property advisers to investigate whether the potential of marrying interests exists.

#### **5.2.4 Assignment**

Assignment is the transfer of the whole leasehold interest to another party and is therefore a method of 'releasing' property. It is also a method of passing on the responsibilities for the covenants set out in the lease.

Assignment is referred to as 'assignation' in Scotland.

If the assignment is to occur under strong market conditions where the passing rent is below the market rent and there is a significant time until the next rent review, a premium can be charged to a new tenant (assignee) for the benefit of the lease. Conversely, however, should the market not be strong and the current rent is higher than the market level, or the lease terms are particularly onerous, it may be necessary to offer an inducement to any incoming assignee by way of a 'reverse premium'.

There are often situations where a 'special purchaser' can be found and this should be considered, particularly if the property being disposed of is accommodation in a multi-let property. In such a situation a special purchaser may exist amongst the other occupiers. The possibility of obtaining additional accommodation in the same property might induce a potential assignee to pay a higher premium than would otherwise have been obtained.

Assignment usually requires the consent of the landlord. Checks should be undertaken to establish:

- whether consent is required
- whether the lease restricts assignment
- whether the lease sets down procedures for obtaining consent for assignment, particularly if this involves a long lead-time that could potentially hinder an assignment.

It should be noted that premiums paid to an ingoing tenant in return for a lease assignment may be treated as a taxable supply and be standard rated for VAT. It is important, therefore, where a property is being disposed of by way of a reverse premium that the VAT implications of the transaction have been fully considered.

For leases completed before 1st January 1996, under the doctrine of 'Privity of Contract' an assignor remains liable for the duration of the lease for breaches of covenant by its assignee at any time during the remaining term of the lease. Therefore, if a department assigns such a lease, it may be ultimately liable if either its assignee or a subsequent tenant defaults on rent payment or other covenant. This liability could arise at any time before lease expiry and could occur many years after the date of assignment.

On 1st January 1996 the Landlord and Tenant (Covenants) Act 1995 came into effect. This removed from leases the effects of privity of contract and provided that when an assignment takes place all the responsibilities and liabilities for the covenants and terms of the lease pass to the assignee (unless they were completed out of a contractual obligation entered into before this date).

Landlords can, however, require an assigning lessee to create an Authorised Guarantee Agreement, which contractually binds the current tenant should the new tenant default. Market conditions are currently such that this expectation is considered the norm, particularly with the strength of the Crown Covenant on an existing lease.

Landlord and Tenant legislation provides that a landlord should not unreasonably refuse consent for an assignment, unless the lease states in absolute terms that the tenant may not assign. However, the department's legal advisers should advise the department on this matter.

Strength of covenant is therefore very important when considering whether to assign a lease, particularly one granted before 1st January 1996. It is, therefore, important to thoroughly investigate the financial standing of any assignee and their ability to meet lease demands throughout the term.

A key obligation that may face the assigning department is that of dilapidations. If the lease provides for interim dilapidations in the event of an assignment, the extent of these will need to be ascertained and, where necessary, dealt with. It may be possible to negotiate with the landlord to enable the liability to pass to the assignee and the department's property advisers should be asked to advise on this matter.

Advice should also be sought in respect of a future liability for dilapidations. Where privity of contract remains, it is possible that the department will be faced with a dilapidations claim some time in the future if the new assignee, or any future assignee, defaults.

Case Officers in Scotland should note that Scottish leases did not carry with them privity of contract in the same way that leases in England and Wales did before 1996. Some Scottish leases therefore carried clauses that made tenants jointly and severally liable with their successors and future assignees for the performance of their leasehold obligations. Departments should take care when reviewing these leases as these clauses introduce the principles of privity of contract into Scottish leases.

#### **5.2.5 Internal transfers of leasehold properties**

It is possible that another department will wish to acquire property similar to the property identified as surplus. By notifying OGC and placing the subject property into the ePIMS property mapping database, such an interest can be identified. A valuation will then be required in order to establish the open market value and determine whether it would be appropriate to require a premium for the 'assignment', or indeed whether a reverse premium would be appropriate.

SROs and Case Officers should note that the Crown is indivisible and most departments hold property in the name of the First Secretary of State. As such an assignment to another Secretary of State should not be necessary since the key test is whether or not the Crown covenant status will be maintained. They are advised to seek legal advice to ensure that this is the case.

Disposing bodies will need to seek legal advice on transfers between departments and NDPBs due to the different legal status of each.

#### **5.2.6 Subletting**

Sub-letting is essentially the creation of a lesser leasehold interest to another tenant (the sub-tenant) to whom the department is then the landlord. It is not a method of disposal recommended by the Treasury, except in special circumstances, for a number of reasons. Following the grant of the sub-lease, the department remains liable for all its covenants under the head-lease while at the same time it must collect rent and generally manage the sub-letting.

Sub-letting is a sub optimal disposal route and should only be considered as part of a disposal strategy or estate rationalisation programme, rather than as a method to reduce or limit a department's exposure to property liabilities in a particular property.

It is not recommended for departments to become long term head lessees in property that is surplus to their own business requirements and sub-letting should generally only be considered as a short term measure. In that connection, it can be a useful tool to reduce liabilities. An example would be where a lease has a short unexpired term and the department is unable to assign its interest. A sub-letting of part of the property, if not the whole, could therefore serve as a method of reducing outgoings in respect of that particular property.

If the sub-letting is only intended as a temporary measure then the department should ensure that it does not lose security of tenure by giving up occupation.

As with assignment, a landlord's consent is usually required before a sub-letting can take effect and the lease itself may restrict sub-letting. The department should ensure that legal advice is sought on these matters before focussing its energies on setting up a sub-letting.

The appointed legal advisers should also address issues of security of tenure, dilapidations and environmental regulations/legislation where necessary.

An alternative approach to subletting part of a property might be to assign a lease and take back a sublease over the part that the department wishes to retain. This would obviate the need for the department to manage that part of the property it is not occupying and would further reduce its exposure to liabilities over that property.

If the subletting is intended as a short term arrangement, the department may wish to consider granting a licence or, alternatively, granting a sub-lease that is outside the terms of the Landlord and Tenant Act 1954. This would protect the department against a situation whereby the sub-tenant can claim security of tenure and would enable re-possession upon a relatively short notice.

The department will need to take advice from both its property advisers and its legal advisers in connection with the key terms of the sub-lease to be granted. Key considerations will include:

- use and use restrictions
- rent review pattern
- break clauses
- repairing and insuring covenants
- alienation and subletting permissions & restrictions
- who will be responsible for the repair and upkeep of common areas and shared space
- whether the sub-lease can be excluded from protection under Part II of the Landlord & Tenant Act 1954
- how the sub-lease will provide for permissions sought for alterations or improvements by the sub lessee (This will need to reflect the conditions of the main lease)
- whether any improvements will be disregarded at rent review
- if any improvements take place, whether the premises should be reinstated to their former state at the termination of the sub lease
- the financial status of the proposed sub-lessee (Financial and other checks will need to be undertaken)
- whether a new sub-lessee's use of the premises will affect other users of the property
- what the appropriate rental level is and whether a premium will be obtainable
- whether some or all of the dilapidations liability can be transferred to the sub-lessee
- whether subletting is preferred over a licence arrangement, subject to being able to avoid exclusive possession or certain term
- whether a sub-letting can be granted at a rent below the rent passing under the superior lease? (this may be relevant in times when market rents are low and may prevent a tenant forfeiting the tenancy due to an inability to pay).

As an alternative to subletting the property to a third party in the open market, a form of subletting could be undertaken to another department by use of a Memorandum of Terms of Occupation (MOTO), in accordance with the Civil Estate Occupancy Agreement (CEOA).

The CEOA, in effect since 1st April 1996, acts as a framework document that Crown bodies in central government should adopt to define general arrangements between the owning department (usually the major occupier) and another occupying department (usually a minor occupier).

Departments should be certain that if subletting to an NDPB or an executive agency, that body or agency can operate under a MOTO rather than requiring a formal tenancy. Departments should be sure to take appropriate legal advice on this matter before proceeding.

## 6. Negotiation, exchange and completion

In most instances the disposal of property will be undertaken through a direct negotiation with the purchasing party. Case officers should have prepared themselves for any negotiation and have ensured that all due consideration has been given to the disposal before the negotiations are entered into.

### 6.1 Preparation

The aim of the negotiation phase is to achieve the best consideration for asset disposal terms reasonably obtainable for the department. Preparation for negotiations plays an important role in achieving that goal.

Although the department's selling agents are likely to be both skilled and experienced in negotiating disposals, the department can assist them greatly by ensuring they are fully briefed about the department's parameters for agreement and its negotiating circumstances.

Key considerations prior to negotiations will include:

- strengths and weaknesses of the department's negotiating position
- an assessment of the parameters within which terms would be acceptable.

### 6.2 Negotiation

Case Officers should consider what the department's negotiating objectives are. This should be done in consultation with the department's property advisers. Examples are:

- where the purchasers are 'special purchasers' such that they would benefit more from the acquisition than another purchaser
- should there be a shortage of properties similar to the subject property such that potential purchasers may be prepared to pay a premium in order to secure the purchase than they might be at other times
- in the case of a sale and leaseback proposal, the prospective landlord would be faced with the opportunity of having a government department as the covenant on the lease, which is considered to be a secure covenant
- where there is a surplus of similar properties available on the market such that the potential purchaser could choose to acquire another similar property on better terms
- where the department is facing a potentially large backlog maintenance cost or dilapidations liability if they retain the property
- should the department be seeking to surrender a lease that has a long unexpired term, thus creating a potential problem for the landlord, if he agrees, in terms of a void period and uncertainty as to who would be the next tenant.

Case Officers should also establish a risk register and consider the risks identified in light of any negotiation or offer amending the register as necessary to reflect the latest negotiating position.

### 6.3 Agreement of terms

It is important that agents negotiating on the department's behalf clearly understand the parameters within which they must work. They need to be briefed to enable them to plan their negotiations accordingly.

The agent representing the department must clearly understand the decision making process for agreeing terms. This way, the agent can know when proposals can be agreed in principle and when they cannot. Information is often the negotiator's key tool and knowing what can be revealed and when can be important in obtaining the best disposal terms.

The Case Officer and Project Manager need to be certain about what levels of delegated authority exist in relation to this disposal so that they know when to refer matters to others for decisions.

Case Officers should also note what approvals will be required in order to complete the disposal. These should be arranged in good time, particularly if a report is to be produced recommending the terms for acceptance, or the matter is to be considered at a periodic Committee.

There is no guarantee that negotiations with the preferred purchaser will complete successfully. It will be important, therefore, to identify opportunities for keeping other prospective purchasers involved so that a 'reserve list' can be created. Tactics, such as setting time limits for agreement or holding simultaneous negotiations should be discussed with the department's disposal agents and their advice taken as to the most appropriate tactics under the prevailing circumstances.

#### **6.4 Liaison with Legal Advisers**

Ideally legal advisers and negotiating agents should be appointed at the same time for although the negotiating agent will be experienced in these matters, contract terms and conditions should still be discussed with the department's legal advisers prior to final agreement.

The Case Officer should ascertain when the legal advisers will require instructions at different stages of the process in order to ensure that those stages run smoothly.

The Case Officer and Project Manager should also establish whether the legal advisers will be given any form of delegated authority for transacting documents and upon whose authority they will be able to act.

#### **6.5 Due Diligence**

Departments should expect their agents to undertake adequate checks to ensure that:

- the terms agreed represent value for money
- the sale meets the objectives set out in the brief set by the department
- the proposed purchaser is able to complete the purchase as agreed.

Departments should be satisfied before committing to any transaction that they are not through committing to a transaction likely to be drawn into a "tax efficient" or involved in money laundering schemes. Particular care should be exercised when a potential purchaser is domiciled off-shore.

## 7. Vacant property

### 7.1 Vacating property

It is unlikely that properties can be disposed of prior to vacation.

The department will therefore remain responsible for all aspects of stewardship of the property following vacation until disposal even if not occupying it. If a freehold property, the department will remain liable for the Capital Charge; if it is a leasehold property, then the department will remain liable for the covenants under the lease including for the payment of rent. In addition, there will be the normal costs of ownership that accompany any property, such as Uniform Business Rates, insurance and any service charges that might apply. As many of these costs can be mitigated, there may be some advantages in vacating the property. In addition, there may be savings due to not incurring expenditure on energy usage and cleaning costs.

A risk evaluation should be undertaken to assess the total costs against benefits of the property remaining empty over given periods of time.

The department may also take steps to improve the likelihood of a successful disposal that might not have been possible whilst remaining in occupation such as refurbishment or reinstatement.

### 7.2 Mitigating costs

There are a number of outgoing costs that the department will remain liable for despite vacating a property. Many of these can be reduced or cut completely.

#### 7.2.1 Rent (if applicable)

This is one cost that cannot be either reduced or avoided. The landlord has a right to receive the rent, whether or not the department is in occupation.

#### 7.2.2 Uniform Business Rates

Government pays Uniform Business Rates on the non residential properties it occupies. If the property is vacant, an application can be made to the Local Authority for 'Empty Rates' to be applied. This could reduce the obligation by up to 50% for office property and up to 100% on warehouse and industrial property, which could be a considerable saving in respect of a large property. The relevant Local Authority should be advised at the earliest opportunity that a property is vacant.

SROs and Case Officers should be aware that leases occasionally include clauses through which Landlord's if losing the right to rates relief on account of the tenant already having enjoyed such relief can be indemnified.

Rating is a specialist area of property management and the department should take advice from its Rating advisers to ascertain what, if any, relief from Uniform Business Rates will be available.

#### 7.2.3 Insurance (if applicable)

Although the Crown normally 'self insures, where a lease contains a specific insurance clause it may be possible to reduce premiums if the property is vacant, provided that the property is adequately secured against illegal entry and potential vandalism.

#### 7.2.4 Utility costs (water, electricity, gas, etc)

Utilities such as water, gas and electricity can be disconnected, thus removing cost associated with them. There will be a charge for disconnection, as well as one for re-connection, which may be necessary in order to make a successful disposal.

An electricity supply may be necessary if an alarm system is in operation and the department decides to maintain that facility.

## 8. Advisers

### 8.1 Internal Advisers

The department may have a number of internal advisers available as a first port of call, with either legal or property expertise. In addition, advice is available from OGC's Consultancy division to support departmental disposal teams in their 'intelligent client' role.

These internal resources should be called upon to assist in the process of determining which professional advisers may be required in a particular project and how the procurement process should be approached. Departmental Heads of Procurement should be involved in any procurement.

### 8.2 External Advisers

*Advisers are procured by the department to give advice rather than to become decision-makers. Whilst external advisers may be relied upon to supply relevant professional and technical advice, that advice should support decision making rather than be a surrogate for it. The departmental disposal team through the SRO retains responsibility for decision making and must ensure that it has sufficient capability and resource to act as an 'intelligent client' for the services of external advisers and service providers.*

It is important to appoint suitably qualified professional consultants to advise on property disposals. The terms and conditions must be clear and agreed.

#### 8.2.1 Frameworks

In essence, a framework agreement exists where a department agrees with a number of external consultants the terms upon which they would undertake work for the department and, in return, the consultants will be given the opportunity to tender for work from time to time.

The procurement section of each department will hold a list of the framework agreements that exist for different kinds of work and the Case Officer should establish whether a framework exists for the type of work that is to be commissioned. In addition OGCbuying.solutions have a wide range of property, construction, advisory and technical framework agreements in place that departments can make use of<sup>ii</sup>. Departments are not obliged to use framework agreements to procure services but must be able to demonstrate value for money in their procurement choice. Case Officers should liaise with their departmental Head of Procurement.

The nature of advice likely to be required for property disposals will include:

- strategic property consultancy
- estate agency
- planning advice
- legal advice.

There may be occasions when the advice required cannot be obtained from consultants in the framework. In these instances, a justification should be made and a tendering exercise undertaken in order to bring in the required expertise.

#### 8.2.2 Specialist Advisers

Some tasks will require specialist advice. These may include clawback arrangements; development planning; and situations where Crichel Down Rules might apply.

Consultants in the framework agreement may have expertise in these matters, but if they do not then a case should be made to justify the use of specialist consultants that are not part of the framework agreement.

The need for specialist advisers should be identified at the stage of setting up the project or programme and as part of developing the business case.

### 8.3 Property Advisers

#### 8.3.1 Internal

As referred to earlier, the department may have a number of internal advisers available with property expertise. When reviewing the nature of property advice and expertise required for a specific disposal project, the Project Manager and Case Officer should consider whether there are internal resources that are appropriate and capable of providing the necessary advice.

Property transactions usually involve significant capital or revenue sums and, therefore, it is important that the department uses qualified professionals who have the appropriate expertise and capabilities for job in hand.

#### 8.3.2 National & Local

Local experience and knowledge may be relevant for some advice, for example local valuation advice, estate agency and knowledge of the local market. This should not be underestimated, as it can be a significant factor in a successful disposal.

For other advice, such as landlord and tenant matters or planning advice, local knowledge may not be as important as a broad market experience and knowledge.

The Case Officer should establish whether local knowledge will be important when engaging professional advisers.

#### 8.3.3 Types of Property Advice

Not all property advisers will be competent to advise on all property matters. Indeed, so wide is the field of property that it is almost impossible for one property professional to possess sufficient capacity and knowledge to provide all the necessary property related advice. Examples of the different types of property advice that may be relevant include those listed below.

<b>Estate Agents</b>	These handle the marketing of and selling of property assets. Agents provide expert knowledge in the relevant market sector and will advise on the best way to market a particular property interest in order to maximise interest from potential purchasers. Agents will then negotiate with potential purchasers in order to achieve the best terms possible for the department.
<b>Workplace Strategy Advisers</b>	The issues discussed in Section 1 relating to the development of a business related workplace strategy and the resulting disposals strategy is likely to be informed by specialist workplace strategies advisers who can help align the property strategy to business needs, and in particular, can advise on new ways of working and innovative workplaces that offer the potential to release property for disposal.

<b>Strategic Property Advisers and Estate Managers</b>	The wide range of considerations set out in Section 2 of this Guide is likely to be the province of the strategic property adviser and the estate manager who can advise on disposal considerations and appropriate disposal routes. They should work with the workplace strategies advisers to develop value for money disposals strategies.
<b>Property Valuers</b>	The appraisal work undertaken at the Business Case stage and in determining the disposal strategy will require the advice of a qualified property valuer. The valuer will identify the likely realisable value of the property or, as may be the case, the likely level of reverse premium to be paid in order to vacate a property.
<b>Building Surveyors</b>	A factor in the project appraisal will be an assessment of all aspects of the fabric of the property including the likely maintenance required to a property should it be retained and, where necessary, an assessment of a dilapidations liability. A building surveyor would probably provide the advice necessary to enable such assessments to be made.
<b>Planners</b>	Planning considerations have been mentioned several times in this Guide. This is particularly relevant where the property's disposal value could be increased should a change in planning use be obtained or where improvements that require planning consent are being considered in order to improve the marketability of the property.
<b>Development Surveyors</b>	Development surveyors provide specialist advice in cases where some form of pre-disposal development is to be considered.
<b>Investment Surveyors</b>	Investment surveyors will likely have specialist knowledge of the market for investments property, that is property that is either let or to be let by the potential purchaser.

#### 8.4 Legal Advisers

The department may be able to call upon internal legal advisers to manage the legal aspects of the project. However, there may be specialist aspects of the project that will require external legal advisers. This may include expert knowledge on issues such as:

- landlord and tenant legislation and procedures
- conveyancing
- clawback arrangements or restrictive covenants
- conditional contracts.

#### 8.5 Financial Advisers

The department may be able to call upon internal legal advisers to manage the financial aspects of the project. However, there may be specialist aspects of the project that will require external financial advisers. This may include expert knowledge on issues such as:

- financial appraisals
- financial modelling
- cost benefit analysis exercises.

The following documents have been referred to in this guidance. They form the basis for many of the assumptions made in this Guide in respect of government policy and provide the basis for the statutory foundations supporting many of the processes and disposal considerations described.

- Appraisal and Evaluation in Central Government 2003 (*The Green Book*) (<http://greenbook.treasury.gov.uk/>)
- Government Accounting (2000) ([www.government-accounting.gov.uk](http://www.government-accounting.gov.uk)), specifically Chapter 24
- OGC Information Note 02/2003 *Disposal of Surplus Land and Property within the Public Sector* ([www.ogc.gov.uk](http://www.ogc.gov.uk))
- OGC Information Note 20/2000 *Signed, Sealed and Delivered – Deeds and Sealing Guide* ([www.ogc.gov.uk](http://www.ogc.gov.uk))
- OGC Information Note 01/2003 *Transfer of Functions (Transport, Local Government and the Regions) Order 2002* ([www.ogc.gov.uk](http://www.ogc.gov.uk))
  
- OGC Estates Services Guide – England and Wales Edition 3 Revision 2 (2001), and ESG – Scotland Edition 2 (2000) ([http://www.ogc.gov.uk/sdtoolkit/reference/ogc\\_library/property/index.html](http://www.ogc.gov.uk/sdtoolkit/reference/ogc_library/property/index.html))
- OGC Workspace Strategies publication 2004 *Working without Walls – An insight into the transforming government workplace* ([www.ogc.gov.uk](http://www.ogc.gov.uk))
- OGC Programme / Project Management Centres of Excellence Information Pack (2003) (
- Protecting our Historic Environment – making the System Work Better (2003), Dept for Culture, Media & Sport (Architecture & Historic Environment Division)
- Resource Accounting Manual, 2004–2005 Edition, (<http://www.resource-accounting.gov.uk>), 8.10 and 12.1

*OGC Successful Delivery Toolkit*  
*OGC Gateway Process*  
*OGC Project Handbook*  
*OGC Finance & Procurement Handbook*  
*Civil Estate Occupancy Agreement*

<sup>i</sup> electronic Property Information Mapping Service (ePIMS) of government's civil property – further information about ePIMS is available at <http://www.ogc.gov.uk>

<sup>ii</sup> OGCBuying.solutions *Catalist* catalogues are available through [www.ogcbuyingsolutions.gov.uk](http://www.ogcbuyingsolutions.gov.uk)



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