



House of Commons
Committee of Public Accounts

The termination of the PFI contract for the National Physical Laboratory

Fifteenth Report of Session 2006–07

*Report, together with formal minutes, oral and
written evidence*

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The Committee of Public Accounts

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Summary

The National Physical Laboratory (NPL) works on the measurement of physical properties such as time, length and mass. It stands at the centre of the UK's National Measurement System.

Since its inception in 1902, the NPL has spread across its Teddington site, occupying a disparate collection of buildings. By the early 1990s many of the buildings could only with difficulty provide the conditions required for the NPL's scientific work. In 1998, the Department of Trade and Industry (the Department) and Laser, a special purpose company jointly owned by Serco Group plc and John Laing plc, signed a 25-year long Private Finance Initiative (PFI) contract, under which Laser would redevelop the NPL facilities.

The redevelopment of the NPL involved the replacement of many existing buildings and the construction in 16 linked modules of over 400 laboratories, many of which had to meet exacting environmental requirements. The project suffered considerable construction delays and problems, the most serious of which involved 30 laboratories in which stringent temperature and/or sub-audible noise requirements had to be met.

In July 2004, Laser recognised that it did not have the financial capacity to complete the project to the required specification and proposed either revision of its contract or termination. After negotiations, the PFI contract was terminated in December 2004 and the Department paid Laser £75 million for its interest in the new buildings. The termination was the first for a major PFI contract involving serious deficiencies in contractor performance.

On the basis of a report by the Comptroller and Auditor General,¹ we examined the problems that led to the termination of the PFI contract for the NPL and considered the lessons that might apply to future PFI projects. We took evidence from the Department, Serco Investments Ltd, John Laing plc and Abbey National plc.

1 C&AG's Report, *The Termination of the PFI Contract for the National Physical Laboratory*, HC (2005–06) 1044

Conclusions and Recommendations

- 1. The project incurred extra costs of some £10 million, plus a delay of five years or more.** The Department too readily assumed that the winning bidder would be able to meet the exceptionally demanding specification for this state-of-the-art scientific facility. Public sector clients should always satisfy themselves that contractors have the technical and financial capacity to handle the degree of project risk which they undertake to bear.
- 2. The long delay in completing the project obliged leading UK scientists to pursue their research in seriously outmoded facilities.** Through improvisation and ingenuity, they were able to continue their work, but it must be regretted that they were placed in this position by shortcomings in the Department's procurement strategy for the new facilities.
- 3. The Department received only ten expressions of interest in response to its initial advertisement of the procurement, and two of the four bidders short-listed for the contract withdrew shortly thereafter.** As a consequence, the Department had only limited scope to use competition to encourage Laser to improve its design. Before short-listing bidders, departments need to gauge the strength of the interest in their projects and reformulate projects if there is not sufficient interest to provide strong competition in the procurement.
- 4. The bid submitted by one of the two remaining bidders was weakened by the Department's concerns that the bidder's proposals for exploiting surplus land might not be acceptable to the planning authority.** Departments should satisfy themselves that bidders can meet the principal requirements of the project before considering the potential benefits from secondary opportunities.
- 5. Although it had concerns about the bidders' design, the Department expected the financial consequences of failure to discipline the prospective contractor into taking corrective action.** If departments have concerns about bidders' designs, they need to satisfy themselves that bidders have addressed these concerns before placing contracts. For particularly challenging projects, departments should require bidders to demonstrate that their designs will work before the award of contract, for example by constructing prototypes of their designs. The highly technical nature of this project means that the Department should have consulted the scientists affected more closely.
- 6. Following contract award, the Department became aware that John Laing Construction Ltd modified its design without first confirming that the result would meet the Department's objectives.** The Department was reluctant to insist on changes for fear of taking on responsibility for the design. Departments should require bidders and contractors to notify them of significant changes of design, and demonstrate that amended designs will continue to meet the required specification.

7. **The Department retained use of the existing facilities at the NPL while the new buildings were being constructed.** As a result, the NPL was able to continue its scientific work despite the delays in construction, and the Department was not under pressure to compromise on quality requirements in order to gain use of the new buildings quickly. Departments should plan standby arrangements so that if there are delays to projects they can maintain business continuity without compromising their requirements.
8. **The project lenders did not exercise their step-in rights to save the project because they did not want to take on the responsibility of solving the problems with the design.** Treasury guidance recommends the provision of such rights to provide an opportunity for lenders to revive projects whilst avoiding the disruption of termination. Departments should be aware that project lenders are unlikely to exercise their step-in rights unless they consider it in their interests to do so.

1 The Department could have reduced the project risks

1. The Department chose to procure the contract for redeveloping the National Physical Laboratory (NPL) using the Private Finance Initiative (PFI).² The procurement was based on the delivery of specified outputs.³ The intention was to transfer the design risk to the private sector.⁴

2. The redevelopment involved the construction of over 400 laboratories, many of which had to meet exacting environmental requirements, such as for temperature and sub-audible noise control.⁵ The specification for the development was drawn up between the prospective contractors, engineers and scientists on the basis that the new facilities would replicate the specification of the existing laboratories in terms of their performance, but with increased reliability and over a greater volume of space.⁶

3. Expressions of interest in the project were initially received from ten consortia. The Department short-listed four of these to bid for the contract, but two subsequently withdrew.⁷ The two remaining bidders were Laser, a special purpose company jointly owned by Serco Group plc and John Laing plc, and a consortium called Osborne.⁸ Following an assessment of the bids, a twenty-five year PFI contract was let to Laser in July 1998, under which the company would redevelop the NPL facilities and provide property management services.⁹ The planned cost of the new buildings was £96 million. The Department would pay a unitary charge of £11.5 million a year once the buildings were complete.¹⁰

4. At the time the contract was let the NPL redevelopment included the most technically demanding requirements yet specified under the PFI.¹¹ Nonetheless, the Department did not consider that the project was too complex for the PFI, and believed that it would be possible to achieve the output specification since it was being met in the existing NPL buildings and at the American National Institute of Standards and Technology.¹²

5. Concerns regarding the suitability of the project designs were first identified during the evaluation of the two bids received by the Department. The bid evaluation team's assessment of the bids concluded that neither bidder had demonstrated how they would meet the requirement for stringent temperature controls in certain laboratories. The

2 C&AG's Report, para 2

3 C&AG's Report, para 2.2

4 Qq 33–37

5 Qq 5, 111; C&AG's Report, para 2.3

6 Qq 28, 61, 65

7 Qq 56–57; C&AG's Report, para 2.12

8 Q 56; C&AG's Report, para 1.2, Figure 9

9 Q 40; C&AG's Report, para 1.2

10 C&AG's Report, para 1

11 C&AG's Report, para 2.3; Q 55

12 Q 5

evaluation team suggested that the bidders should work up their designs by constructing a pilot laboratory but the Department did not follow up this idea because of potential costs and delays, the risk that the potential contractors would walk away from the project, and the confidence it had in John Laing Construction Ltd (JLC Ltd) as the building contractor.¹³

6. The bidders were also encouraged to consider opportunities to develop surplus land made available by the consolidation of the NPL facilities on a smaller site.¹⁴ The Department's intention was that the cost of the project would be reduced by the amount of the proceeds from the sale of the land.¹⁵ However, the Department's concerns that Osborne's proposals for the development of the surplus land might not be acceptable to the planning authority effectively ruled Osborne out of the bidding, and Laser was left without strong competition to encourage it to improve its proposal.¹⁶ The Department now accepted that better cultivation of the market to secure more bidders would have been helpful.¹⁷ At the time, however, it had believed that Laser could deliver the project, and that the low number of bidders did not bring the feasibility of the project into question.¹⁸

7. The Department had felt able to proceed with Laser because John Laing Construction Ltd had extensive experience of constructing specialist laboratories and part of the Serco Group plc had been running the science facilities at the NPL, and because by the time the contract was signed it had designs from Laser which gave it the necessary confidence.¹⁹ The Department's due diligence enquiries gave it no reason to doubt JLC Ltd's technical or financial capability to deliver the project.²⁰ The appointment of Laser as preferred bidder was considered preferable to re-tendering in an effort to increase the number of bidders.²¹ The Department also considered that by transferring design and construction risk to Laser, the financial and reputational consequences of failure would provide an incentive for Laser and JLC Ltd to meet the requirements of the output specification.²²

8. In the event, construction encountered serious delays and difficulties in meeting the specification.²³ Although the best and final offer from Laser showed that some of the suggestions made by the Department's advisers had been incorporated in the designs, when later a pilot was built it became clear that the design of the pilot did not reflect the designs that had been discussed. By this time construction of the main facility had begun, making it difficult to change course.²⁴ John Laing plc told us that JLC Ltd had grossly underestimated the technical complexity of the job and had failed to test rigorously its own

13 C&AG's Report, para 2.4; Qq 14–15, 31

14 C&AG's Report, para 2.13

15 Q 53

16 Qq 121–122

17 Q 80

18 Q 107

19 Q 2

20 Q 3

21 Qq 80, 110

22 C&AG's Report, para 2.5; Q 34

23 C&AG's Report, paras 1.10, 1.11

24 Q 32

competence, and that of its sub-contractors, to deliver the project.²⁵ The Department also now thought that it should have scrutinised more thoroughly the technical capabilities of the contractors.²⁶

9. The structure of the contract meant that JLC Ltd received payments based on progress with building work rather than meeting the output specification. By 2001, it had been paid £76 million against an agreed fixed price contract of £82 million, although only nine out of the sixteen modules were finished and further work was required to meet the specification.²⁷ At this point JLC Ltd estimated that the cost of completing the project would be at least £45 million, while it could only earn a further £6 million. JLC Ltd also estimated that its future losses would greatly exceed its £31 million contractual liability to Laser.²⁸

10. Although the facilities are being delivered many years late, the Department believed it would not have had sufficient capital to develop the facility using traditional procurement methods. To have followed the traditional procurement path would have resulted in a piecemeal development and a high level of disruption to the ongoing scientific work at the NPL.²⁹ The availability of the existing facilities had allowed the NPL to continue its scientific work despite the delays in construction.³⁰

25 Qq 14, 88

26 Q 80

27 C&AG's Report, paras 2.28–2.29

28 C&AG's Report, para 1.19

29 Qq 5, 86, 124

30 Qq 25, 124

2 The termination of the PFI Contract

11. Construction work on site began in July 1998.³¹ Deficiencies in JLC Ltd's designs were identified by the Department's technical advisor, HDR, and the project's Independent Certifier in early 1999.³² As construction continued numerous problems arose, including significant problems with the performance of JLC Ltd's designs, which resulted in delays in the completion of all construction phases. These delays ranged from six months up to nearly four years, and altogether the project has been delayed by five to six years.³³

12. The Department offered advice to Laser on solving the design problems, including advice from the Department's engineering advisers, HDR.³⁴ The Department was however concerned not to take back from Laser the design risk that had been transferred to it under the PFI contract. The Department therefore felt unable to step in and insist on design changes for fear that by doing so it would accept some of the design risk, and decided to leave the problems with Laser.³⁵

13. The Department considered terminating the contract on three occasions between 2001 and 2003.³⁶ On the first occasion, in 2001, it considered doing so on the basis of Laser's performance. On the second, towards the end of the same year, it considered doing so because Laser had signed an agreement with John Laing plc relaxing the performance requirements in the construction contract without the Department's consent; and on the third because of Laser's late delivery.³⁷ On each occasion the Department received firm legal advice from experts in construction law that it would be risky to initiate termination, particularly while Laser was still solvent and willing to continue, because it might itself be liable for damages.³⁸ The Department was also concerned at the potential difficulty of finding a replacement contractor, and the likelihood that the project's evident problems would have meant that it could only have done so by paying a much higher price.³⁹

14. Treasury guidance recommends the provision in PFI projects of step-in rights for lenders. These rights entitle the lenders in defined circumstances to take control of a project and are intended to provide an opportunity for the lenders to revive the project, thereby avoiding the disruption of a termination.⁴⁰ However, Laser's lenders chose not to exercise their rights to step-in to the project because they did not want to assume responsibility for solving the problems with the design.⁴¹

31 C&AG's Report, Figure 3

32 C&AG's Report, para 2.9

33 C&AG's Report, paras 1.10, 1.11; Figures 5, 6; Q 23

34 Qq 35–36

35 Q 8

36 Q 8, C&AG's Report, para 1.20

37 Q 8; C&AG's Report, para 1.20

38 Qq 8, 76, 103; C&AG's Report, paras 3.18–3.21

39 Qq 8, 76, 104–106

40 HM Treasury, *Standardisation of PFI Contracts Version 3*, April 2004, para 31.1.3

41 C&AG's Report, para 1.27; Qq 100–101

15. By mid-2004 Laser had exhausted the funds available to it to complete the building and on 7 July 2004 it proposed to the Department that the PFI contract should either be revised and re financed, or terminated.⁴² The Department decided on termination, but sought to achieve it by negotiation, which it considered would probably get a better and quicker result than a formal termination for contractor default.⁴³

16. The agreement between Laser and the Department provided for the appointment of an Independent Certifier to determine the completion of each phase of the building, paid for jointly by Laser and the Department.⁴⁴ By 5 July 2004, the Independent Certifier had signed off completion of the last of the building modules.⁴⁵ The Department considered that some of the construction phases had been wrongly certified and referred the matter to adjudication.⁴⁶ The adjudicator concluded that the Department did not have beneficial use of the space at issue, and decided in favour of the Department.⁴⁷

17. The Department and Laser formally terminated the contract in December 2004.⁴⁸ The Department paid Laser £75 million for its interest in the building and assumed responsibility for its completion.⁴⁹ The Department's opening position in negotiating the termination sum was informed by the contractual provisions governing contractor default. Under these provisions the termination sum was the lesser of the lender's liabilities, initially assessed at £93 million, and Laser's construction costs, adjusted for the projected cost to the Department of completing the project and any unpaid damages owed by the company, initially assessed at £54 million.⁵⁰ As negotiations progressed, the Department estimated that a more realistic assessment would be between £86 million and £73 million; the agreed termination sum was near the lower boundary of this range.⁵¹

18. Over three years passed from when the Department first considered termination of the contract to the actual termination, but a lot of work was completed during this period.⁵² And if had it pushed for termination of the contract in 2001, it would not have been in as good a position as had been achieved, with a nearly completed building.⁵³ It was confident that the remaining construction work could be completed within a budget of £18 million and that the scientific modules would be 98 per cent ready for occupancy by the end of March 2007.⁵⁴ With completion, the Department's investment in the new facilities was likely to total £140 million (2005 prices), £10 million more than the total of Laser's budgeted construction cost of £113 million (2005 prices) and the Department's

42 C&AG's Report, paras 1.22–1.24, 1.28–1.29, Figure 8

43 Q 78

44 C&AG's Report, para 1.9; Q 73

45 C&AG's Report, Figure 3

46 Qq 69, 75, 123

47 Q 75

48 C&AG's Report, Figure 3

49 C&AG's Report, para 1.4

50 Qq 10, 77; C&AG's Report, paras 4.3

51 Q 10

52 Q 8

53 Q 8, 76

54 Qq 16–17

procurement and other budgeted costs of £17 million (2005 prices).⁵⁵ Laser, its owners and its contractors reported losses totalling over £100 million.⁵⁶

55 C&AG's Report, para 4.15; Q 22

56 C&AG's Report, Figure 2

Formal Minutes

TUESDAY 27 FEBRUARY 2007

Mr Edward Leigh, in the Chair

Mr Richard Bacon
Annette Brooke
Mr David Curry
Mr Philip Dunne
Helen Goodman

Mr Sadiq Khan
Mr Austin Mitchell
Dr John Pugh
Mr Don Touhig
Mr Alan Williams

Draft Report

A draft Report (The termination of the PFI contract for the National Physical Laboratory), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 18 read and agreed to.

Conclusions and recommendations read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fifteenth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned until Wednesday 28 February at 3.30 pm.]

Witnesses

Wednesday 18 October 2006

Sir Brian Bender KCB, Permanent Secretary, and **Mr Peter Dawes**, Deputy Director, National Measurement System, Department of Trade and Industry, **Mr Bill McNaught**, Managing Director, Serco Investments Ltd, **Mr Adrian Ewer**, Chief Executive, John Laing plc, **Mr Andrew Briggs**, Head of Corporate Banking Services, Abbey Financial Markets, Abbey National plc Ev 1

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Oral evidence

Taken before the Committee of Public Accounts

on Wednesday 18 October 2006

Members present:

Mr Edward Leigh, in the Chair

Mr Richard Bacon
Mr David Curry

Mr Don Touhig
Mr Alan Williams

Mr Tim Burr, Deputy Comptroller and Auditor General, and Mr Richard Abadie, HM Treasury, were in attendance.

REPORT BY THE COMPTROLLER AND AUDITOR GENERAL

THE TERMINATION OF THE PFI CONTRACT FOR THE

NATIONAL PHYSICAL LABORATORY (HC1044)

Witnesses: **Sir Brian Bender** KCB, Permanent Secretary, and **Mr Peter Dawes**, Deputy Director, National Measurement System, Department of Trade and Industry, **Mr Bill McNaught**, Managing Director, Serco Investments Ltd, **Mr Adrian Ewer**, Chief Executive, John Laing plc, **Mr Andrew Briggs**, Head of Corporate Banking Services, Abbey Financial Markets, Abbey National plc, gave evidence, **Mr Chris Shapcott**, Director, National Audit Office and **Ms Paula Diggle**, Treasury Officer of Account, were in attendance and gave oral evidence.

Q1 Chairman: Good afternoon. Welcome to the Public Accounts Committee. I should say that Kitty Ussher will not be joining us because she has been made a Parliamentary Private Secretary, so perhaps on behalf of the Members of the Committee I can send her our congratulations and warm good wishes. I would also like to thank the staff of the National Physical Laboratory for entertaining Mr Don Touhig and myself yesterday morning and for a very interesting visit which certainly brought the whole project alive. We were very impressed by the extraordinary calibre of the staff at the laboratory and the world quality work they are doing. It was fascinating. This afternoon's hearing is on *The Termination of the PFI contract for the National Physical Laboratory*. I would like to welcome back to our Committee Sir Brian Bender, who is the Permanent Secretary of the Department of Trade and Industry, Bill McNaught, who is Managing Director of Serco Investments Ltd, Adrian Ewer, who is Chief Executive of John Laing plc and Andy Briggs from Abbey National plc. Sir Brian, perhaps I could address my initial questions to you. Of course, if you want to refer your answer to anybody else you are free to do so. The first question is why did you give this contract to Laser when you had doubts about its ability to do this work, doubts which are well documented in the NAO Report?

Sir Brian Bender: Before I answer can I just introduce Mr Dawes whom I think you and Mr Touhig met yesterday and who has been Project Manager for this project for the last 11 years or so.

Q2 Chairman: Yes; he was very helpful in taking us round yesterday and we are very grateful.

Sir Brian Bender: There were two main reasons why we proceeded with Laser. The first is that in the case of the two companies who were the partners of Laser we had people who we believed had a track record. Laing had extensive experience of laboratory construction, the Central Science Laboratory, Glaxo Smith Klein and so on, and Serco themselves had experience in a different part of the company running the science facilities at NPL, so we believed that they were companies that had the expertise. Secondly, the doubts we had, that as you say are well documented in the Report, were at preferred bidder stage, but in the period between then and contract signature nearly a year later we and our advisers worked with Laser and their contractors to develop the detailed output specifications based on the performance of the existing laboratories; and by contract signature the designs that we had from Laser gave us reason, the Department felt at the time, to be confident.

Q3 Chairman: Do you think that Laing really had the financial capability to carry this through? Obviously, in retrospect, we know they did not.

Sir Brian Bender: We did due diligence at the time. They were a reputable company, and plainly what we did not know at the time was how much this project, and indeed the parallel difficulties they were in on the Welsh Millennium Stadium, would cause them difficulties. We had no reason at the time, as a result of the advice we had, either on technical or on financial grounds, to doubt their capability.

Q4 Chairman: Was the National Physical Laboratory really suitable for a PFI project?

 Department of Trade and Industry, Serco Investments Ltd, John Laing plc and Abbey National plc

Sir Brian Bender: We did some testing at the time and, of course, as the Committee will be well aware, this was one of the first PFI projects. It was a long time ago. The testing, the assessment, the advice we had at the time were that there was a case for it. The second point is that the alternative would have been piecemeal construction because the Department at the time would not have had the capital available to do a single new build like this. A piecemeal construction would have been more disruptive and we would not have ended up with a single new building of the type we sought.

Q5 Chairman: You see, I think that this is too complex. It is rather like very complex IT projects. It is too complex a project for PFI. We are talking about labs which are of an extraordinarily high specification and have to be very quiet and have very careful temperature control. The people who actually design these sorts of lab are the people who work in them. Maybe it would have been better if they had been much more closely involved in the traditional procurement mechanism and the design of this rather than putting it out to PFI. I am saying all this, perhaps you would say, with the benefit of hindsight, but we know that the National Physical Laboratory is at the absolute cutting edge of technology and surely somebody in the Department might have just questioned whether it was appropriate for PFI, which is fine for building a hospital or a school but not for this maybe.

Sir Brian Bender: If I may say so, you are using the benefit of hindsight and there are a number of lessons from this that you may want to ask about later on, but from looking at the papers myself I would make a number of points. First of all, the specifications were being met in the old buildings, strangely enough, and also, we believed, in the American National Institute of Standards and Technology. Secondly, as I say, having done the relevant market testing and having had the discussions with Laser along the way, we had no reason not to have confidence that it was possible. The third point I would make, that I referred to earlier, is that we have actually ended up with a single new build facility, albeit many years late, which, had we gone down the traditional route, we would not have had because we would not have had the capital available.

Q6 Chairman: We were very struck yesterday when we were told that the original laboratories—the National Physical Laboratory which was opened by George V in 1901, so it has been there a long time—worked extremely well because they were in a solid brick structure built on gravel, but this new build is a glass and steel lightweight structure near a main road and a bus station. You do not think that some of these brilliant minds might have made the connection?

Mr Dawes: There are a number of issues here. The first is that yes, the old buildings are good in some aspects. The solid brick structure, as you saw, does give you good vibration performance but there are severe difficulties, and again, as I think we saw, in

getting good temperature control the solid structures have good passive control but they tend to drift and there is not the space to get the good environmental equipment in there.

Q7 Chairman: I do not deny that the old buildings are not perfect. It just seems that this is all fairly elementary, is it not, that a brick building built on gravel tends to be less prone to vibration than a glass and steel structure that is built next to a main road.

Mr Dawes: Yes, but I think the care that was taken with the structure again we saw with the offices surrounding the central labs. The central labs being on pile foundations and separated from the main structure are a modern equivalent of getting a solid brick structure. It performs to the output specification so I think it is a compromise. You either accept a solid structure with very limited ability to control temperature or you have a modern structure with deep piling and a protected environment but having the ability to get good temperature control as well.

Q8 Chairman: Sir Brian, why did it take you so long to terminate this contract that was stuttering along in its death throes for three years?

Sir Brian Bender: The short answer, which I will then, if I may, elaborate on, is that we were operating on the best advice we had from our legal and financial advisers. There were three points along the way when we considered initiating termination ourselves: in 2001 based on the performance of Laser, towards the end of that year on the signature of the supplemental deed, and in the middle of 2003 we considered terminating on the grounds of late delivery. On each occasion we received firm legal advice that it would be very risky for us to initiate termination on that basis, particularly while the company was still solvent and willing to continue. I would also assert that quite a lot happened in that period to enable us to have a building that by next March will be complete, so quite a lot of good things happened while this termination process, as you put it, was not happening. The company was carrying on doing its best, albeit with problems and with its own financial problems but had we terminated successfully, despite the legal advice, in 2001 I suspect we would not have been in as good a position now with a nearly complete building.

Q9 Chairman: If it is such a brilliant way of doing things why did John Laing get most of the money for half the job?

Sir Brian Bender: I assume you are asking about the point that is in paragraph 2.28 about progress on each phase.

Q10 Chairman: For instance, you agreed to terminate for a sum of £75 million. You had calculated that Laser's entitlement might be as little as £54 million.

Sir Brian Bender: The question of the termination sum is set out as clearly as I could have done it myself from the NAO Report. We had a negotiating position. It was informed by the provisions

Department of Trade and Industry, Serco Investments Ltd, John Laing plc and Abbey National plc

governing contractor default. There was then a wide range of likely outcomes, £54 million to £93 million, and on some of those our assessment was that our justification was weak, so we then refined that (this is in Part 4) to a more realistic range of outcomes, £73 million to £86 million, and the conclusion was the £75 million. We feel the outcome was satisfactory and I am reassured that the NAO in paragraph 4.6 said it was near the lower boundary.

Q11 Chairman: I had better put this question to Mr Ewer then. Is it a fair criticism that you got most of the money for half the job?

Mr Ewer: Our former construction company would not have entered into the job if it was not going to be paid on the way through because you have pointed out already the fact about Laing's financial capacity, which was not to take on £90 million worth of building without being paid until you handed over at the end of the day.

Q12 Chairman: So you did get most of the money for half the job.

Mr Ewer: You need to be paid on the way through.

Q13 Chairman: So you did get most of the money for half the job?

Mr Ewer: Half the job? The job was substantially finished. I know it is not performing to what was absolutely required but on a job where—

Q14 Chairman: Why did you enter into this contract which proved to be beyond your capabilities?

Mr Ewer: I have to hold my hand up and say that John Laing Construction, which was sold in 2001, as you know, did grossly underestimate the technical complexity of the job. Had they fully appreciated the technical complexity I do not think they would have entered into the construction contract, not in that format.

Q15 Chairman: Mr McNaught, the same question: why did you enter this contract which proved beyond your capabilities?

Mr McNaught: We had a great deal of confidence at the time that John Laing Construction would design and build the new laboratory to the DTI's specification. They had a proven track record, looking back 10 years ago. I think the year the contract was signed they were the building contractor of the year, celebrating 150 years in the industry, so there was a great deal of confidence that they could achieve the output specification.

Q16 Chairman: Sir Brian, can you complete this job for £18 million? You are confident, are you? The private sector had such difficulties you are confident that you can do it where they could not do it?

Sir Brian Bender: I asked my team exactly that question, why are we confident, and the answer is that first of all we are nearly there. We are confident of getting into the building for occupancy from next March.

Q17 Chairman: Hang on: we were there yesterday. This is six months away now and there still seems to be a lot of work on this.

Sir Brian Bender: As I understand it, 80% is now available for occupancy. Six out of ten of the scientific modules are fully occupied, two out ten partially. We are confident that by the end of March it will be 98% ready. There are issues about the category two facilities. In terms of readiness for completion, we are cautiously confident. In terms of how we managed to do it, I think the answer is that we have learned an awful lot along the way from our tracking and from the advice we have had, so that by the time of the termination we had a fair degree of confidence about how to proceed.

Q18 Chairman: Mr McNaught, do you think they can do it?

Mr McNaught: I have not seen their completion plan. We had a plan that showed, apart from category two, that we would have completed around the middle of last year.

Q19 Chairman: Last year?

Mr McNaught: Yes.

Q20 Chairman: So they are performing less well than you would have done?

Mr McNaught: We had an experienced team on site. They had to start from scratch.

Q21 Chairman: Sir Brian is laughing at that.

Sir Brian Bender: I think it is fair to say that there was some delay after we took over because we had to put the project management capability together, so, although we had a lot of experience and some expertise in our team, we then had to put together a team that would make sure we could do that, and that would explain why there was therefore some delay.

Q22 Chairman: Just remind me how much this has all cost the taxpayer?

Sir Brian Bender: For the taxpayer I think the sum is £140 million.

Q23 Chairman: And it is how many years late?

Sir Brian Bender: It is about five or six years late. There is a question about how you cost that.

Q24 Chairman: If you coped so well without these labs why did we need them in the first place?

Sir Brian Bender: I hope, Chairman, that from the visit you and Mr Touhig made yesterday you would have seen that the excellent way that the NPL has coped is essentially through a slight Heath Robinson-type approach.

Q25 Chairman: It has been through a slight Heath Robinson-type approach?

Sir Brian Bender: I do not know how much of the old facilities and the old buildings you saw, but I think it says a lot for the ingenuity of British scientists that they sort of strung things together, they put fans

here, they put baffles there, and it is quite remarkable that the NPL has remained among the top three such institutes in the world without such facilities.

Q26 Mr Touhig: Can I echo the Chairman's remarks about our visit yesterday. It was a first-class visit. We paid tribute to the staff there who are working in a little bit more than Heath Robinson conditions and are actually making some of this work, and I think are probably are working in inferior conditions to the ones they are leaving. Sir Brian, have you ever built anything?

Sir Brian Bender: I am not sure the Committee really wants to know about my DIY ability but the answer is no.

Q27 Mr Touhig: Garden walls?

Sir Brian Bender: The answer is no. I have not been responsible for construction and, as for my DIY capabilities, my wife is glad I have now got to the level of seniority that I can pay someone else to do it.

Q28 Mr Touhig: We built a house and thank God my wife was the clerk of works because she ensured that when the work was not right it was pulled down and started again and the whole job was kept to the specification. We met people yesterday who were certainly consulted about the design and the planning and so on, but then there was a break and there were things that they told us about yesterday that certainly would have been spotted had they been a bit more involved. As I say, my wife was there constantly monitoring the project. Do you not think there was a failure somewhere to keep those people directly involved right throughout the whole project?

Mr Dawes: Certainly at the outset, as you might have picked up, we did have a lot of involvement from the scientists in negotiating the specifications. It was not simply a question of handing over the output specifications, "Here they are". There was a process of negotiation with the contractor and with the engineers. Subsequent to that, when there were issues which arose, we again got the scientists involved in trying to reach compromises or accommodations for some of the issues that were coming up.

Q29 Mr Touhig: But you got involved, Mr Dawes, when it started going wrong.

Mr Dawes: Yes.

Q30 Mr Touhig: Why were they not involved right the way through? We talked to people yesterday, and they planned it so it was an excellent visit, who said to us—they said to me certainly—that if they had been more deeply involved they would have spotted some of the errors that have now left you with a problem.

Mr Dawes: As I say, it is unfortunate and regrettable if there are individual cases where that has happened, but in some of the key areas, some of the close control labs that you saw, the redesign of those, which was one of the fundamental issues that we dealt with, was based on a very close understanding

between the engineers and the scientists as to how those spaces could be reconfigured, as you saw, probably a reduced volume of control space but still being able to do the science. You cannot do that unless you have a very close working relationship. If there are still lingering concerns, yes, we are picking those up as we go along, but, as I say, some of the fundamental problems that we faced, which were arguably some of the reasons for the failure of the project as a PFI, and some of the actions that we had to take along with Laser and the contractors, were based very much on a close discussion between the engineers, the scientists and ourselves. Yes, I accept there probably are still some lingering issues but we still have a team in place where we are going through each of the individual labs and discussing with the scientists what their difficulties are and where we can we are correcting those as we go along.

Q31 Mr Touhig: My impression yesterday was that you are very fortunate to have such a committed and professional staff who are making up for the shortcomings of the management of the whole project. If we can turn to page 21, paragraph 2.4, "The Department identified concerns about the design at several stages", at the bottom of that it says, "The [evaluation] team concluded that neither bidder"—Laser or Osborne—"had demonstrated specifically how it would meet the stringent temperature controls required in some of the laboratory spaces". We saw that raised yesterday. "The team suggested that a single laboratory should be selected and the bidders asked to work up their designs. The Department did not follow up the idea." Why is that, Sir Brian?

Sir Brian Bender: I think with 20/20 hindsight that is one of the things we would probably do differently, but, at that point in time, given the potential cost and/or delay, or indeed the risk of competing contractors walking away, and given the confidence that we were developing, as I mentioned earlier to the Chairman, it did not seem a necessary thing to do.

Q32 Mr Touhig: But your evaluation team recommended it.

Mr Dawes: At this point in time, yes, there were concerns, but the designs that were included in the best and final offer from Laser showed that some of the suggestions that were coming through from our advisers were being incorporated in the designs. It was only later, I think, when the actual pilot was built—and they did build a pilot—that unfortunately the designs that were incorporated in the pilot did not reflect the designs which we had seen during the discussion at the at the BAFO stage, the best and final offer stage. The other thing that happened, of course, was that the pilot was being tested in parallel at the same time that the facility was being built, so you had a difficulty in changing course. At least, I assume that is what happened.

Q33 Mr Touhig: The Report goes on in paragraph 2.5 to say, "The bid evaluation team also considered that Laser had underestimated how tough meeting

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the most stringent temperature control requirements would be and had not made sufficient space available in its design for the machinery needed to maintain the specified environmental conditions. However, the Department did not demand from Laser detailed plans for addressing these concerns.” It is somewhat negative again.

Mr Dawes: I think the whole point of PFI is about risk transfer. We can make the observations, if you like, about concerns that our advisers had with the design but ultimately it is for the contractor to decide how to build the facility and to deliver the output specifications. If we had stepped in and dictated how the designs ought to be carried through we would have accepted design risk.

Q34 Mr Touhig: It is a bit like Pontius Pilate though, is it not, washing your hands of it? If you look at 2.8 in the Report on page 22, it tells us that although there were concerns you really felt that “the financial and reputational consequences of failure would discipline Laser and JLC Ltd”, but it did not, did it?

Sir Brian Bender: If I may say so, I think again there is some hindsight coming in here. At the time we were very concerned not to transfer the risk back to us and therefore we were determined to stick to output specifications. As I explained in a reply to Mr Leigh earlier, by the time of contract signature our earlier doubts about the partnership’s ability to deliver this had largely been dissipated. Therefore, the question was how much confidence we had moving forward, but to step in in the way you were suggesting would have seriously risked us taking the design risk upon ourselves and therefore the consequences of that.

Q35 Mr Touhig: What are you doing now, Sir Brian? You are taking the design risk on yourself and putting it right.

Sir Brian Bender: We have taken it upon ourselves.

Mr Dawes: Just coming back to when the build was happening, as soon as we knew that there were difficulties coming out of the results from the pilot we offered, and I think they accepted, advice from our own engineers as to how to resolve these issues, so we did at that stage step in and take some positive action. That in itself was difficult because of the problem of taking design responsibility, so we had to be careful in doing that. We felt at the time that we were doing what we responsibly ought to do to try and help the contractor along.

Sir Brian Bender: We have taken the design risk back now because at the point of termination it was no longer a PFI.

Q36 Mr Touhig: Several times, Sir Brian, you have used the phrase “with hindsight”, and I agree that the perfect view of the world is the one looking back, but again, if you look at paragraph 2.6 of the Report on page 22, it says, “After the Department had appointed Laser as preferred bidder, reservations about its understanding of the project’s requirements remained. In early 1998, the Department was of the view that some of Laser’s

proposed mechanical and electrical solutions would not deliver the specified performance.” That is not hindsight. That was telling you then.

Sir Brian Bender: And at the time we were spotting this and, as Mr Dawes has said, we were therefore giving additional engineering advice and support to Laser, including from a company, I think it was called HDR¹, that had been involved in the building of the American Institute. If you are getting the impression from the document that we were just standing back saying, “Here are the specifications; get on with it”, that was not what we were doing. We were giving as much support as we felt we prudently could.

Q37 Mr Touhig: You are challenging 2.8, are you? You do not agree with 2.8?

Sir Brian Bender: No. I am saying that the impression is that we were doing absolutely nothing. Of course, I agree with the Report, but the impression from this period of questioning is that we were standing back. We were working as closely as we could with Laser, including giving them engineering advice, and indeed access to the advice from this company HDR to help them solve the problem, but without stepping over the line and accepting the design risk.

Q38 Mr Touhig: What does your Secretary of State say about all this?

Sir Brian Bender: My current Secretary of State?

Q39 Mr Touhig: No, the Secretary of State at the time.

Sir Brian Bender: No doubt submissions were put to him.

Mr Dawes: There were obviously some concerns about the progress of the job as it went along and there were reviews, quite clearly, of progress, how we were getting on, whether we were doing the right things.

Q40 Mr Touhig: The Secretary of State signed the contract on 31 July 1998. That was Mr Mandelson. He took up the job four days before. What did you tell him—he had been in the job four days—about what he was signing?

Mr Dawes: I am afraid I cannot answer that.

Sir Brian Bender: If the Committee would like a note in terms of what ministers were told at a particular time we can of course provide that.²

Q41 Mr Touhig: I think it would be helpful. He was a new Secretary of State, he had been there for four days, signing off this huge project, one of the early PFIs, which had gone pear-shaped. It would be rather interesting to us to know exactly what you told someone who had just been in the job four days. Sir Brian, what do you think of the NAO?

¹ *Note by witness:* In early 1998 the Department’s principal engineering advisors were Hulley & Kirkwood, although Laser and its engineers were offered access to HDR at a visit to NIST in spring 1998. HDR’s involvement in the project on-site started in the summer 1999.

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Sir Brian Bender: This is a leading question, Mr Touhig. I think they do a difficult but effective job.

Q42 Mr Touhig: You value what they do?

Sir Brian Bender: Yes.

Q43 Mr Touhig: And they are really worth listening to?

Sir Brian Bender: Yes.

Q44 Mr Touhig: If you turn to page 39, Appendix One, paragraph 2, it says, “In 2000,”—this is the NAO—“we commenced a study into the value for money of the PFI deal. However, as our work progressed we became aware of the project’s instability”. That was in 2000, so you did not take any notice of them.

Sir Brian Bender: We were monitoring it and being closely involved with it. We obviously had been in discussion with the NAO about the balance sheet treatment of it, so again it is not as though we were just ignoring this. The question is whether at this point in time there was anything else we should have done in order to correct matters. Most of my comments about hindsight would relate to the time and place in the contract rather than what happened subsequently.

Q45 Mr Touhig: But the NAO warned you that there was project instability in the year 2000 and no action was taken. Mr Byers was then Secretary of State. Was he told?

Mr Dawes: It is obviously a statement of fact here that at this period there were considerable difficulties in the way that the project was progressing and we even had an adjudication about the interpretation of one of the output specifications, which was, as I say, at the centre of the difficulty of the close control labs. It was a period of quite considerable difficulty, so I am not surprised that the NAO drew this conclusion. As I say again, we were working our way through those issues at the time. We were using our own engineering advice and supplying Laser with the engineering advice to overcome that, and what we have now is a design concept which was picked up by the contractors and developed.

Q46 Mr Touhig: Could you perhaps provide us with a note and comment on, when the NAO advised you in 2000 that there was instability in the project, exactly what you did and did you tell the Secretary of State at the time?³

Sir Brian Bender: Okay.

Q47 Mr Touhig: Did you tell the Treasury? This was one of the early PFIs. A new Government had come in and they were really pushing the success of PFIs.

Mr Dawes: I think we would have to look at the record. There certainly was communication with the Treasury but—

Q48 Chairman: Mr Touhig, you can always ask the Treasury. They are sitting on your left. Ask them.

Ms Diggle: We have been trying to work out whether we did know, and I am afraid we cannot tell you either, but we can find out if you wish us to.

Sir Brian Bender: We will cover all this in a note including whether we agreed it with the Treasury.⁴

Q49 Mr Touhig: In my experience of the Treasury there are some things known only to God and the Treasury and some things known only to the Treasury, and I am sure that they would have been rather interested in this very early PFI and its success. It just seems to me, Sir Brian and the team, that there were red warning lights issued all along the line, even before the contract was signed, and it just seems very worrying, following on from the Chairman’s original question, that you were taking on a company here, Laser, which were put together to provide this facility. I have a school in my constituency, a Welsh language medium school provided through a PFI project. It does not require the same kind of specifications and detail that you required and at the quality that you required in these labs and it just seems to me that you have ignored the red lights. Just one other final point, because my time up, is that I noted when we were over there yesterday that they have got 50 acres of land reduced to 25. Was it intended that Laser would then market or sell or benefit from the other 25 acres?

Mr Dawes: The acreage that we have is split into three parts. There is our own freehold on which the new facility is built, there is land which is under the management of Royal Parks, and there is also Crown Estate land, so there are restrictions on what can be done apart from on our own freehold. As you saw yesterday—

Q50 Mr Touhig: Was that a development opportunity which would have fallen to Laser? If you look at paragraph 2.14 in the Report, it says, “The opportunity to develop surplus land encouraged the bidders to look beyond the design . . .”, which would seem to suggest that they were somewhat focused on what they might have made from selling or developing this land?

Mr Dawes: The development opportunity was again part of our freehold which we vacated and sold and there is now a housing development on there.

Q51 Mr Touhig: Who got the money for that?

Mr Dawes: That went to offset the costs of the original contract.

Q52 Mr Touhig: The land was developed and sold for housing, yes?

Mr Dawes: That is right.

Q53 Mr Touhig: Who received the benefit of that?

Mr Dawes: It was what I think is classically called a barter deal where the cost of our project was reduced by the amount of the proceeds from the land sale.

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⁴ Ev 14

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Q54 Mr Curry: It is quite a remarkable form of planning gain, is it not, if you think about it? It is writ large, 106, in huge type, is it not?

Sir Brian Bender: Sorry—106?

Mr Dawes: Yes, it is a section 106. I am not a planning expert but yes, it was part of the whole arrangement with the local authority and part of the land was sold to a housing association. It was transferred to a housing association and that was part of a section 106 deal.

Q55 Mr Curry: Would you say this was the most complex PFI that had yet been attempted?

Mr Dawes: I believe it probably was, yes, from my understanding.

Q56 Mr Curry: When the thing first went out to tender, before you got to the preferred bidder stage, how many people were bidding?

Mr Dawes: We had, I believe, ten expressions of interest, and that got down to four bidders. It then reduced it to two. One was Osborne and one was Laser.

Q57 Mr Curry: When you got down to four and then down to two was that reduction on the basis of the financial advantage or were you taking into account the technical capability to deliver the project?

Mr Dawes: Oh, very much so. It was an overall assessment of value for money of the bids. There was a whole series of factors that came into that assessment, one being, as you say, technical capability. The other one which came in, I think as the Report mentions, was the planning risk. Certainly one of the issues with the Osborne proposal was the question as to whether they could achieve the planning solution that they put forward, so the assessment was on a range of things.

Q58 Mr Curry: When you say “the planning solution”, what do you mean by that?

Mr Dawes: The way that they were going to develop the site.

Q59 Mr Curry: So it was not to do with whether they could deliver the labs to spec?

Mr Dawes: Both, yes. It was a series of things, partly the question, had they demonstrated that they understood what the specification was about, and I think our assessment was that they had not done enough work on that particular aspect.

Q60 Mr Curry: What was the process by which the spec was drawn up? I assume that the scientists that work in this National Physical Laboratory are (a) at the absolute top of their profession, (b) there probably are not very many of them, and (c) they probably do not have many competitors in the UK. Is that right...?

Mr Dawes: Yes. They have unique capabilities, I think.

Q61 Mr Curry: If they have unique capabilities were you in a position, and for me this is fine but I realise this is years before Sir Brian was in his present job,

was there a peer review of the spec? Was anybody capable of judging whether the specification was necessary or were scientists being told they had a wonderful chance to have a wonderful new toy and naturally wanted absolutely every gong and whistle on it?

Mr Dawes: We were very much aware of that risk and the guideline which we followed was that we were not providing in general improved or tighter specifications. We were simply replicating the specifications of the existing laboratories in terms of their performance but with more reliability and over a greater volume of space to give the scientists more flexibility in the way that they carried out the science.

Q62 Mr Curry: The problem then was how we managed to deliver in 2001—let us speak in centuries—a building which was as good as one which had been built in 1901. Is that right?

Sir Brian Bender: With more space and in one location rather than bits and pieces.

Q63 Mr Curry: It does not say much about the advances in technology since, does it?

Mr Dawes: It comes back to one of the earlier points, that the old buildings have some merits, there is no question about that, or some of them do. Some of them are steel framed, asbestos—

Q64 Mr Curry: They have probably been listed, have they not, I should think?

Mr Dawes: No, apart from Bushey House and the surrounding buildings. As I say, some of the old buildings have good characteristics but they have severe limitations.

Q65 Mr Curry: My point is this, and it is a very basic point. Was anybody capable of, as it were, looking at that spec outside and saying, “Actually, this is an overspend. It is not absolutely necessary to do that”, or were you absolutely confident that what was being asked or sought for was absolutely essential for the laboratories discharging the work that they were entrusted with?

Mr Dawes: Certainly our advisers were instructed that what we were trying to do was simply to replicate the characteristics of the existing laboratories rather than improve the spec, and that was a very clear guideline. In terms of other people, the contractors, I guess, would also have a view, and certainly the dialogue that took place between the scientists and the contractors was in part exploring that very area: “Are you asking for something which you do not have at the moment?”. That was a lot of the conversation.

Q66 Mr Curry: As I try and understand the technical background, it seems that in a sense the more you tried to deliver the subliminal noise levels the more you ran up against the problems of delivering the temperatures. It was the relationship between those two which proved a huge difficulty?

Mr Dawes: Sure, yes. That was a particular problem which we ran up against. The old building that houses those labs which have this category two

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specification has this brick structure and it performs well at low frequency levels of vibration but it does not perform well at the higher levels. The new building is the reverse and we are looking at ways of fixing the new building and these category two labs to try and correct that. The question of how far we get with that correction in terms of the acoustic performance at low frequencies we will know at about the turn of the year. There is various work going on right now.

Sir Brian Bender: Just to be clear though, the areas that have been really difficult are eight laboratories like these here out of—what is the total number?—400.

Q67 Mr Curry: But it is a bit like saying, “We have managed to complete a new Parliament but we are having real problems with the chamber”, is it not?

Sir Brian Bender: I think I will not be drawn on that.

Q68 Mr Curry: Tell me about the Certifier because I am rather intrigued by this. As Mr Touhig has said, early on the Department started getting the wind up about this project. It got the wind up to such an extent that it actually brought in the heavy mob of lawyers as early as 2000.

Sir Brian Bender: Yes.

Q69 Mr Curry: So even at that stage it must have been thinking, “Is this do-able?”, but the Certifier then said, “No, they have done their job”, and the Department was unhappy enough to go to an adjudication. This sounds like Juventus appointing the referee, does it not, from the contractor’s point of view? What happened there? Is it unusual for an adjudicator to overturn a Certifier’s conclusions?

Sir Brian Bender: I will ask Peter to answer that in a moment, but his role was the issuing or not of completion certificates, and in this particular case he agreed with the company about the interpretation of the output specifications but not actually whether they had been delivered. We thought that was the wrong judgment to make, which was why we went to the adjudicator, because we did not think it was the role of the Certifier.

Q70 Mr Curry: So did that imply that the original contract had some deficiency in it?

Sir Brian Bender: Again, perhaps Mr Dawes can answer that, but the essential point is that we thought he was wrong in carrying out his duties in reaching that conclusion because that was not what he was asked to do.

Q71 Mr Curry: You have all emphasised that a very rigorous process of drawing up specifications went on and that the scientists were talking to the engineers who were talking to the contractors and one had the impression that there was no room left for doubt about to what was going to be delivered, so it is really quite surprising that clearly there is a doubt, that the contractor can be assured, “Yes, you have delivered”, and the Department says, “No, you have not”, and then there is an adjudication process. It is surprising, is it not?

Mr Dawes: The Certifier is in quite a difficult position. He has to interpret the contract himself.

Q72 Mr Curry: Who is it? Tell me about your Certifier. Is there a Chartered Institute of Certifiers?

Mr Dawes: No. It was a tender which Laser handled and we were party to the contract as well. It was competitively tendered and there are firms that specialise in this sort of activity.

Q73 Mr Curry: Who paid his fees?

Mr Dawes: We split the costs.

Q74 Mr Curry: The “we” being who?

Mr Dawes: Laser and ourselves.

Q75 Mr Curry: So you were confident this man would remain neutral, or it might have been a woman?

Mr Dawes: Yes. That is what he is paid to do. As I say, he has a difficult task in interpreting the contract and the output specifications: have they been delivered or have they not? In this particular case, and we are talking about the category two issue here, I guess, he thought that it was not a contractual default by Laser. The adjudicator concluded that the Department did not have beneficial use of the space and therefore he was incorrect in having signed off completion. That was the basis on which the argument went.

Q76 Mr Curry: Moving on to your lawyers, you said, Sir Brian, I think, and we all accept that you were very worried early on but, if I read the document right, earlier termination was not decided upon because there might be a legal liability. You were concerned about the legal position. Had you been reassured that that was not a problem when do you think the Department would have pulled the plug?

Sir Brian Bender: Again, it is probably better if I ask Mr Dawes to answer that question, but at each of a series of points that I mentioned, I think, to the Chairman, when issues arose we took advice and if the advice had been the other way round I imagine we would at that point have pressed for contractor liability. We looked at it at three stages—June 2001 based on poor performance, November 2001 when the supplemental deed was signed, and then mid 2003 based on late delivery, at those three stages and, as I say, on each occasion the legal advice we had from experts in construction law was not to force termination because otherwise we might end up in a less well protected position.

Q77 Mr Curry: And at the end of the day you never did pull the plug because at the end of the day the company said, “We cannot cope with it”?

Sir Brian Bender: That is correct, although, again, as I said to the Chairman, the basis on which we finalised our negotiating position was as though there had been contractor default.

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Q78 Mr Curry: Would you have had the option of saying, “No, we will not bail out. You will damn well get the job done”. What would they have done? They would have done a bankruptcy deal, would they not, and you would have been left with an empty building?

Mr Dawes: We got to the point where Laser, as the Report I seem to recall reflects, came to us, so the options then were either to go for a negotiated termination or to adopt the formal contractual mechanisms for contractor default. Our view at the time was that we would probably get a better and quicker result through a negotiation rather than going through a formal process.

Q79 Mr Curry: So when they came you finally said, “Praise the Lord. At last we can do what we have wanted to do for several years”, did you? In the silence of your bathroom and in front of your shaving mirror you said, “At last we are out of this”?

Mr Dawes: Not quite. It was always in our interests for the contractor to complete the facility. That is what we were striving to support all the way along through our advice, but there comes a point when it becomes quite clear, I think, to all the parties concerned that there is a fundamental difficulty in achieving that, and I think the sensible thing happened.

Sir Brian Bender: I would repeat the point I was trying to make earlier to the Chairman, which is that during this period between when we first thought of it in June 2001 and the actual termination, a lot was completed in the building, so it must have been much more questionable, had we actually pushed successfully for termination in 2001, whether we would have ended up with something of equivalent dimensions and the same value for money.

Q80 Mr Curry: Just continuing Mr Touhig’s list of Labour heroes who have been Secretary of State for Trade and Industry, let us assume that a new one comes in and he says, “I have looked over this history. I do not want anything like that to happen on my beat. Tell me, o, Sir Brian (or Mr Dawes), what is the one key thing I must learn above all from this? What is, without hesitation, deviation or repetition, the one absolutely key piece of wisdom I have got to learn so that I do not land myself in this like poor old Mr Mandelson or Mr Byers?”

Sir Brian Bender: If I may say, I do not think it would be quite as simple as that. The first thing I would say would be to make sure, since this was a very early PFI, that all the lessons of subsequent PFIs had been learned and I would instruct the department to make sure that all that guidance was being followed. Secondly, and perhaps it is the moment I can give the 20/20 hindsight vision, it strikes me that if we had our time again, knowing what we now know, I think the first thing, coming back to what I think was Mr Touhig’s question but maybe it was your own, Mr Curry, is the cultivation of the market; we thought it was okay but it would have been nicer to have more companies. Secondly, as I said earlier, at the time we thought it was right not to insist on the construction of a pilot laboratory

but I think if we had our time again, knowing what we now know—and then, thirdly, more due diligence about the technical engineering and other capabilities of the contractor and sub-contractors, and indeed the engineering resource we provided to help them. Those are the three or four points that perhaps are not a direct answer to your question but I have asked the team, “With 20/20 hindsight what might we do differently?”, and those are the areas.

Q81 Chairman: Sir Brian, I forbid you for the rest of this hearing, or indeed in any other hearing before us, to use that phrase “20/20 hindsight”.

Sir Brian Bender: I am so instructed, Chairman.

Q82 Mr Bacon: Sir Brian, has it occurred to you that if you were not sitting where you are today defending the Department’s role in this you could be limbering up for the Rural Payments Agency on which the NAO have published a Report today? Are you not a happy man?

Sir Brian Bender: I am very conscious that the NAO have published their Report today and I have been following the matter closely since I left Defra.

Q83 Mr Bacon: With equal distance?

Sir Brian Bender: I do not think it is appropriate to be drawn on that.

Q84 Mr Bacon: I will confine myself to the NPL. I was listening to your answers to Mr Touhig earlier, and indeed to the Chairman’s very first question, because you described a situation where you were not sitting back, where you were trying to help. On the contrary, from what has been suggested, you were highly involved in trying to put it to the contractors what it was that they should be doing, but you described a situation where you were dancing round the heads of pins to try and not step over some mythical line so that you did not end up with the design risk, and what you ended up with was something that was deeply sub-optimal, something that in many ways failed to deliver. The National Audit Office Report says on page 6 that it did not secure value for money, and you ended up with the design risk. When it says in 2.18, “Forcing resolution of its concerns over the design would mean that the Department would be taking back some of the risk . . .”, so essentially you had entered into an arrangement where it was the case that you had serious concerns and you were not able, because of the arrangement you had entered into, to force resolution of those design concerns, were you?

Sir Brian Bender: As you were speaking I re-read the passage on page 6. We did not achieve, as the NAO says, full value for money in the short to medium term.⁵

Q85 Mr Bacon: But you protected the downside, yes. I should have included that.

⁵ *Note by witness:* I would have gone on to complete the quote from the NAO Report; that the Department did protect its downside position.

Sir Brian Bender: If I may say, given what turned out to be such a complex project, and given some of the problems that arise in project management in the construction or indeed the IT area, I would not belittle that achievement.

Q86 Mr Bacon: No, no, protecting the downside is important and I do accept that. Coming back to the Chairman's question at the beginning about complexity, if it is complex then surely to goodness the people who are going to be engaged by you to do something need to have a very deep understanding of what it is that you want them to do and, what is more, you need to be sure that they have got that understanding, and yet there were you, on the cusp of helping, doing what you could to help, reaching over to help without actually stepping over the line where you could have given the most help you could, and I bet there are people inside the laboratories who would love to have said, "You need to do this, this and this", but who were not allowed to, which comes back to the Chairman's question about complexity. We saw with the Libra project in the magistrates' courts, and that kind of product actually was not particularly complex, frankly, but the NAO concluded, as did we, that that type of IT project should not be done with PFI. Given the very high technical specification, one in which you, the Department, did not know until after you had signed the contract that some of your requirements would need leading edge engineering, which is itself an astonishing thing: you signed a contract without having that knowledge, is it not the case that perhaps, as the Chairman said, this type of project of this complexity makes it unsuitable for PFI?

Sir Brian Bender: I find that very difficult to answer and I will try not to use the words I was instructed not to use by the Chairman a few minutes ago. There was no reason to believe at the time the contract was being signed that there was going to be such difficulty about these particular laboratories. After all, as was discussed earlier, the requirements were being achieved, albeit on a smaller scale and with less reliability, in the old buildings and therefore there was no reason to believe that it was impossible. The American Institute was producing something similar and we were dealing with contractors who had a very good track record in high technology laboratories. The other point I would repeat is that, had we not gone down the PFI road with all the difficulties we had, but had gone by traditional procurement methods, we would not have had the capital to have ended up with a single facility. We would have had piecemeal development with much more disruption to the ongoing science.

Q87 Mr Bacon: Why was the construction of the buildings commenced before you could know what the footprint ought to be when important elements of the mechanical engineering were not yet made clear?

Mr Dawes: There were a number of things that were done before the contract sign. There was clearance of some of the old buildings in the preparation of the site, which I think is, as I understand it, not unusual.

The extent to which there was new build was very limited and was literally about a month before the contract sign. It was limited to some piling, I think, in the first phase, so it was quite limited. The other pre-contract expenditure was that we paid up front something like £1.8 million in advance design fees which we would recover if the contract had not been signed. That was the extent of the up-front payments, if you like, or the construction up front. Could I just come back to the last point that Sir Brian was dealing with? I think it is also interesting to note that at about the same time as the PFI project was being built Laing, under a direct contract with the Department, not part of PFI, was building a radiation dosimetry measurement facility which had a very similar specification to the close control rooms, plus or minus 0.1, and that works; there are no problems. It was built on time and on cost. That, I think, is an indication that the engineering is there, it is available in the market. Yes, I think category two is a different kettle of fish possibly, but with regard to the fundamental principles of delivering plus or minus 0.1 control, the technology is available.

Q88 Mr Bacon: Mr Ewer, why did Laing sign the design and build contract if there were concerns inside the company about the output specification?

Mr Ewer: At the time the contract was signed the company did not, I believe, have those concerns. There should have been concerns. I think there were failings in the company to rigorously test our competence and the competence of our subcontractors in this area, but at the time it was signed it was probably on the border between naivety and arrogance by building people who feel they have done everything that has been thrown at them so far so they can do anything. They did not test it. It was not tested rigorously enough and the management processes within our organisation were not sufficient to put down that challenge. There were failings on our part but I do not believe those who signed thought, "It will not work".

Q89 Mr Bacon: Your liability cap was set at £31 million, was it not?

Mr Ewer: On termination.

Q90 Mr Bacon: Why was it as low as that?

Mr Ewer: That is what was negotiated. In these projects a liability cap is negotiated. We would at that time have regarded that as quite high by normal standards for a fixed price design and build project. The margin that is made on these projects, if they are successful, is very thin.

Q91 Mr Bacon: What is it?

Mr Ewer: It would have been somewhere around 5% of the contract value, and therefore traditionally one would set a liability cap that—

Q92 Mr Bacon: That was commensurately low. When you say "these projects", what kinds of projects are you referring to that typically have a margin of 5%, because I remember somebody sitting

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where you are sitting for a major construction group a few years ago saying that a typical return on the sorts of building projects that his members were involved in was 17%?

Mr Ewer: That is in my experience absolutely not the case.

Q93 Mr Bacon: The return has come down recently, has it?

Mr Ewer: The norm would be somewhere between 2% at the low end at bidding and up to 10% at the high end.

Q94 Mr Bacon: As low as that?

Mr Ewer: Yes.

Q95 Mr Bacon: For taking for quite a big risk. Sir Brian, would you like to comment about the liability cap?

Mr Dawes: Certainly at the time it appeared to be quite a high cap as far as we could see but this was clearly disciplined within the contractual mechanism, which gave us comfort that there would be delivery of the project, so I think we were reasonably comfortable with that capping arrangement.

Q96 Mr Bacon: May I ask about paragraph 2.16 where it says: "The Department considers that JLC Ltd subsequently modified its design." I thought that was a well-phrased NAO sentence that suggested perhaps that JLC did not consider that it had carefully modified its design. What is your opinion of that sentence?

Mr Ewer: I could not confirm that we had modified our design.

Q97 Mr Bacon: You could not confirm that you had modified your design?

Mr Ewer: No, but I cannot categorically say that there were not some changes to the design either. It is not in my knowledge and unfortunately because—

Q98 Mr Bacon: Who is in charge of the design because it clearly was not the Department because they were standing there a tennis court's distance away trying to help but not get too involved? It was somebody on your side, was it not?

Mr Ewer: On our side, we were in charge of the design. We had responsibility.

Q99 Mr Bacon: Who?

Mr Ewer: The project management team. Unfortunately, we sold that business and none of them exist in our business today, and I do not have access to the design records.

Q100 Mr Bacon: Mr Briggs, you are the Mr Moneybags in all of this, are you not? Why did you not step in? A PFI theologian would turn around at this point and say, "Well, of course a PFI cannot go wrong because it is all in the contract and if it all goes horribly wrong eventually the consortium owners, the banks will step in and sort it out." Well, why did not you not step in and replace Laser?

Mr Briggs: For the simple reason that by stepping into the shoes of Laser in the contract the banks would have effectively assumed full responsibility for the design. The banks would—

Q101 Mr Bacon: You did not want it either?

Mr Briggs: No.

Q102 Mr Bacon: Sir Brian did not want it. Nobody seems to have wanted it, do they?

Mr Briggs: No.

Q103 Mr Bacon: And those who did want it did not know about it. Great! In paragraph 3.21, on page 31, Sir Brian, I think this has been alluded to earlier, you ended up in a position where you actually could not terminate the contract. You were in a position where you had concerns but your legal counsel said you might not have grounds for termination any more because you had had discussions and following the spirit of those discussions the Department could be exposed to risks. How was it that you got yourselves into a position where you had not got what you wanted and yet you were not able to terminate the contract?

Sir Brian Bender: Again, I might ask Mr Dawes to say a bit more. I am not sure I can add to what I said in earlier replies to these questions in terms of what advice we were getting and why that was the case. Can you add something?

Mr Dawes: I think the issue here was that we had been discussing a Supplemental Deed to resolve a number of issues and there was doubt, certainly in the legal advice, as to whether in the process of having those discussions we had, by implication, agreed to some extension of time and there was that risk there. The Supplemental Deed was never signed, as I think the Report shows, but there still was that underlying risk that if there was a problem in terms of us pursuing a termination at that point, this might have been something we had stumbled into inadvertently. It was never consciously discussed, but the fact we were actually talking to them about various issues in the contract could imply that we were dealing with an extension of time.

Q104 Mr Bacon: What steps did the Department take, if any, informally to see whether it could find contractors to replace Laser?

Mr Dawes: We did not, I think is the short answer. The prospect of actually going to the market with a job like this, halfway through, with all sorts of difficulties, was certainly one of the issues that we felt was quite persuasive.

Q105 Mr Bacon: In not doing it?

Mr Dawes: In not doing it.

Q106 Mr Bacon: You mean apart from cultivating the market, as Sir Brian wanted you to do, you would have poisoned it?

Mr Dawes: I think at this stage of the job it was fairly clear that there were all sorts of issues which were quite difficult. We had a major concern to go to the market at that time would have given us a real problem.

Sir Brian Bender: Arguably, what the companies did not appreciate at the time of the contract was the extent of the design risk they were taking on. The judgment the Department was reaching by the time of the period you are now covering in the questioning was that the market would have realised that by then, and therefore any recontracting of any sort would have been likely to have been at a much higher price. That is the advice the Department was getting.

Q107 Mr Bacon: This is my final question: was there not a warning sign quite early on when you ended up with just two bidders that actually this was not a particularly attractive proposition?

Sir Brian Bender: Again, I am not sure I can say more than the response to the earlier questions on that. We had reason to believe, based on the expertise of the companies and what we understood about what we were asking and what had been done elsewhere, that this was going to be doable. That obviously turned out not to be the case but at the time, as I say, based on what the companies had delivered and what we thought we were asking for and what was actually existing in the current facilities, it did not seem such a problem.

Q108 Mr Bacon: Finally, sorry Chairman because I did say that was my last one; can you remind me, Sir Brian, when you joined the DTI and left Defra you had been at Defra for how long?

Sir Brian Bender: I joined the Ministry of Agriculture in June 2000 and Defra was created in June 2001 and I joined the DTI on 3 October 2005.

Q109 Mr Bacon: You do not want to come back on 31 October, do you?

Sir Brian Bender: I did give evidence to the Efra Select Committee so what I said about my stewardship, albeit to a different Committee on slightly different questions, is on the Parliamentary record.

Chairman: Thank you, Mr Bacon. Alan Williams?

Q110 Mr Williams: I was puzzled as well about these two bidders and by Sir Brian's comment—not surprised by his comment, I accepted the sense of it—that he might have said to the new Minister it would have been nicer to have more than two bids. Why did that not set any alarm bells ringing? Surely it should have done?

Mr Dawes: It certainly was not desirable, should I say, to have such a limited field but, as I think we have mentioned before, we felt that the Laser bid, the component parts of it, the fact that Laing were going to construct this with all the experience that they had with GSK and a number of other facilities, and with Serco supporting it as well, bearing in mind that Serco at the time had the science contract to operate the laboratory, that to us appeared to be

quite a powerful combination. The track record and also the experience that they had had suggested to us that they had all the skills that were required to deliver this project. However, I accept the point that it would have been certainly more attractive, should I say, to have had more bids. On the choice of either stopping the whole process and retendering or going ahead with Laser, we concluded the right decision was to go ahead with Laser.

Q111 Mr Williams: I was surprised to read in the briefing we got that the Department did not know until after it signed the contract that it would require leading edge engineering design. I just do not understand how that could come about from a Department that already had lengthy experience in this field with the old laboratories.

Mr Dawes: I think “leading edge” is a relative term. The basic engineering, the majority of it, (the air-conditioning systems) is available, as I was mentioning earlier. It is certainly available in other metrology labs around the world and a lot of the basic design is a variation, I believe, on clean room technology, so it is not as though it is completely off-the-wall design. It is true that some of the specifications are quite difficult and one of them that we discussed with the contractor quite extensively was the magnetic specifications, that for some of the science we needed control of the magnetic fields in the laboratories and we approached the contractors and said, “Can you design to a field strength of so many gauss in a particular location in a room?” and they said “No,” so we then reverted to input specification. In other words, we said, “Fine, that is difficult, that is a design issue that you have not come across before. We will therefore work with you to define where we want things like stainless steel reinforcement bars.” In one module we have wooden beams instead of steel beams so we were quite conscious that some aspects were outside the normal range of contracting but we took a lot of trouble to discuss with the contractor just where he felt that he did not have the experience, so we did our best to identify those areas.

Q112 Mr Williams: I notice that in paragraph 2.16 it also says: “The Department considers that JLC Ltd subsequently modified its design.” In usual NAO Report terms when you find the word “consider” it means that the Department thinks that but the others disagree. Is there disagreement about whether the design was modified or not?

Mr Dawes: I do not know. You will have to ask Laser, I guess.

Mr McNaught: I have got no idea whether the design was modified at the last moment. Clearly a design was chosen that in the end did not work.

Q113 Mr Williams: You have no idea?

Mr McNaught: No.

Q114 Mr Williams: You had a copy of this Report before you came here?

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Mr McNaught: Yes.

Q115 Mr Williams: You did not think to find out how this strange piece of—

Mr McNaught: I very much regret that anybody that was involved in the early days of this project is no longer around so it was very difficult to check.

Q116 Mr Williams: Was that part of the cause of the trouble that there was an enormous turn around of personnel or did that come as a consequence of the mess-up?

Mr McNaught: No, I do not think there was a huge turnover of personnel on the project, but we are looking back ten years, the project designs of ten years ago.

Q117 Mr Williams: We are also told that you started construction of the buildings before important elements of mechanical engineering design had been finalised, including space requirements of mechanical plant. How can you decide a container until you know what is going in it, whoever is responsible for that decision?

Mr Ewer: Probably I should take that rather than Laser. Unfortunately, this is quite common in construction that design continues to develop as work continues. It is not appropriate in circumstances where there are particular critical path issues to be designed for them to have to be established at the outset. I think there were mistakes, and I hold my hand up and say there were mistakes here, and it would have been in this sort of circumstance absolutely essential that certain elements of this design were absolutely fully signed off before construction commenced, before the contracts were entered into.

Q118 Mr Williams: Yes. Would variations of this sort have been included within the flexibility of the contract or would they have needed any revised bidding, because one of the things we have always found to be disastrous is to alter specification part way through a contract?

Mr McNaught: As far as Laser is concerned, I do not believe there were any variations to the contract.

Q119 Mr Williams: There were not?

Mr McNaught: Nothing significant that I recall.

Q120 Mr Williams: Okay. An interesting point made by the NAO to us, and you may disagree with this, is that the Department allowed commercial exploitation of commercial land to detract attention from the key matter of ensuring that the building met the output specifications. This is essentially for the Department. How on earth could the exploitation of spare lands in any way detract from the focus on this particular contract? This is not in the Report; it is in briefing.

Sir Brian Bender: If this is a question for the Department, as I think Mr Dawes said in reply to an earlier question, we were concerned with the other bidder that they were not up to speed both

on the technical specification and were too focused on exploitation of the remaining land. We did not have that doubt in relation to Laser along the way and therefore I am not sure I recognise the point as you have just read it out.

Q121 Mr Williams: What did you mean by it, NAO, what was the implication you drew? It seems to require completely different people with completely different skills. Where did the overlap come that caused a distraction?

Mr Shapcott: I think the point we are trying to make was that the other bidder in the competition, Osborne were to some degree being ruled out of the thing because of the planning issues to do with the commercial development of the land and therefore really Laser were so clearly ahead in the competition it meant the competition was not a strong force to encourage them to improve their proposition.

Q122 Mr Williams: Do you see that as—?

Sir Brian Bender: Well, it a fact that we did not think the Osborne bid, for the reasons Mr Dawes explained earlier in reply to another Member's questions, was sufficiently competitive and therefore there was only one really viable bid to go for, so to that extent I do not disagree at all with the NAO. As I tried to explain earlier in response to questions, we nonetheless had reasonable confidence that what we were asking for was deliverable, which is why we proceeded.

Q123 Mr Williams: A final question because I think everything has been asked, why did the Department wait six to ten months before challenging the completion certificates for the non-performing laboratories?

Mr Dawes: I think it takes a while to assemble the evidence associated with any challenge of that type. You have to be very sure of your ground and it just takes a while to develop the case that you are going to put. It is a characteristic of the job that it is not immediately evident how you are going to present the case and it does take a while to put together.

Mr Williams: I do not think there is anything else.

Q124 Chairman: I think that probably concludes our hearing, gentlemen. It is rather sad that when we have got a facility which is perhaps one of the best in the world, or certainly the third best in the world, that the Department could have constructed a contract in which, as it says in paragraph 2.28: "This arrangement meant that, provided construction work was complete, JLC Ltd would be paid most of the contractually set price for a phase, even though it did not meet the specification and required significant remedial work." I think that sums it up, that our scientists, who are working in such a vital area for the nation, have, in your phrase Sir Brian, been condemned to put up with a Heath Robinson arrangement because of the way that this contract was constructed in the first place. It is rather regrettable, if you do not mind me saying so.

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Sir Brian Bender: That is your conclusion, Chairman, and it clearly is a regrettable position to be in. I just repeat the point that we have a situation, albeit five or six years late, where we will have these facilities that had we gone down a different route I do not believe we would have had.

Chairman: That is fair enough as an answer. Thank you very much.

 Supplementary memorandum submitted by the Department of Trade and Industry

Question 40 (Mr Don Touhig): Communication with Ministers

Mr John Battle MP was responsible for this project as Minister for Industry, Energy and Science from 6 May 1997. The final report on evaluation of tenders was put to Mr Battle on 11 July 1997. This recommended Laser be selected as preferred tenderer. Over the next year the Department resolved the reservations it had recognised on Laser's design in this report, so that on 17 June 1998 a submission was put to Mr Battle and the President of the Board of Trade, Margaret Beckett, reporting that officials were confident the deal could be recommended to Ministers for approval at the end of the month. The submission reported that, "In the last 12 months, the needs of the laboratory staff have been clarified, (and) the original design has been updated." And that, "Mr Battle has been continually updated on these and other developments during the contract negotiations." Duly, on 26 June 1998, a recommendation was put to Mr Battle recommending approval to sign the Project Agreement and associated documents, committing the Department to the PFI development project. This was obtained, and the Project Agreement was concluded on 31 July 1998.

Question 46 (Mr Don Touhig): Communications with the National Audit Office

The Department was aware that the project was experiencing difficulties from mid 1999, as the NAO Report makes clear (paragraph 1.10), and officials kept Ministers informed of the situation. In July 1999 Lord Sainsbury assumed Ministerial responsibility for NPL (in succession to John Battle MP). A submission was put to him in September 1999, highlighting that construction was running behind schedule, and that some output specifications were not being met. The issue was brought to a head when Laser launched the adjudication described in Appendix 3 to the NAO Report in February 2000. Ministers were kept informed about the result of the adjudication and the actions the Department was taking to mitigate the problems Laser were experiencing.

The suggestion that the Department only learnt of the project's difficulties in 2000, and from NAO, is thus incorrect. NAO began investigating the value for money of the PFI project in 2000. During the course of their enquiries over the following year, NAO realised the fluidity of the situation on site, and in March 2001 decided to postpone their studies in order to await developments in the project, rather than continue work, which they recognised may have quickly become out of date.

Question 48 (Mr Don Touhig): Advice received from the Treasury

From 2000 onwards, the Department was in touch with Partnerships UK (PUK), and with the Office for Government Commerce (OGC) through regular interdepartmental meetings, at which progress on the NPL PFI would have been discussed informally. The Department wrote to the Treasury on 31 October 2002 when the possibility of a termination became more likely (explaining that the project was then running some two years late, and that JLC had encountered severe delays, technical problems and financial losses at Teddington).