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Review

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OGC Releases New Procurement Guidance on Development Agreements

The recent decision of the European Court of Justice (ECJ) in *Auroux v Comune de Roanne* has generated uncertainty and concern in relation to the extent to which development agreements will (or will not) be subject to regulation under the Public Procurement rules. This uncertainty resulted in serious delay in the commencement of regeneration and development schemes and in some cases, their abandonment.

The industry has been extremely vocal regarding the implications of the decision and the affect it has had on development, with the British Property Federation calling for clarification in its "Regeneration Manifesto". At the same time, the European Commission has been active in the field, sending formal requests to the UK over the award of a development agreement in the city of York (Commission Press Release, IP/09/1000) and to the Netherlands to review a contract for land development in Eindhoven (Commission Press Release, IP/09/1478).

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After long delays, the Office of Government Commerce (the "OGC") has now responded with the publication of guidance on the application of the case and on the applicability of the procurement rules to development agreements generally.

The Guidance seeks to clarify when a "development agreement" between a public body and a developer is likely to be subject to the public procurement rules. In doing so it attempts to strike an appropriate balance, allowing maximum flexibility whilst staying within the parameters of the Court's judgment and the Commission's interpretation. Whether it achieves this balance remains to be seen - the OGC itself recognises that its guidance is neither definitive nor comprehensive, and could be subject to change depending on future arguments from the Commission.

BACKGROUND: *AUROUX V COMUNE DE ROANNE*

The Roanne Case concerned the application of the procurement rules to an agreement for the development of a leisure centre, entered into between the Roanne Local Council and a semi-public regional development company (SEDL).

Under the agreement, SEDL was entrusted with the overall management and development of a leisure centre, including the construction of a multiplex cinema and commercial premises (intended to be transferred to third parties), a car park, access roads and public spaces (intended to be transferred to the Council). The Council was to make a direct payment to SEDL for delivery of part of the works as well as a contribution to the funding of the rest of the development. The agreement between the Council and SEDL was not publicly tendered, but SEDL – a "contracting authority" in its own right – put the contracts out to OJEU.

The ECJ held, amongst other things, that the applicability of the Public Procurement rules is determined by reference to the main purpose of the contract, in relation to its economic and technical function.

The judgement made it clear that it was not necessary for SEDL to be capable of direct performance of the works in order for the contract to be classified as a "public works contract" within the meaning of the procurement rules. In addition, the Council does not necessarily have to become the eventual owner of the work for it to be classified as a public works contract. Neither was the fact that SEDL is a "contracting authority" who had put the works out for tender, sufficient to exempt the Council from complying with the procurement rules when awarding the contract.

NEW OGC GUIDANCE

The OGC Guidance seeks to interpret the Roanne decision and to clarify its implications for a relatively broad spectrum of development agreements, in line with recent decisions and infringement actions taken by the European Commission.

The OGC takes a case-specific approach to the question of when a contract is deemed to be for public works or works concession, recognising no formal single definition of a "development agreement". In particular, regard must be had to whether a developer is placed under a binding contractual obligation to carry out works "corresponding to the contracting authority's specified requirements".

With the above in mind, the OGC goes on to examine various scenarios by reference to the intent and purpose of the activities directed by the public body, including the potential applicability of the public procurement rules to section 106 planning agreements. The following guiding principles are provided:

- **Level of specification required for "works contracts"** – The OGC considers that merely setting broad parameters for development arrangements is unlikely to offer an adequate degree of precision for the application of the procurement rules. For example, where the contracting authority invites developers to submit proposals for a lease to develop a publicly owned building with "listed" status without specifying the function of the building and any works to be carried out therein, it may not be subject to the public procurement rules.
- **Transfer of land or property** – Where no works are involved, the sale or lease of land or property does not fall within the scope of the public procurement rules. The same position appears to apply where the performance of work is merely "incidental" to the assignment of property. The OGC adopts a purposive approach to the definition of "incidental", advising that the main purpose of the sale should be considered, for example, by reference to the scope and value of the works in relation to the value of the sale.
- **Specific legally binding contractual obligation** – In view of the Commission's recent decision to close an infringement case against Germany (Flensburg), the OGC concludes that a public works contract only arises if there is a specific legally binding contractual obligation to undertake the works. This is so even if the contracting authority has a contractual right to reacquire the land if the work (corresponding to certain urban development needs) is not undertaken.
- **Development agreements ancillary to a lease –** A lease is not considered a public contract if development of the property is to take place according to the intentions of the developer. The payment of rent is unlikely to comprise a pecuniary interest for the supply of goods, works or services sufficient to bring the development agreement within the procurement rules.
- **Building licenses –** The OGC also refers to the application of the procurement rules to building licences. In some cases, public authorities will enter into a building licence with the developer for the duration of the construction contract with a view to ensuring that the construction activities comply with specific land obligations. Once the developer has demonstrated compliance, the freehold (and ultimate control) is transferred. According to the OGC Guidance, such building licences may not give rise to a contract subject to the procurement rules, provided that the purpose of the license is to ensure the purchaser/ developer does not go back on its own intended activities.
- **Mixed Land Ownership** – In some cases, the development will comprise a mixture of land or property owned partly by the authority and partly by the developer. The OGC considers that the specifics of such arrangements will determine the application of the procurement rules. The sale or lease of the land is more likely to fall within the rules if it also imposes works obligations on the developer. In such circumstances, public authorities are advised to consider competitively tendering a separate contract for the elements that comprise the development.

It is clear from the guidance that the facts of each intended development and the precise relationship between the parties must be considered. It is also noted that the OGC assessment may develop depending on future feedback from the European Commission. In light of this, the OGC recognises the limits on generic guidance and advises public bodies to obtain their own legal advice before proceeding. A full copy of the OGC Guidance is available at http://www.ogc.gov.uk/documents/PPN_11_09_Development_Agreements.pdf

For more information relating to this article, please contact:

Ohad Soudry
EU, Competition & Trade
T: +32 2 627 7622
E: ohad.soudry@hammonds.com

Emma Roarty
EU, Competition & Trade
T: +32 2 627 7607
E: emma.roarty@hammonds.com

WWW.HAMMONDS.COM

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