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EU green paper on the modernisation of public procurement

A paper by the British Property Federation

Introduction

This paper has been produced by the British Property Federation in response to the publication by the European Commission of a green paper on the modernisation of EU public procurement policy.

The British Property Federation (BPF) is the voice of property in the UK, representing companies owning, managing and investing in property. This includes a broad range of businesses – commercial property owners, financial institutions and pension funds, corporate landlords, local private landlords – as well as all those professions that support the industry.

Scope of this paper

The BPF supports the creation of a more efficient, effective and non-discriminatory system of public procurement in the European Union. This submission relates primarily to **question 1** of the Green Paper, and addresses the key issues applicable to the property industry in the UK.

The specific concerns that we wish to raise relate to the application of EU public procurement policies to development agreements. This is a difficult area which has been the subject of a number of landmark cases in recent years. We believe that striking the right balance in this area is crucial as the imposition of an inappropriate or overly onerous procurement regime can prevent much needed regeneration from taking place within our towns and cities. Accordingly, we would welcome greater clarification of the regulations, taking on board the judgements in the *Helmut Müller* case and the Advocate General's Opinion in *Case C-306/08 European Commission v Spain* and in addition, clarity on various other issues that have not yet been properly addressed by the courts.

The background

The key issue is the extent to which land development agreements fall within scope the public procurement Regulations. It is clear that transactions relating to land conducted by contracting authorities are exempt from the procurement rules and so such authorities do not have to run a tender process before deciding with whom they wish to contract. The exemption applies to the seeking of offers in relation to a proposed public contract or framework agreement for the acquisition of land, including existing buildings and other structures.

This means that the acquisition of land or existing buildings, or the lease or sale of land by a contracting authority to a third party will not be subject to the public procurement rules. However, if the deal involves development, construction, or the oversight or management of

such activities, it is more likely to be classified as a public works contract or a public works concessions contract. The procurement rules will therefore apply.

Recent case law

In recent years the European Court of Justice (ECJ) has discussed the nature and extent of the exemption in the cases of *Auroux v Commune de Roanne (Auroux) 2*, *Helmut Müller v Bundesanstalt für Immobilienaufgaben (Helmut Müller)* and *Case C-306/08 European Commission v Spain*.

The Auroux case

The ECJ judgement in the *Auroux* case drew the land exemption from the procurement rules very narrowly. It was widely interpreted to mean that the exemption would not generally be sufficient to avoid an obligation on the contracting authority to tender large development and regeneration opportunities, when such projects involve local authorities. By its very broad interpretation of the scope of the EU procurement regime in this area, the judgment raised serious concerns among local authorities and developers.

The impact in the UK was severe. It prompted a range of local authorities to put important urban development projects on hold, so that competitive tendering procedures could be organised. If local authorities discerned even a theoretical risk of being caught by the regulations they felt they had no choice but to adopt a cautious approach and assist on a competitive tendering process.

Whilst this affected development of all kinds, the effect on regeneration projects was particularly acute. The considerable added cost of participating in competitive tendering processes made the prospect of finding developers willing to take on such projects remote. There was even a danger of a competitive tendering approach being applied in circumstances where its application would make little sense, including instances where much of the land on which development was to take place was owned by a single developer and therefore no development would be feasible without their participation.

The concern within the UK was such that the Office of Government Commerce (OGC) issued a Policy Note giving "preliminary guidance" on the application of the procurement rules to development agreements. This went some way to easing concerns but fundamental issues remained unresolved.

The Helmut Muller case

Fortunately, the ECJ's ruling in *Helmut Müller* provided some much needed clarity and common sense. The ECJ's ruling made clear that the procurement rules will apply only where works are to be carried out for the authority's direct economic benefit and where the authority has defined the works in a way that goes beyond the mere exercise of its planning powers.

In broad terms, it can be said that the more initiative that a developer takes in the first instance, the less likely it is that the rules as defined in *Helmut Müller* will apply. In addition, schemes carried out on privately owned land are less likely to be caught. However, the rules may still apply if the authority takes a financial interest in the outcome of the project or intends to use part of the development for its own (or public) use.

Case C-306/08 European Commission v Spain.

Advocate General Jääskinen's Opinion in Case C-306/08 European Commission v Spain went even further in striking a more sensible balance as the ECJ were warned not to "over-stretch" the public procurement rules for the sake of ensuring that certain developments fall within those rules regardless of whether such projects were ever envisaged by the legislation. This Opinion brings refreshing simplicity to what was becoming an over complex arena and is a welcome "reining-in" of the recent case law in the area of land development and public procurement rules.

The AJ states that for a pecuniary interest to exist it is necessary that "*the contracting authority bears the economic detriment either positively in the form of a payment obligation towards the economic operator, or negatively as a loss of income or resources otherwise due*".

He suggests that "*mere power of the contracting authority to require a third party to pay for the works or services cannot … be sufficient* ".One of the key statements made by AG Jääskinen comes at the end of his opinion, where he states "…*one of the aims of the public procurement directives is to ensure that when contracting authorities spend money in public markets there is no distortion of competition. It follows that where the contracting authority is not spending any public funds there is no danger of distorting competition within the meaning of [the relevant procurement directives]".*

Similarly, where the developer is providing public works which are handed over free to the Local Authority and the developer does "*not receive a right to exploit these public works because they do not have the possibility of recovering the charges from the user of the structures*", then "*the contract cannot amount to a works concession even if it were held that the principal aim of the contract is the execution of works*". Where, as is commonly the case in the UK with town centre public / private development partnerships, the developer is both paying for the public works and paying land value to the Local Authority, it seems unlikely the agreement can be classified as a public works or services contract.

We hope that the Court of Justice adopts this Opinion in full and provides more clarity for authorities in the context of land development projects.

Outstanding issues

Recent judgements and opinions have, therefore, provided welcome clarity on a number of difficult issues relating to the application of procurement rules to development agreements.

However, uncertainties still remain and often compel the parties to adopt an unduly cautious approach when drafting agreements. It is essential that such uncertainties are, as far as possible, removed so that the vital process of urban regeneration is not further undermined and that attempts to over-stretch the public procurement rules in inappropriate ways will be much more difficult.

Some areas of uncertainty which should be addressed include:

- It should be spelled out that for the procurement rules to apply there must be some "economic detriment" to the contracting authority and that where the contracting authority is not spending any money there is clearly no danger of distorting competition.

- It should be made absolutely clear that where the developer is providing public works which are handed over free to the Local Authority and does not receive a right to exploit these public works because they do not have the possibility of recovering the charges from the user of the structures, then the contract cannot amount to a works concession even if it were held that the principal aim of the contract is the execution of works.

- In the *Helmut Müller* judgement, the ECJ gave a useful steer on the circumstances when the works will be regarded as corresponding to requirements specified by the authority. It seems clear that the mere exercise of planning powers by a local authority is not sufficient to trigger the procurement rules. Nonetheless, the court's terminology remains quite vague: terms such as "defining the type of work" and having "a decisive influence on its design" leave plenty of scope for differing interpretations.

- The common situation where the contractor owns some or all of the land on which the works are to be built has not been satisfactorily addressed. The ECJ was not asked to consider the question of whether such ownership may justify an exemption from applying the procurement rules at all, on the basis that the landowner enjoys "exclusive rights" and is therefore the only party capable of performing the developer role. We would stress that the rules must take account of commercial realities. For example, the economics of large developments can sometimes depend on the developer using their in-house construction units to break even. Inappropriate use of tendering in such situations may, therefore, simply prevent any work being done at all. Clarification on this whole issue is badly still needed.

- Further confirmation is needed that obligations on developers to provide affordable housing do not give rise to procurement concerns. This will be a real issue where there is also public land ownership and an acceptance (implicit or explicit) that policy compliant levels of affordable housing will be provided. It should be made clear that because a planning arrangement/agreement never requires anyone to develop, it cannot properly be characterised as procuring works.

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Further Comments

We would be pleased to clarify or amplify any of the above comments.
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