WHEN IS AN OJEU OR OTHER COMPETITION REQUIRED FOR A LAND DEAL?

Public procurement rules can be tricky to navigate. Although designed to ensure that public bodies award contracts in a fair and transparent manner, they are often misunderstood, creating unnecessary barriers that can hinder the regeneration of urban sites. It is essential that public bodies understand what is and isn’t likely to be subject to public procurement rules at an early stage in the procurement process. This is particularly important at a time when many of our towns and cities need significant investment in properties and infrastructure in order to meet the needs of businesses and residents.

In order to cut through the legalese surrounding this issue and set out the key issues that the parties involved in land transactions need to address, the British Property Federation, the Local Government Association, Local Partnerships, and Revo have come together to produce this guide, updated for 2016. This guide, which has been developed with input from developers, leading procurement lawyers and local authorities, identifies the most common structures used in land developments and, by means of a flow chart, seeks to indicate:

- Where OJEU tenders will normally be required
- Situations where some lesser form of competition may be required
- Circumstances where the EU procurement rules are unlikely to apply

We would stress that this guide has been created for general guidance purposes and specific legal advice should always be sought when dealing with any particular sets of facts or circumstances. We hope, nonetheless, that it will be a very valuable aid to decision-making for both contracting bodies and developers.
This complex, evolving and often confusing area of law is regarded as one of the most important areas for all public bodies. This chart is designed to provide high-level guidance to both contracting authorities and developers on the strategic choices open to them. For ease, tenderers that are subject to the full tendering requirements of EU Procurement Directives are referred to as “OJEU” tenders. Where some lesser form of competition may be required, the chart is based on the law as at April 2016. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

What constitutes an economic benefit?

Works are likely to be carried out for the economic benefit of the contracting authority where one of the following occurs.

- The disposal of land is in the public interest.
- The developer is the same party as the contracting authority (i.e. state ownership).
- The disposal of land is for the economic benefit of the contracting authority.

Additional “Notes” boxes provide more detailed explanations of key legal concepts. Even if there is no legal obligation to hold an OJEU or other competition, there may be other factors such as ensuring eligibility for EU funds which may prompt parties to opt for some form of tender process. The risks associated with each of the options below may differ, but none of the options are entirely risk free. As ever, much depends upon the particular circumstances of each case and this guide is not intended as a substitute for specific legal advice. Remember, material changes to the terms of an existing deal can trigger fresh OJEU obligations. Other legal obligations will need to be considered on a case-by-case basis. The chart is based on the law as at April 2016. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

NOTES

1. Definition of contracting authority

The EU procurement rules contain special definitions of “contracting authorities” which are “contracting bodies” including central-government, local-authority, police and fire-authorities, national and sub-national bodies. Other public bodies or publicly-funded organisations, such as Registered Providers, housing associations and academies, are also contracting authorities. Authorities which are in part owned by another contracting authority, e.g. a sport or leisure company, may themselves be contracting authorities depending on its obligations and functions and the level of control over day-to-day operations exercised by the owning contracting authority.

2. Additional requirements for works or services

There are additional requirements in a public body’s tender process. For ease, tenders that are subject to the full tendering requirements of EU Procurement Directives are referred to as “OJEU” tenders. Where some lesser form of competition may be required, the chart is based on the law as at April 2016. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

3. Non-OJEU competitions

Even for public bodies not subject to OJEU tender obligations, there may still be requirements under local or court design rules that enter into a tender. Local tenders may be required for below-threshold contracts. The Public Contracts Regulations 2015 also impose advertising obligations for local service contracts. Equally, there may be requirements under domestic legislation or other duties to demonstrate best value in an open one. One way of doing this might be to hold a competition. Such competitions do not have to be fully OJEU tenders, in which case tendering authorities and developers may assess the risks involved, thereby, provide greater flexibility. Best value can also be achieved by holding tenders in a more flexible manner. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

Assessing and managing risk

There are several approaches to risk. A public body might take the lead in the client tender process. A developer may take the lead on contracts being awarded via an OJEU process. Failure to run a tender at all is, of course, a risk of its own, as is the risk of an inappropriate tender process if the contract is put in place without first obtaining a contract award notice. In the event that a wrong decision is made, there are risks in the context to allow the procurement process to subsequently change the terms and conditions of a decision in a way that is not to the advantage of the developer. There are risks whichever approach a public body takes to market. Best value can also be achieved by holding tenders in a more flexible manner. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

OJEU options

The EU procurement regime is designed to provide fair, transparent and uniform processes for selecting developers to enter into land transactions. There are advantages of OJEU, including mitigations of staff time and in some cases an advantage in terms of speed and programme. chop in the event of challenge. Careful evaluation is necessary.

Annuity

Projects will be considered for OJEU process. This means that the project will be subject to a full tendering process.

Risks

The project is not subject to OJEU as it does not meet the threshold. There are risks whichever approach a public body takes to market. Best value can also be achieved by holding tenders in a more flexible manner. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

Public bodies

These are bodies which are wholly or partly owned by another contracting authority. Authority may also constitute an economic benefit, although obvious examples are where the authority will own part or all of the site. The public interest is the same as the public interest.

Ineffectiveness challenges

In effect, there are two “offsetting” challenges for the developer as the contract will be an important issue for all parties. Where both or all of the procurement requirements are met, the contract may increase the risk of challenge. Careful risk assessment is necessary. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

Risks

The project is not subject to OJEU as it does not meet the threshold. There are risks whichever approach a public body takes to market. Best value can also be achieved by holding tenders in a more flexible manner. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.

Carcinogenic contractors are subject to a separate regime with different thresholds. For further information, see also Note 10.