Development Agreements and Procurement

Planning professionals seeking to secure a development agreement, whether acting for developer or regulator, do not need to look for hurdles to overcome before achieving successful completion. However, they overlook the possible complications posed by procurement law at their peril. Not only has the potential application of procurement law to development agreements — whether under s 75 of the Town and Country Planning (Scotland) Act 1997 ('the 1997 Act') or otherwise — recently been confirmed in European case law, the Court of Appeal in England has just held that the right to challenge on the basis of breaches of procurement law is not limited to disappointed economic operators. It can be exercised by opponents of the development, be they commercial competitor or local interested party. If the planning permission is granted upon the basis of a flawed agreement, it too may be susceptible to challenge.

It is not the purpose of this article to attempt to explain the intricacies of procurement law, but to appreciate the potential planning implications of the procurement regime.

Procurement regime

The procurement regime, which aims to provide a fair and transparent playing field in the award of public contracts, derives in Scotland, as elsewhere in Europe, from Directive 2004/18/EC on procurement in the public sector. Three facets of the procurement regime, as contained in the Public Contracts (Scotland) Regulations 2006 ('the 2006 Regulations'), need to be understood by those who engage with our planning system.

First, while procurement law covers a number of different types of contract in the context of development agreements, it is public works contracts which are most relevant in the planning context.

A 'public works contract' means a contract, in writing, for consideration (whatever the nature of the consideration):

- for the carrying out of a work or works for a contracting authority; or
- under which a contracting authority engages a person to procure by any means of the carrying out for the contracting authority of a work corresponding to specified requirements.

Subparagraph (a) is straightforward. If a council enters into a contract for the building of a school, the regime may apply. It is subparagraph (b) which causes the problems. Its language is not precise, its ambit is unclear and the guidance from what is now the Court of Justice of the European Union ('ECJ') is limited. Use of phrases such as 'by any means' indicates the potential breadth of its ambit.

A comparison with the proposed amended s 75(2)(a) of the 1997 Act is instructive. That section will provide that planning obligations may require 'operations or activities specified in the relevant instrument to be carried out in, on, under or over land'. Consider the extent of the difference between specified 'operations or activities' with specified 'requirements', if any.

Second, it is only contracts over a certain financial threshold that are caught. At the time of writing the current limit is £3,927,260. There are less onerous obligations for under-threshold contracts which may have Community interest — see, for instance, the recent decision in *Sidey v Clackmannanshire Council and Another* [2010] CSIH 37 — discussion of such matters is beyond the scope of this article.

Third, controls do not extend to the acquisition of land, including existing buildings and other structures — provided that this is the main purpose of the agreement.

A recent example may help to illustrate the possible problems. In *Commission v Germany*, Case C-536/07 (29 October 2009) the City of Cologne entered into a lease of land with a private developer. Exhibition halls were to be constructed on the land by way of a separate agreement; however, the funding for the works was principally derived from the lease. The ECJ held that agreement was caught, as (a) the lease would not have been entered into without the construction of the exhibition halls on the land; (b) the specifications for the buildings in the lease went far beyond those that a tenant would normally require; and (c) the main purpose of the lease was for the construction of the exhibition halls. The lease was simply used as a financing mechanism for the works and so the exception did not apply (see also the reasoned opinion of the Commission in *Quedlinberg* (IP/09/437)).

Planning agreements

Planning agreements can cover a wide number of issues. It is common, for example, for affordable housing to be built to a particular standard, and for transport works to be required to a particular specification. Larger developments may also lead to the need to secure schools, hospitals and other community infrastructure. All could potentially be caught.

Alarm bells began to ring in the development industry following the case of *Jean Auroux and Others v Commune of Roanne* (C-220/05). This case concerned a development agreement between a town council and another state body, SEDL, which provided for the phased construction of a cinema, other commercial premises, a car park and roads in a run-down urban area. The council hoped to regenerate the area and promote tourism/leisure. It did not own all the land. The council not only contributed to financing the project (it 'primed the pump'), it agreed to acquire the car park and those parts of the development not disposed of, and to bear the full risk of any losses incurred. Not surprisingly, it was considered to be a public works contract.

Three particulars points are of note. First, a contracting authority does not necessarily have to become the eventual owner of a 'work' for the contract to comprise a public works contract. The potential application to planning obligations is obvious. Second, an agreement by which one contracting authority entrusts a second contracting authority with the execution of work can constitute a public works contract. Third, thresholds are assessed against the total value of the works from the viewpoint of the potential tenderer (including third-party revenue), and not the contracting authority. For a helpful discussion of the implications of the decision, see the Office of Government Commerce ('OCG') Procurement Policy Note ('PPN') 11/09 about 'Development Agreements'.

Recently, the ECJ has provided useful and reassuring guidance on the application of procurement procedures to development agreements, and in so doing has recognised that a planning authority entering an agreement simply in pursuance of its planning function is not likely to be caught by the procurement regime. In *Helmut Muller* (C-451-08), judgment 25 March 2010, the ECJ had to consider the application of the rules in the context of a state entity selling off 24 hectares of old army barracks. There were two rival bids. The successful bid was chosen on the basis of urban development grounds — its scheme would make the town more attractive and agreement was secured to that end. Was that procuring work 'corresponding to specified requirements' as regards the buildings etc designed to replace the barracks?

The ECJ considered that, in order to qualify as 'public works contracts', the works which were the subject of the contract must be carried out for the contracting authority's immediate economic benefit. The mere exercise of urban-planning powers, intended to give effect to the public interest, was not an exercise undertaken for the immediate economic benefit for the contracting authority. Further, the ECJ confirmed that the sale of land from council to developer is not, by itself, within the 2006 Regulations. The concept of 'immediate economic benefit' is nowhere defined.

The ECJ however gave some assistance and held that in order for there to be a public works contract, there must be an enforceable legal obligation on the contractor to carry out the works (directly or, it is to be noted, indirectly). The ECJ was of the view that the economic benefit may arise (a) from the contracting authority becoming the owner of the works; (b) where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public; or (c) from the economic advantages which the contracting authority may derive from the future use or transfer of the works, whether in the fact of it having contributed financially to the realisation of the works, or in the assumption of the risks were the works to be an economic failure.

Consider the provision of affordable housing where an authority sells land to a developer, but retains a continuing interest in the development of the site because the authority is to be entitled to allocate tenants to a proportion of the housing which is built (indeed, such interest may arise even without the sale of land). The OGC advises that if the developer is placed under an obligation to undertake the works to an agreed specification, the agreement may comprise a public works or public works concession contract, even if the specification was arrived at with the assistance of the developer (see further OGC PPN 12/10 (30 June 2010)).

The retreat in terms of development agreements from what might be called an interventionist procurement based approach has been reinforced by the very recent opinion of the Advocate General in *Commission v Spain* (C-306/08), delivered 16 September 2010. The Advocate General's opinion concerns the specific wording as contained in Directive 2004/18, which differs in wording from that in the 2006 Regulations and which contains a requirement of 'pecuniary interest' in a contract. His view was that a mere power to require a third party to pay for works cannot be sufficient to engage the procurement framework absent some economic detriment to the authority, for example, in the form of positive obligation to pay. His view was that there must be some spending of public funds before there could be the possible distortion of competition, concern about which underlay the Directive. If the ECJ agrees with that approach then the scope for applying procurement law to development agreements will be even more limited — but it will remain.

Court challenge

While the impact of the procurement regime may have been restricted and clarified, the English Court of Appeal in *Chandler v London Borough of Camden and Others* (CA) [2009] EWCA Civ 1011 (9 October 2009) has expanded the possible scope of challenges which rely upon failure to comply with the procurement regime. While it is an English case (where the rules for standing for judicial review are different) and a non-planning case (it concerned a challenge to a decision to bring in City Academy-type schools), it is none the less of importance and the general outcome is likely to apply in Scotland. The court considered the basis upon which a challenge arising from a failure to follow the rules might be made. Were such challenges restricted to economic operators — that is, disappointed bidders or potential bidders? The court determined not. It reasoned that failure to comply with procurement regulations is an unlawful act and thus a paradigm situation in which a public body should be subject to review by the court. The court indicated that an individual with sufficient interest in compliance, even if not an economic operator, can bring judicial review proceedings, particularly where the proceedings are being raised to prevent breach. The court suggested that an individual might have sufficient interest in compliance where the procurement exercise has either a direct impact on that individual or where there is serious non-compliance with public law. (Note that previous authority which did restrict such challenges, such as *Austin v Portsmouth City Council* [2009] EWHC 322 Admin, is no longer good law.)

Comment

The risks for developers and authorities here are obvious. If a planning agreement or obligation is contemplated which is near or over the threshold (currently £3.9m), it is important that consideration is given at an early stage to the application of the procurement regime. Failure to do so may either lead to significant delay while the regime is being complied with, or, worse still, to a challenge in the courts that succeeds in attacking an underlying planning permission. It will be no defence that the planning regime is not conducive to procurement procedures.[1]

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[1] http://www.ogc.gov.uk/procurement