The Procurement Lawyers' Association

EU Public Procurement and Land Development Agreements after the ECJ's judgment in Jean Auroux v Commune de Roanne (C-220/05)

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About this Paper

The Procurement Lawyers' Association (**PLA**) is an organisation to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA aims to represent, promote and strengthen procurement law expertise in a number of ways, including through in-depth discussion of procurement law issues.

The 2007 judgment of the European Court of Justice (**ECJ**) in Jean Auroux v Commune de Roanne, Case C-220/05 (***Auroux***) has raised significant questions in relation to the scope of application of the EU public procurement rules to land development agreements.

The PLA has considered the implications of *Auroux* for a number of different land development situations and has produced this paper to share its views as at 22 June 2009, on the application of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and related EC law, implemented in the UK by the Public Contracts Regulations 2006 (**the Regulations**) and the Public Contracts (Scotland) Regulations 2006 (together the **public procurement rules**).

The European Commission has publicised procurement infringement proceedings and the PLA is conscious that there are a number of proceedings before the ECJ, in respect of which judgment expected in due course may resolve some of the current legal uncertainties. Moreover on 25 June, after the PLA finalised its views for this paper, the European Commission announced its decision to send a reasoned opinion to the United Kingdom under Article 226 of the EC Treaty, concerning the City of York Council's award of a public works concession contract relating to land development at Osbaldwick. This paper requires to be kept under review accordingly.

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Introduction to Public Procurement and Land Development Agreements

Public Works and the Public Procurement Rules

The public procurement rules are intended to assist the functioning of the EU internal market in relation to the award of public works contracts, as well as contracts for the supply of goods and for the provision of services.

Economic operators across the EU should have an equal opportunity to compete for contracts to provide public buildings and infrastructure, on an EU-wide basis, in circumstances where those contracts are awarded following a compliant procurement procedure.

Such opportunities should create competitive tension between tenderers seeking to secure contracts, in conditions of transparency and non-discrimination. According to the economic principles underpinning the public procurement rules, this should result in the proposals made to public authorities to construct public works being more competitively priced and comprising greater economic advantageousness, and so improve the value for money of public works.

Contracts for buildings and infrastructure may include other contractual requirements, for example relating to transfer or treatment of the land on which they are to be located or for the provision of services for the facilities to be constructed. Accordingly, public works requirements falling within the scope of the public procurement rules may be incidental to a different, principal object of the contract.

The public procurement rules do not apply to the "pure" disposal of land (such as to a developer). Similarly, it is likely that - following the application of the "main objects" test illustrated in cases such as Gestion Hotelera Internacional SA v. Comunidad Autonoma de Canarias and Others (Case C-331/92) - a transaction which is principally concerned with the disposal of land, and where the obligation to develop the land is purely ancillary, will fall outside the scope of the public procurement rules. Certainly, in reliance on this principle, historically many public authorities took the view that conventional development partnerships between the public and private sector, whereby a public authority would lease land to a developer in return for a share in the development profits, were essentially land agreements which were not subject to competitive tendering requirements. Whatever the rationale may have been for this view in the past, the ECJ's ruling in Auroux makes it clear that development agreements of this nature constitute public "works" contracts which are subject in full to the application of the public procurement rules.

Land Development Contracts

Contracts for public works such as buildings and infrastructure may be contained within land development obligations, including for example agreements under section 106 of the Town and Country Planning Act 1990 (**section 106 agreements**).

The open nature of public procurement procedures, which as described above are designed to allow equality of opportunity to economic operators in tendering, is in tension with the enjoyment of exclusive, private property rights including, potentially, when provision is made in respect of those rights in development agreements and/or as a consequence of a grant of planning permission.

The Auroux Case and its Implications

Auroux

On 18 January 2007 the ECJ issued its judgment in *Auroux* which concerned the application of the public procurement rules to a contract which had been granted by the French municipal authority of Roanne to a semi-public body (**SEDL**) under a national law, without having followed a public procurement procedure.

In that instance, the contract was for the overall implementation of a town planning project and the works involved the construction of a leisure centre which was to be sold off in part to third parties, with a car park and other elements to be provided for Roanne. Consideration for the works was to be paid partly by Roanne and partly by third parties, and any land and buildings not disposed of to third parties at the end of the project would automatically pass to Roanne, which would take over SEDL's ongoing contractual and financial responsibilities. In addition, French national law provided for public development agreements to be awarded only to certain entities. In this connection, the ECJ's judgment addressed three issues:

1. whether the contract constituted a public works contract within the meaning of Directive 2004/18/EC

2. how the financial value of the contract should be determined for the purposes of establishing whether or not it exceeded the threshold, above which the public procurement rules would apply and

3. whether the public procurement rules still applied where national law provided that such a contract could only be agreed with certain legal persons.

The French authorities contended that the contract did not constitute a public works contract because the works extended beyond the municipal authorities' requirements, but the ECJ held that a contract could be a public works contract, for the purposes of the application of EU public procurement rules, whether or not the contracting authority will become the owner of all or part of the work.

In terms of the value of the contract, the ECJ took into account that some of the consideration would be paid by the contracting authority and some by third parties. Nevertheless, ECJ held that all consideration paid must be taken into account when determining the total value of the contract for public procurement purposes.

Finally, the ECJ held that a contracting authority is not exempt from any public procurement procedures on the ground that national law provides that the contract may only be awarded to certain legal persons.

The Implications

Following *Auroux*, concern arose in relation to a number of different public works and land development arrangements, including some regeneration projects. The following risks exist for such projects:

- where public procurement procedures are not followed as required, the opportunity may be lost to put contract arrangements in place in competitive conditions, and the contracting authority will be exposed to the risks of legal challenge and European Commission investigation and

- development proposals may not be implemented at all, because the contracting authority wishes to avoid challenge and so a development opportunity may be delayed or lost.

Uncertainty over the legal position for development agreements may increase these risks. The PLA has considered in detail the implications of *Auroux* for a number of different land development situations and sets out in this paper its views on how the public procurement rules are likely to apply in four different types of situations.

Nature of Comments on Case Studies

The examples chosen for Case Studies illustrate a number of legal considerations which may be important in any particular case, but the comments in this paper should not be relied upon as legal advice. The suggested answers are necessarily tentative given the developing nature of case law in this area. Moreover it is important to appreciate that the comments made in this paper relate to the Case Studies and should only be read in light of those Case Studies as a whole.

For these reasons readers should not act on the basis of the comments in this paper without taking appropriate advice on an individual case-by-case basis.

Furthermore, this paper has been prepared by a working group of the PLA and does not represent the views of any of: the PLA as a whole, any individual member of the PLA and/or any firm or other organisation with which any individual member of the PLA is connected.

Case Study One

Land Transfer

Romfield Borough Council (**the Council**) owns the freehold of a large derelict site in the north of the Borough. The Council's Master Development Plan has earmarked the area for development, consistent with the Council's regeneration objectives for the Borough.

The Council has recently been approached by a developer, First Estates (**FE**), which has submitted outline proposals to purchase and develop the site in a development scheme with a cost of over £30 million, involving high-quality retail and leisure facilities.

The Council considers that FE's proposals would greatly enhance the prospects for regeneration of the Borough, and is proposing to grant to FE a long lease of the site at open market value (a premium of £1.5 million and a peppercorn rent). It will not enter into a development agreement or impose any detailed development obligations, but reserves the right to re-acquire the site in the event that development in line with FE's outline proposals does not proceed. The Council will however need to use its CPO powers compulsorily to purchase two small areas of land bordering its freehold interest, in order to provide the developer with the area it requires. FE will keep the Council closely informed about progress in regular update meetings.

The local planning authority expects to enter into a Section 106 Agreement with FE before granting planning permission for the development, to make provision in respect of standards of traffic management and for various nature conservation interests which will be affected by the proposals.

The Regional Development Agency has agreed to provide a £4 million financial contribution to FE to fund the provision of open community space and landscaping works on the site, to be owned by FE.

In addition two possible variants of the above are under consideration:

I. FE has suggested that, rather than paying an initial premium, the Council should take a small share of the development proceeds, potentially greatly increasing the Council's receipts from the site, and

II. The Council wants FE to construct a public library on the site. It will fund in full the construction of the library at a total cost of £8 million and the library will be leased back to the Council.

Comment on Land Transfer Case Study

In this example the Council is entering into a "pure" disposal of land to the developer, which is not subject to the Regulations.

Clearly, the context of this transaction is the proposed development of the site by a developer which is consistent with the Council's regeneration strategy. However, there is no procurement of "works" within the meaning of the Regulations. In particular, there is no contractual obligation on the developer to develop the site in accordance with the Council's requirements. The fact that the Council has the power to re-acquire the site in the event that the development does not proceed is not in itself sufficient to constitute a procurement within the meaning of the Regulations. The European Commission's decision in June 2008 to close an infringement case against Germany concerning a land sale for urban development purposes by the public utility company of the city of Flensburg is of interest in that regard.

The fact that CPO powers are to be exercised in respect of two small adjoining areas of land does not affect the position. The acquisition of land is exempt from the Regulations, and the subsequent disposal of the land to the developer is not subject to the Regulations.

The section 106 agreement between the local planning authority and the developer appears likely to contain provisions relating to adherence to environmental, health and safety, technical and quality standards. It is unlikely that a section 106 agreement of this nature which essentially governs the terms on which planning consent is being granted, will of itself constitute a public works contract. That said, it must be remembered that the application of the public procurement rules to section 106 agreements will depend on all the circumstances and that there may well be circumstances in which these agreements contain public works obligations.

The RDA's grant raises questions as to whether the RDA is itself engaging in a procurement of works. This will depend on the nature of the commitments imposed in the relevant grant agreement. The imposition of detailed design specifications could lead to the grant agreement being characterised as a public works contract. Arguably, even if the RDA is procuring works, this could be seen as ancillary to the main object of the transaction, which is the leasing of the site to the developer (see the *Gestion* judgment referred to above). However, account will need to be taken of Section 34 of the Regulations which lays down special rules for subsidised public work contracts and, if applicable, FE would itself need to put the works out to tender.

In relation to the two variant proposals:

I. The fact that the developer pays a consideration for the land based on a share of the development proceeds rather than an upfront premium makes no difference to the proper characteristics of the contract as being for land disposal.

II. The Council will almost certainly be entering into a works procurement in relation to the public library, since these are works "for" the Council, for which the Council will be giving consideration. There may be similar argument as to whether this is a "mixed" contract (see *Gestion*). However, the safer approach would be for the Council to treat this as a separate and distinct element of the arrangements with the developer and either (i) to put out to tender the contract for the library, or (ii) to structure this as a subsidised contract under Section 34 of the Regulations and require FE to tender for a contract to carry out the library works.

Case Study Two

Redevelopment of an Existing Facility

DevMec is a private sector developer that operates mainly in the retail sector. It is active in developing and managing shopping centres in the UK and Germany. DevMec has an existing shopping centre in Fairfield town centre. The shopping centre is now run-down and outdated, having been built in the early 1980s. DevMec owns the shopping centre on a long leasehold from Fairfield Council, the freeholder of the site.

The developer is concerned about losing value on its increasingly dilapidated shopping centre and wants to push ahead with a plan to update and extend it. DevMec's proposal is in line with the Area Action Plan for Fairfield which provides for the expansion of the town centre, including the extension of the existing shopping centre (and some new residential units).

As a first step, DevMec has to assemble certain land parcels to be able to bring forward the expansion proposals. DevMec already has a substantial landholding in the town centre - it owns approximately 55% of the potential development site, including the shopping centre and car park. Land next to the existing shopping centre is owned in varying proportions by third parties (together, approximately 15% of the potential site).

Approximately 30% of the potential site is owned by the Council. This includes the existing town library which abuts the shopping centre. The developer is aware that in expanding and reconfiguring the shopping centre, it will have to knock down the existing library and relocate it. DevMec begins working up plans for the site bearing in mind these considerations.

DevMec approaches the Council (a unitary authority) to get the Council's agreement in principle to exercise its compulsory purchase powers to acquire the third party land in the event that DevMec cannot acquire the land by private treaty. DevMec is optimistic, however, that it should be able to acquire the third party land through direct negotiations with the land owners. Following initial discussions with the Council, it is clear that the Council is keen to promote DevMec's proposed scheme.

The Council agrees with DevMec's proposal that it work up draft heads of terms for review by both parties. These will include a CPO indemnity from the developer. The Council makes known that it will require certain minimum outputs from the developer under the heads of terms. These include:

- The introduction of a further 20 retail units as part of the shopping centre expansion;
- The inclusion of 60 residential units to comply with the Code for Sustainable Homes level 4;
- The requirement that the Council has approval rights in respect of the external facades of the expanded shopping centre and its uses; and
- The requirement that the Council has full design rights over the specification for the relocated library.

In addition, the parties agree that the Council will own the freehold interest of the relocated library (assuming it is a free standing building, or a long lease if it forms an integral part of the shopping centre extension) in return for granting a lease (supplemental to DevMec's existing shopping centre lease) of the current library site and any land acquired by CPO. The parties intend that DevMec would pay for the construction of the new library in consideration for the Council agreeing to grant the lease of the additional land. Profits from the completed new scheme above an agreed minimum return would be split between the Council and DevMec.

Comment on Redevelopment of an Existing Facility Case Study

Given the following assumptions:

- the majority percentage ownership of the potential site by the developer,
- that there is a long time to run under its lease,
- the value of the additional requirements on the refurbishment of the shopping centre do not comprise the primary value of the works, and
- the ancillary nature of the library procurement and Council's requirements to the refurbishment works,

the refurbishment works as to be undertaken by the developer would not be subject to the Regulations.

In this case study, the developer's private rights to its property and the Council's (public) right to regenerate are difficult to separate. It is clear that the developer has a requirement to refurbish the shopping centre and the refurbishment works can therefore be seen as directly linked to its right to enhance/maintain the value of its asset. Given this position, it would be reasonable for the developer to refurbish the shopping centre as part of its enjoyment of its right to use the land without public procurement rules preventing it from doing so (as the exercise of the developer's rights should not impair the functioning of the internal market).

On the other hand, the Council wishes to exercise its rights to secure regenerative benefits to the surrounding area, but the exercise of these rights can lead to a public works contract covered by the public procurement rules.

Where these two sets of rights are closely entwined, it is generally helpful to look at the overall purpose and intention of the development. If the main purpose is to meet a Council requirement then (notwithstanding the developer's interest and involvement in the overall project) the public procurement rules will apply and the Council would be obliged to interpose a public procurement prior to contracting with the developer, rather than characterise the development as an exempt "developer-led" proposal.

The CPO powers to be exercised by the Council must be operated within certain guidelines but are designed to fulfil a statutory procedural role and as such they are not, in themselves, sufficient to constitute a works procurement. Nevertheless, it is worthy of note that if provision of a CPO indemnity may be viewed as consideration and the Council expects the subsequent development of the land to be subject to certain outputs and/or specified requirements for its benefit, then the development agreement could *prima facie* be capable of comprising a public works contract within the meaning of the Regulations.

There are a number of variants in this case study that could alter the above conclusion:

I. Percentage of land holding by the developer –

The greater the land-holding by the developer the more the likely it is that this arrangement could be seen as a re-negotiation of the current lease for improvement works to maintain the viability of the shopping centre prior to the end of the lease. According to *Gestion*, this could then be seen as a mixed contract (i.e. the works are ancillary to the main object of the transaction which is compliance with the terms of a land agreement (lease)) not subject to the Regulations.

If the developer owned a smaller landholding and therefore needed to acquire a greater proportion of the land required for the development through private treaty (supported by a CPO), then it is more arguable that the ensuing contract with the Council could be seen as a works contract. The application (or non-application) of the procurement rules would then depend on the nature of the obligations between the Council and the developer (and whether it amounted to an entrustment as set out in *Roanne*), discussed below.

Conversely, (and see III below for further discussion on this point), if the Council's requirements are not ancillary to the main purpose but are capable of severance from the refurbishment works and subject to a separate procurement process, then the refurbishment works (for the benefit of the developer) could fall outside the public procurement rules.

II. Nature of the land holding by the developer –

In order for the contract to be treated primarily as a land agreement, the developer would need to possess a substantial interest in the land, amounting to either a freehold or a significant lease-hold interest. This would assist in the developer arguing that the works are proportionate to the pursuit of its primary functions either under the lease or as the freeholder of the shopping centre.

Furthermore, in the event that the developer only held a short-term lease, it would be more straightforward for a competitor of the developer to argue that, had the Council undertaken a procurement process, it could have included the purchase price of the remaining interest in its bid and therefore been able to deliver the same or similar works to the Council on a value for money basis.

Whether an interest in land can amount to an exclusive right which leads to exclusion of the public procurement rules in certain circumstances has not been decided by the ECJ. Some commentators consider that an "exclusive right" should be interpreted narrowly as a private right akin to intellectual property ownership whilst others favour a wider interpretation and construe "an exclusive right" as capable of including ownership of land that provides that owner with exclusive rights to deliver a procurement. Please see the final comments on this Case Study.

III. Nature of Council's requirements –

The Council has included a number of minimum outputs in its heads of terms to be agreed with the developer. These could result in a "work corresponding to specified requirements", and the issues to consider are noted below.

Refurbishment works

In respect of the refurbishment works, this will depend primarily on:

(a) the nature and length of the developer's interest in the land;

(b) whether it could be said that the Council will receive a benefit of the works due to the indirect regenerative effect of the works (as in *Roanne*);

(c) whether the requirement for the 20 retail units, 60 residential units and the approval rights of the Council in respect of the external facades of the expanded shopping centre and its uses amounts to "specified requirements". (We have presumed that there will be a contractual obligation in this respect and therefore the ruling in *Flensburg* is unlikely to be relevant).

Additional retail and housing units

On the given assumptions, the additional retail and housing units do not represent the principal subject-matter of the contract, given the assumed value of the refurbishment works, their integration into the shopping centre and the procurement requirements of the developer and therefore we consider that the overall development proposal is unlikely to be viewed as a public works contract.

However, the Council would need to consider whether the additional works over and above the refurbishment works, (i.e. 20 additional retail units and 60 additional housing units) would turn the project into an opportunity that would make it financially attractive to a competitor of the developer, and this may depend on the value of the additional works in terms of potential income which the developer could be expected to obtain, as explored by the ECJ in relation to Roanne's third question.

Library development

Conversely, in respect of the library development, given that:

(a) the Council will own the free-hold or long lease-hold interest of the completed library, and

(b) the Council's requirements in terms of full design rights over the specification and other requirements are likely to result in a "work corresponding to specified requirements", and

(c) the flexible nature of the positioning of this library (i.e. it could be a free-standing building, and as such is divisible from the refurbishment works to the shopping centre (arguably the principal facilities to be created out of the project),

then the Council is likely to be entering into a works procurement for the construction of the library.

If so, there may be similar arguments to point II in the Comment on Case Study One, in that the library works could either be argued to be incidental to the main purpose of the contract (namely the re-negotiation of a land agreement) or that a safer approach could be adopted by the Council if it were to separate out the library as a distinct element of the arrangements with the developer and either:

(a) put it out to tender; or

(b) structure it as a subsidised contract under Section 34 of the Regulations and require the developer separately to tender for the library works contract.

We recognise that there will be contrary views to those expressed above and that, in similar circumstances, a Council may wish to go out to the market openly to procure the entire scope of its works requirements for the area. Whether a Council chooses to procure these works through an EU public procurement is likely to depend in part on whether a procurement process realistically can be interposed between the developer bringing forward its proposals, and the resulting scheme being procured. In this context questions can arise over the effect of the developer having existing land interests and whether these can amount to exclusive rights as discussed above.

Case Study Three

Local Authority Regeneration Transaction

A Council identifies a need to replace its current library and information service to a particular area and carries out feasibility studies to locate a site on the high street which is suitable for such new facility. However, the Council does not own all of the site, the majority of which is currently occupied by a number of small commercial retail operators and owned freehold by a pension fund.

The Council's feasibility study suggests that if the Council can acquire and contribute the land for the scheme then a developer will be capable of constructing a mixed use scheme comprising the proposed facility at lower levels and a mixture of private housing and affordable housing on upper floors.

On the basis of the feasibility study the Council commissions an architect to design a scheme to sufficient detail to enable the submission of an application for outline planning permission. Simultaneously the Council commences a process to select a developer capable of delivering the scheme through an appropriate EU compliant process.

After selection of a developer the Council will enter into land and development agreements which will detail the arrangements for making the land available to the developer, obtaining detailed planning consent, the financial deal and vitally the construction obligations relating to the building as a whole and the facility in particular.

Comment on Local Authority Regeneration Case Study

The Council is entering into a public works contract, the award of which will be subject to the public procurement rules.

It seems clear that the proposed regeneration transaction has been instigated by the Council in order to fulfil its requirement to replace the current library and information service to its specification and in an area identified as most suitable by the Council's feasibility study.

Looking at the regeneration scheme as a whole, it seems clear that the developer is to carry out "works" for the Council, in return for consideration, and there is to be a contractual obligation upon the developer to construct the facilities as a whole in line with the Council's requirements. As a result and given its primary purpose, the scheme must be characterised as a public works contract and so should be procured in compliance with the public procurement rules.

The inclusion of additional "private" elements namely, the development of private and affordable housing is only ancillary in main purpose of delivering a new public library (see also the ECJ judgment in *Commission v Italy, C-412/04*). Since the housing elements are to be located on upper levels they would seem harder to procure separately (given the construction implications) and accordingly they are not likely to be severable from a procurement of the principal works.

Case Study Four

Complex Multi-party Area Redevelopment Project

Fairfield Railtown is a run-down area of Fairfield containing a large number of brown field sites, a disused railway goods yard and a patchwork of low-quality industrial units. A number of stakeholders (including a number of private landowners) have resolved to work together to regenerate the area. There are some major environmental problems.

A regeneration plan for the area has been developed by consultants appointed by the RDA. The principal elements of the plan are as follows:

- A large science park will be built at the centre of the existing site, many of the facilities will be built by private landowners on land to be transferred by the RDA or Fairfield Council as part of the obligations under a series of development agreements, RDA grants will pay for environmental clean-up although the developer will award the contracts and supervise the work;

- For construction on land already in private sector hands, the RDA will provide grant funding to fill the "gap" between the cost of development and the expected value of buildings on the science park (plus an agreed developers return), with the grant agreement specifying the size, design, fit-out and permitted use for the building concerned;

- The Council would like to consider, for some sites, establishing a joint venture, on an arm's length commercial basis, with Regen Fairfield Ltd, who have a strong track record of working with the Council. Land would be sold to the JV on arm's length terms and Regen would give the guarantees necessary to secure bank funding. The JV would carry out the work and sell the buildings constructed, paying dividends to the Council and Regen out of profits earned;

- The Council wishes to secure the construction of a linear park and nature reserve around the perimeter of the area (i.e. around the edges of development sites) with a cycle path and public leisure spaces, by imposing obligations on developers under s106 agreements; much of this is landscaping work, but there is some environmental clean-up work and 2 footbridges will be required to cross a busy trunk road; path lighting, signage and benches will be installed. It is hoped to save money by commissioning this work from the builder appointed by the developer for each plot as part of their on-site works; and

- At the centre of Railtown is a station complex of major historical significance, owned by a local historical trust. The trust has little money, and the Council wishes to provide funding for the renovation of the buildings and its opening as a museum. The Railtown regeneration is not considered viable if this site, currently a very visible eyesore at the heart of Railtown, is not renovated.

Finally, grants will be available to owners of existing industrial buildings to carry out improvements of a cosmetic nature.

Comment on Complex Multi-party Area Redevelopment Project

Taking each of the elements of the proposed regeneration scheme in turn:

Science Park Buildings on land transferred from the Council/RDA

Development agreements with the landowner

Given the fact that the buildings will be constructed pursuant to development agreements entered into as part of the same transaction as the land sales, and assuming (as would usually be the case) that the obligations set out in the development agreements as to the nature of the buildings and other facilities to be constructed are sufficient to amount to *"the carrying out …of a work corresponding to specified requirements"*, this element of the project would amount to a public works contract for public procurement purposes. Therefore, developers would need to be identified via a procurement process compliant with the public procurement rules. *Auroux* confirms that this is the case even if the buildings are never intended to be used by or for the purposes of the RDA and/ or the Council.

Grant agreements with the RDA

As noted in the Comments on Case Study One, it may be that grant agreements themselves amount to public works contracts. It would be sensible to conduct a single procurement so as to obviate any procurement concerns arising from this. The contract notice and tender documents should make it clear that grant funding may be available, or the procurement could be in joint names of the landowner and the grant funding body, as required.

In considering the risk of a successful procurement challenge to a grant agreement providing funding to a development which had itself been the subject of a compliant procurement process, those supporting the grant-aided development may hope that the Court would take a pragmatic view but it is notable that the ECJ's case law appears inconsistent in this respect (compare *Auroux* and *La Scala*).

Grant agreement only, construction on land already in private hands

The comments above apply here also, together with the Comments on Case Study One. It is apparent, following *Auroux*, that there is some risk that grant agreements which specify the nature of the facilities to be constructed amount to public works contracts. This scenario highlights one of the challenges posed by the *Auroux* decision, namely how that judgment should be reconciled with the fact that the land concerned may already be privately-owned.

Regeneration of Railtown will require the carrying out of works on land which is in private hands. Advertisement of the requirement for works by the RDA and/ or the Council would seem pointless.

Prior to *Auroux*, the grant-giving authority could have assumed that it had discharged its public procurement law obligations by requiring any grant-aided landowner to award works contracts in accordance with the public procurement rules as if it were a contracting authority, as contemplated by Regulation 34 of the Regulations, if the grant amounted to more than half of the consideration for the works; prior to *Auroux*, one could logically have concluded that no such requirement arose for a contracting authority where the grant constituted a smaller proportion of the relevant consideration.

It may be that one of the consequences of *Auroux* is that a contracting authority must consider its procurement obligations in selecting the entity which is to be grant-aided. Does this force a position in which the contracting authority either:

(a) must compulsorily purchase the land (involving a positive obligation to construct circumstances in which the public procurement rules can be applied, which seems unduly interventionist and artificial) or:

(b) must comply both with Regulation 34 and with the full force of the public procurement rules in selecting the grant recipient?

As noted above, *Auroux* raises questions over the extent to which merely entrusting compliance to another entity discharges public procurement law obligations; in this respect, *Auroux* may question the status of Regulation 34 itself.

Establishment of development joint venture

It is clear from the European Commission's Interpretative Communication on Institutionalised Public Private Partnerships that most if not all collaborations between the public and private sectors, even those falling outside the strict scope of the Regulations, will be viewed as requiring compliance with EC Treaty obligations requiring advertising, transparency and non-discrimination. Accordingly if, for example, a joint venture entity were established to build local sports facilities, the European Commission would envisage a competition taking place to select the joint venture partner, which would include details of the scope and duration of, and the terms of, that collaboration.

It is unclear whether the facilities which it is contemplated this joint venture will construct will be "public facilities" or simply buildings for the sole use and occupation of private sector entities. Whilst it might be argued that the latter case would fall outside the scope of the Interpretative Communication, after *Auroux*, caution would be required in interpreting even such an operation as falling outside the scope of the public procurement rules.

Linear park and section 106 agreements

As discussed in the Comments on Case Study One, the status of section 106 and other planning agreements in the context of the public procurement rules is not settled.

Although it may be argued that these agreements are not really agreements in the contractual sense at all, it would be sensible to assume that they are. In particular:

- Section 106 refers to the creation of obligations or restrictions on a landowner "by agreement or otherwise"; at least in the case where an agreement is used, it may be hard to argue that this does not amount to a "contract in writing" for the purpose of the public procurement rules. Unilateral obligations are effected by deed. Note however that the existence or otherwise of a contract is a matter of Community, not national, law and

- the *La Scala* decision militates against a narrow interpretation of the public procurement rules in the context of works conducted as part of securing planning permission.

As noted above, however, it is difficult to apply the public procurement rules in circumstances in which the land involved is already in private hands and "chooses itself".

As in Case Study One there is a risk, if a contractual requirement to construct a linear park corresponds to specified requirements, that it could constitute a public works contract. The issue could be avoided if the Council used the power in section 106 alternatively to secure a contribution from the relevant landowners and a lease/licence of the relevant land, permitting the construction of the linear park by the Council.

Grants to local historical trust/cosmetic grants:

The comments above regarding the public procurement treatment of grants and Regulation 34 of the Regulations apply here also. Grants for cosmetic purposes, and the works funded by them are likely to be insufficiently large to require full application of the public procurement rules in any event, and challenge may be unlikely in practical terms.

These comments do not address the state aid aspects of what is proposed arising from potential public subsidy, although consideration of those issues would be critical to a comprehensive analysis.

Further Information

This paper is issued by the Procurement Lawyers' Association. For further information about this paper please contact Duncan Osler at MacRoberts LLP, www.macroberts.com. For information about joining the Procurement Lawyers' Association please contact Kathy Thompson at Addleshaw Goddard (kathy.thompson@addleshawgoddard.com).

The comments in this paper should not be relied upon as legal advice and readers should not act on the basis of the comments in this paper without taking appropriate advice on an individual case-by-case basis. Furthermore, this paper has been prepared by a working group of the PLA and does not represent the views of any of: the PLA as a whole, any individual member of the PLA and/or any firm or other organisation with which any individual member of the PLA is connected.