



# ASSET

## ROANNE AND PROCUREMENT

ACES Presidential Conference  
Basildon, September 2008

ACES Paper No. 08.9/04 by

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# ROANNE AND PROCUREMENT

## INTRODUCTION

European case law on procurement is a growth area and only yesterday (at the time of writing – 18/09/2008) a case was referred to the European Commission dealing with planning and working in partnership with others. Apparently the Valencian Authority in Spain set up a joint venture to carry out town and urban planning and have been undertaking works and land disposals under that Arrangement. The case has been referred because the joint venture, when it was set up, was not subject to a procurement process. It will be interesting to see what the outcome is because there is now increasing pressure on local authorities to go through a proper procurement process and even where, historically, certain projects have not been procured through the OJEU, they will probably have at least been advertised throughout Europe.

The developing case law, and the Valencian case mentioned above, has not reached the European Courts of Justice yet, but the Commission are looking at the implications of recent decisions, particularly the Roanne case that has set the cat amongst the pigeons with local authorities.

## THE SCOPE OF THIS PAPER

- intend to deal with the following topics
- What is procurement?
- When do the procurement rules apply?
- Are developments subject to the procurement rules?
- Developing case law
- Factors to consider
- Risk of challenge
- Procurement routes
- Going forward

## WHAT IS PROCUREMENT?

Procurement is the way in which public bodies, particularly local authorities, receive works, services and supplies from the private sector. However a recent communication from the European Commission states that where you are setting up partnerships/joint ventures call them "Institutionalised PPs". Where you set up IPPs, even though it is a public/public venture, if that public venture is going to be letting services or works contracts to other bodies or even back to

themselves, then there should be one procurement to set up your joint venture and that procurement should also include the kind of contracts and the arrangements that are going to be let by the partnership. The scene is becoming increasingly complex but it is worth looking at the communication as it shows the increasing pressure from Europe and the European Commission on how public bodies procure. Procurement involves a competitive process and I will deal with possible alternative procurement routes later. Procurement in the public sector involves public expenditure.

## THE EU PROCUREMENT RULES



A few years ago the EU procurement rules on procedures for the award of public works contracts, public supply contracts and public service contracts comprised three sets of regulations that came from three different directives. In the UK these were then amalgamated into one set of consolidated regulations, The Public Contracts Regulations 2006. These have, in fact, been amended already, but not in a way that needs to be detailed in this paper. The regulations set out the different procedures that can be followed in terms of public procurement. Some of the procedures are detailed, some not so, which is interesting, as the broad brush regulations give the flexibility to do what you want to do and many authorities want to do everything within their power to avoid going out to procurement under the European Regulations. Frankly it is often quicker and easier to go out to OJEU Notice than not. A lot of time and effort can go into avoidance but sometimes it is just as quick to publish an OJEU Notice. Also each authority has its internal procurement rules and contract standing orders and these are equally important in considering whether to tender or not. The hierarchy is indicated above, the Directive comes first, the Regulations second and then an authority's standing orders. In theory you could comply with your standing orders, but breach the other legislation.

The EC Treaty principles underlying the regulations are equal treatment, transparency and non-discrimination and each is equally important. Previously if an authority breached the regulations an action would be for a

specific breach of a specific regulation, but now you will see increasingly cases that include breaches of the general principles. Damages can be awarded against an authority carrying out a procurement that does not comply with the principles and an increasing number of actions are citing transparency and non-discrimination. Therefore it is possible to comply with the regulations, publish an OJEU Notice and go out to procurement and often this might be a long term process that could last over two years for example and during which you must ensure that all the bidders are treated equally, and fairly, and that there is a transparent process and non-discrimination. It is extremely difficult to sustain that kind of compliance because the nature of projects means that you are going out and are consulting with stake holders, residents, local groups and so on and word is going to get out sometimes about the details of other bidders solutions for example. You must put procedures in place to ensure that you think about these issues.

## WHEN DO THE EU PROCUREMENT RULES APPLY?

Procurement rules apply to public works, supplies and services contracts. The current threshold value for works, that is the cost over which a local authority is required to tender, is £3,497,313. This is quite high compared to the supplies and services threshold that is currently about £139,000. (Different thresholds apply to Government Departments and higher education establishments etc.) There are certain exemptions and most of us know that normally for any kind of land disposal an authority is not required to go out to OJEU Notice, as it is exempt from the European Procurement rules. It is acceptable to publish a notice in the Estates Gazette or locally, as many of you do, but there is no requirement to go to OJEU Notice. There is also the "exclusive rights" exemption, which is being looked at in more cases now to see whether or not you can rely on this exemption, for example, where a developer might come to you with a proposal for land that they own which borders land that the local authority owns and they want to do something with you that covers the whole area. Now if a supplier has exclusive rights to deal with property, and not just land, it could be intellectual property rights, for example, where the supplier has a patent or copyright for certain information or rights, then if the supplier does have exclusive rights unless it would put you to extreme effort, cost and time to acquire rights over that land they can rely on the "exclusive rights" exemption. But be cautious as this has been looked at in some development cases and it is quite hard to sustain the argument in every case, because the Courts will say the authority could have relied on its CPO powers; something to think about.

## ARE DEVELOPMENTS SUBJECT TO THE PROCUREMENT RULES?

The usual reason why developments are not put out under OJEU Notice is that the scheme is essentially for the transfer of property rights and that you are not actually procuring works within the meaning of Works in the regulations and the developer is bearing all the risks of the development. When developments are considered there is often discussion about risk transfer, sharing risks, setting up partnerships, and all those things start little bells ringing in my head thinking procurement, procurement, procurement?

There are some searching questions that need to be asked, and answered, about the nature of the development arrangements before deciding on procedure. If the development is for retail, commercial, industrial and for private use rather than public facilities a key questions is what are we trying to achieve:-

Are we trying to pass the site on to a developer to develop in such a way that the developer will own the site, will own the risks, and will produce facilities that the developer would get the benefit of?

- Or is the authority trying to determine and specify what the development is to include?
- Is there a regeneration element the authority is trying to lead?
- What is the authority specifying in terms of types of works?
- Will the involvement of the authority in the land be maintained after development?

It is essential to look at the situation in the round to determine whether it is just a disposal of a site, what it will be used for and the nature of the authority's continuing involvement, if any. Careful analysis will show if it is simply a "land transaction" or a works transaction. If it is the latter then the works regulations do apply.

Remember to consider your proposal in the round to determine whether it is a land or works contract but do not overlook threshold values.

## DEVELOPING CASE LAW FOR DEVELOPMENT/WORKS

**Gestion Hotelera Internacional SA -v- Comunidad Autonoma de Canarias and others (1994) Case C-331/92**

The Government in the Canary Islands issued two invitations to tender. One was for the award and final concession to operate and build and open a Casino at an existing hotel site and for the use of the hotel installations and operation of the hotel business. Mr. Gestion was the licensee of the hotel at the time and he wanted an annulment of the invitations to tender because they only went out to a limited number of bidders and there was no advertisement in the official

journal. He wanted the invitation annulled because of his interest in the hotel operation. The Court held that this was not a public works contract but a mixed contract and it related to both the performance of the works and the assignment of property and so did not fall within the scope of a public works contract. The Court considered whether or not the works were a major feature and decided that the works were merely incidental to the assignment of property. Many people have cited this case for some time.

**R -v- Brent London Borough Council ex parte O'Malley (1998) 30 HLR 328**

This case concerned part of the Borough's Chalk Hill Estate. Mr O'Malley was one of the residents on part of the estate that was to be transferred to a development company but only after the authority had demolished the existing houses and cleared the site. The Borough was to rehouse the displaced residents and after demolition the site would be disposed of for redevelopment including a supermarket, private residential, social housing and public car park. The housing trust was to be the sole provider of the social housing element and a number of the tenants took action about this and in the High Court the tenants lost but the case went on to a Court of Appeal that decided that the authority was correct not to put the scheme out to tender in this case as it was not a public works contract, but a mixed contract. The Judge stated that the purpose of the scheme as a whole must be considered.

**Auroux and others -v- Commune de Roanne (2007) Case C-220/05**

This case excited everyone's interest as it goes a lot further in looking at what actually constitutes a works contract. The Court did not only look at whether or not works were being provided but considered the kind of risks involved, whether risks were transferred, the consideration, what the local authority is paying, and what benefits accrue to the local authority. The Court went a lot further than merely looking at whether the works were incidental to the main purpose.

This case concerned the phased construction of a leisure centre. The contract was awarded to SEDL, a public authority here acting as an "economic operator". The Court decided that the purpose of the development went beyond execution of works. The first phase was a multiplex cinema, commercial premises to be transferred to third parties and works including a car park, access roads and public spaces to be transferred to the contracting authority. The Court looked at it overall and what was being delivered. The Court followed the Gestion case and it was held that the contract contained elements of two types of contract and it was the main purpose of the contract that had to be considered. The Judge decided that the main purpose of the contract was the construction of a leisure centre and the other aspects in the contract were not enough to convince him otherwise. The authority (of the town Roanne) were looking overall to regenerate the area and the leisure

centre was part of this and despite the fact that there were other works involved not for the authority's benefit, it was held that this was a works contract and that the authority was in breach of the legislation.

## KEY ASPECTS OF ROANNE

I Development of a leisure centre in successive phases consisting of the construction of a multiplex cinema, hotel and commercial premises to be transferred to a third party as well as a car park, access roads and public spaces to be transferred to the authority

- Held to be a "works contract"
- A "works" objective
- Buildings for authority's own use and to be transferred to 3rd parties
- Authority to pay consideration

**Commission -v- Italy (Re Public Works Contracts) (2008) Case C-412-04**

Here the European Commission brought an action against the Italian Government for failing to fulfil its obligations under the Treaty and Directives for Public Procurement, because Italy had adopted laws that removed certain public contracts from the scope of Community Legislation. The Commission had to analyse what a public works contract was and decided that it is the main purpose of the contract that determines whether or not the Directive and EU Regulations will apply on public procurement, or not.

The message is clear from all the cases that whether the Directive and EU Regulations apply is linked to the main purpose of the contract and the main purpose has to be determined in an objective examination of the entire transaction to which the contract relates, including:-

- Main object/purpose of the contract
- Land interest
- Authority involvement
- Financial contribution
- Risk transfer

## RISK OF CHALLENGE

You have to be an economic operator to challenge for breach of the Public Contract Regulations 2006 and the procedure is that if there is any breach of the regulations, then anyone who wants to challenge should do it within three months of the breach occurring. Normally the challenge will be made when you become aware that a breach has happened. If the contracts have already been entered into then the only remedy is damages. Often now there is a requirement to notify all unsuccessful tenders, including those that submitted pre-qualification questionnaires, to notify all of them that the award decision has been made, and to whom, and that you are about to enter into contracts. Then there is a minimum ten-day standstill period before

entering into contracts to allow anyone who is unhappy to mount a challenge. These formal letters should go out when an award decision is made, but some leave it until much later than that. If you are getting near to signing contracts and someone comes along to say you did not advertise this, but here you are entering into contracts with them and we would have made a bid had we known. Here they can seek an injunction to stop you entering into the contract and they would have a good strong cause of action. Often someone is incensed and threatens legal action but does not see it through. There are fewer projects out there in the current market and so competition is intense and there will be more challenges. More and more challenges are coming through and whereas in the past the cases have mainly been in other European states there are more coming through now in the UK.

Alternatively if an individual is not happy with what you are doing, then they are not eligible to take action against you for breach of the regulations but they can go to the European Commission, or even the European Commission can, without prompting, take action but not against the individual local authority, the Commission goes after the National Government. Then Government has to make investigations into the circumstances of why there has been non-compliance and then take action. And if the European Commission believe there are grounds they may commence with a European Court of Justice Action as well, but this does not happen that often.

The New Remedies Directive 2007/66/EC lays down additional regulations and requirements and part of it is already implemented in the UK at the time we incorporated the Consolidated Directive. But some other member states have not implemented the new directive. The other big difference with this directive is whereas at the moment if contracts have been entered into the only remedy is damages, but when the new directive comes into UK law in December 2009 contracts may be set aside in certain circumstances. Consequently, with the new system, if a contract award notice has been published an economic operator will only have 30 days to challenge, but if there is no notice published, which is probably the case, because most authorities forget to publish contract award notices, then there is a 6 month window for challenge. That is a long period of uncertainty as to whether or not you are safe from challenge and can move on.

## PROCUREMENT ROUTES

The different types of procurement are open, restricted, negotiated, and competitive dialogue. The open and restrictive procedures are not suitable options for most developments and the European Commission's preference is competitive dialogue for complex projects. The OGC's preferred procedure is also competitive dialogue and most PFI, Strategic Partnerships or large-scale project guidance recommends the same.

Authorities may still use the negotiated procedure but decisions have to be justified. Ideally there should be an audit trail of reasoning and often authorities will complete and retain a questionnaire about alternative routes.

Competitive dialogue can work for developments and it allows the promoter to open a dialogue with bidders, a good thing, much earlier than the negotiated procedure. The competitive dialogue route is a lengthy and expensive process for all. Partnerships for Schools has just decided to change their guidance and what they now do is testing out the partnership aspirations of bidders early in the dialogue to judge whether they can meet and work with the authority over a long term period. In my opinion it is a good idea to bring that forward. Decisions made at this stage are used to remove from the short list those bidders the authority feel they cannot work with and then they are able to get into the serious competition with two bidders who meet their aspirations. However it still remains a costly and lengthy process.

There is provision in the regulations that enable an authority to pay bidders to dialogue with them but I do not know of any authority that has done this. But be aware that most bidders will know this is an option although most will just price the cost of the bidding into the process.

There is another regulation known as the Public Works Concession. It can be applied to a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the works to be carried out under the contract. The test is whether:

- The contract is a public works contract and
- The consideration involves the grant of a right to exploit the work (not all of the work need involve the grant of such a right)"

The promoter still has to publish an OJEU Notice but after that, apart from having to comply with a tender return date period, you can effectively do what you want. For example it is possible to negotiate with only one bidder.

## CHOOSING A PROCUREMENT ROUTE

Factors to consider:

- Flexibility when structuring negotiations. Competitive dialogue can give you that flexibility. You cannot negotiate in competitive dialogue after you have closed dialogue, but can only fine-tune and clarify, terms that are not defined exactly.
- Time constraints. Different procedures, different time rules.
- Financial constraints. The more complex procedure, the more it will cost.
- Complexity of sub-contracting arrangements
- Market response. It is always worth doing soft market testing.

## GOING FORWARD; LEGACY DEALS UNDER EXISTING CO-OPERATION/ EXCLUSIVITY AGREEMENTS

Where an authority has arrangements already in place, legal advice may have been sought on whether or not you could continue with these existing arrangements. Often it is impractical to unwind these and to be honest in some cases it may be more of a risk to try and get out of existing arrangements than it is not to have procured. Because significant sums are invested on all sides, if I was a developer and was told that the authority wanted to pull out in such circumstances, I would be straight on to my lawyer asking what can we do about this. That sort of action does not bode well for good partnership working. In my opinion it is a case of weighing up the legal risks in changing routes and then deciding which the greater risk is, abandonment or to continue. Having advertised the development initially in the Estates Gazette is one mitigation but it is not a full defence.

## GOING FORWARD; FUTURE SCHEMES

A thorough analysis of procurement law is needed by both contracting authority and developer and both need to consider particularly for the scheme in hand whether or not it is likely that the regulations will kick-in in the light of the element of works you want delivered according to the specification. These are the factors that need to be looked at and the key action is to look at the transaction as a whole, thereafter any decision has to be taken on a scheme-by-scheme basis.

## AND FINALLY, SOMETHING FOR YOU TO THINK ABOUT

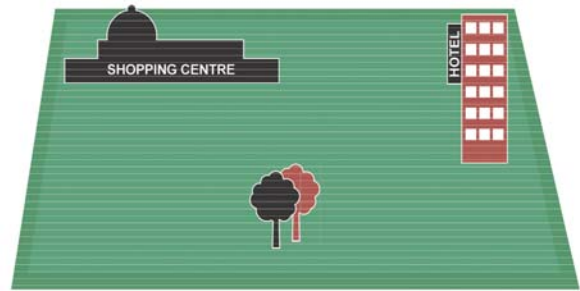
This is something for you to think about. I am not going to give you the answers; it is all down to you.

A local authority wishes to dispose of a site with a tatty old building on it and a developer approaches with a proposal.



The developer has suggested purchasing the site, demolishing the derelict building and building a new hotel. Are there any procurement implications?

And



What if a shopping centre is added?

And a leisure centre; and a large car park on which the authority wants allocated parking, and.....



And finally a housing development with X% affordable housing?

At each step can you assess whether there are any procurement implications?

The authority may operate the leisure centre or it could be operated by the private sector; will it make a difference?

Will it make a difference if either party specifies what the centre looks like?

The big car park will be used by the shopping centre and the leisure centre, but the authority want to have some of the car parking allocated for its own use and will pay a consideration; will this affect your decision?

# APPENDIX 1

## Additional Note on Cases on Procurement of Public Works Contracts

Prepared by Nabarro LLP, September 2008

### 1. *Gestion Hotelera International SA v Comunidad Autonoma de Canarias and others* (1994) Case C-331/92

#### Facts

The Presidential Counsellor of the Canary Islands issued two invitations to tender. These were for the installation and opening of a casino on the premises of the Hotel Santa Catalina in Las Palmas; and for the use of that hotel, its installations and the operation of the hotel business. The lessee of the hotel (Gestion) applied for the annulment of the invitations to tender, arguing that it was a public works contract because the successful tenderers had to carry out renovation works.

#### Decision

It was not a public works contract. This is because a mixed contract relating to both the performance of works and the assignment of property does not fall within the scope of a public works contract, if the performance of the works is merely incidental to the assignment of the property.

The court held that the main objects of the two contracts were the installation and operation of a casino and the operation of a hotel business. The contracts did not contain a description of any works that would be required. Therefore the renovation was incidental and did not justify treating the contract as one of public works.

### 2. *R v Brent London Borough Council ex Parte O' Malley* (1998) 30 HLR 328

#### Facts

This case is concerned with the Bison Estate, which Brent proposed to redevelop. After demolition of the estate, part of it would be disposed of for redevelopment as a supermarket; part of it was to be turned into a privately owned residential development; and the remaining part was to be used for social housing and a public park.

Eight tenants of the Bison Estate challenged the legality of the scheme. One of the limbs of this challenge was that the scheme should have been put out to tender.

#### Decision

Following *Gestion*, this scheme was characterised as a mixed contract and its purpose as a whole must be considered. The judge stated that a public works contract is a contract for the construction or design of building and civil engineering works, or a contract to engage someone to do those things. Although this scheme included *some* work of this type, it was fundamentally a contract for development. This was because the main point of the construction was to provide residential developments. It was therefore not a public works contract.

### 3. *Auroux and others v Commune de Roanne* (2007) Case C-220/05

#### Facts

The municipality of Roanne signed an agreement with SEDL (another public body) for the construction of a leisure centre. The first phase of this scheme was to construct a multiplex cinema, as well as commercial premises to be transferred to third parties and works (a car park, access roads and public spaces) to be transferred to the contracting authority. The French government referred the case to the ECJ, asking whether it was a public works contract.

#### Decision

The *Gestion* case was followed – i.e. where a contract contains elements of two types of contract, it is the main purpose of that contract that must be looked at.

The court agreed that SEDL had to do more than just execute works by dealing with the legal aspects, the acquisition of the land and town planning. However, the contract's main purpose was construction of the leisure centre as a whole. The other aspects covered in the contract did not override its fundamental nature as a contract of works.

The specific circumstances of the case – i.e. that one public authority was engaging another to carry out the project and that any land not disposed of to third parties would automatically transfer back to the first contracting authority at the end of the works – did not remove it from the scope of a public works contract either.

### 4. *Commission v Italy (Re Public Works Contracts)* (2008) Case C-412-04

#### Facts

In this case, the Commission brought an action against Italy for failing to fulfil its obligations under the Treaty and Directives, concerning the procedure for public procurement. In particular, they had adopted laws that removed certain public contracts from the scope of Community legislation.

#### Decision

The Commission held that a contract will be regarded as a public works contract; only if it has an object set out in the Directive and there are no ancillary works that justify treating it as anything other than a public works contract. The Commission also referred to the *Auroux* case, by stating that it is the main purpose of the contract that must be looked at. This main purpose must be determined after an objective examination of the entire transaction to which the contract relates.

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