# REGENERATION DISCUSSION PAPER

## *POST BREXIT ISSUES*

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### INTRODUCTION

The regeneration of our towns and cities has always been important but without doubt the COVID-19 pandemic has compounded the challenges. This has coincided with the United Kingdom's exit from the European Union on the 1st of January, 2021. Whatever your view of the wisdom of that exit, it is fair to say that a misconception may be held by some that this will mean the emergence of a 'blank sheet', that is, the elimination of regulation that had been imposed solely because of our former membership of the EU.

This was of course a wishful notion, as the UK government has to replace EU regulation with UK laws and rules, not only to maintain public accountability in dealing with public funds, probity and good governance, but also to comply with the terms of the EU/UK Trade and Co-operation Agreement. This paper focusses on where changes are proposed and are otherwise consequent upon the UK withdrawal, and which will subsequently continue to impact upon the contracting arrangements between the public and private sectors and therefore upon the regeneration of our economy. (It is worth noting that there may be variations in the application of regulations post-Brexit in different parts of the United Kingdom.)

### PROCUREMENT

#### Case Law

Exit from the EU does not leave a void in the body of case law that has helped shape and define the public procurement regime over the past decades. Although much of the relevant key case law decisions that informed UK case law flowed from the EU, Brexit did not strip out those decisions and leave a vacuum. Instead, there is still a body of retained law preserved in UK law which will remain, until replaced over time by domestic case law as disputes reach the courts for determination.

#### Procurement regulation and development – the issues remain?

Before we consider the recent HM Government Green Paper proposals, it is therefore worth a reflection. Developers, contractors and funders of regeneration property projects in recent years will probably be aware of, and may have been frustrated by, the application of procurement law to development and similar agreements, by classifying them as 'works' contracts.

Ever since the European Court of Justice landmark case of *Auroux v Roanne (2007)*, the normal presumption was that development agreements were subject to procurement law. Subsequent cases carved out 'exceptions', culminating in the Court of Appeal judgment in *Faraday Ltd. v West Berkshire Council (2018)*. Here, a development agreement that did not actually trigger contractual obligations ('the optional trigger') did not necessarily escape the procurement contract regulations and the judgment provided more guidance on where development agreements with contingent provisions could be public works contracts. However, this was not completely definitive.

Earlier exceptions included *Helmut Muller (2010)* {planning obligations not usually determined as contractual obligations}, *Flensburg (IP/08/867)* {no obligation to deliver works on a surrender back of land to public authority was not subject to procurement law}, and *Rv (Midland Coop) v Birmingham City Council (2012)* {no enforceable contractual obligation as competing supermarket Tesco had a discretion to develop and re-provide community facilities}.

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To facilitate a significant regeneration project being structured so as to sit outside the public procurement regime, meant a contracting authority distancing itself from 'specifying works'. This is because if it was 'exercising a decisive influence on the type or design of the work' that will qualify as a public works contract and be caught. There is an obvious natural tension between seeking control for certainty yet having to become detached from the specification of works, if the preferred outcome is not to have to tender for a public works contract. In addition, in light of the Court of Appeal judgment in Faraday, careful drafting of scheme documentation is necessary to avoid enforceable obligations on a developer to carry out works.

The complexity of the above cases, often decided on their own particular facts, highlighted the view of many developers and contractors, and their funders, that procurement laws and regulations (those wicked European impositions!), were materially problematic and a major frustration in the process of developer selection by the public sector. This often prevents exclusive arrangements being entered into, due to the need for competition under the relevant procurement regulations. They perhaps hoped that on the exit from the European Union procurement laws would disappear altogether. Certainly, the jurisdiction of the European Court of Justice and the influence of the European Commission ended on exit, save for some transitional arrangements. However there will possibly be some lingering persuasive influence of earlier European decided cases in the interpretation of procurement law and, of course, the EU/UK Trade and Cooperation Agreement ("the TCA") places obligations upon the UK, some of which will influence its own domestically imposed laws and regulations. In any event, UK public authorities will continue to be accountable for the disposal of public contracts, assets and funds, and will need therefore to introduce its own regulatory requirements as to contracting and selection of bidders.

It is worth noting that the recently published Green Paper on reforms to post-Brexit procurement law, makes no mention of public works contracts and development agreements. This is perhaps surprising given the evolution and residue of case decisions, some of which are referred to above. Perhaps there may be specific guidance on this issue later, but clarity is needed so that expeditious procurement of land development transactions and partnerships can be achieved which are so desperately needed for recovery and regeneration, including housing. The omission to reset a worrying and contentious area of procurement law seems to be a lost opportunity, but it may be that the responses to the Green Paper consultation (closed 10th March 2021), after further lobbying on the point, may attract further attention. It is no great comfort that the Green Paper proposals to thin out the award procedures for public works contracts could adopt a new flexible competitive procedure, allowing direct negotiation (by contracting authorities such as with developers and/or landowners). What is actually needed is a clear filter that helps steer development projects inside or outside the new public procurement regime – which itself may be simplified – and all concerned could move forward with greater clarity.

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**Highlights of the Green Paper and the proposals for reform of public procurement**

Some significant changes are suggested by the proposals from the pre-Brexit era, with the government promoting increased flexibility for contracting authorities, a re-definition of general principles of procurement, streamlined process, and greater transparency and openness, a new oversight body and potentially some provocative amendments to the remedies regime for procurement breaches. A recurring theme is reliance upon technology to gather, manage, share and update/correct data on public procurement processes. The UK government is not known for its successes in the implementation of large scale IT systems so deliverability may be questionable?

The current UK Regulations, the Public Contracts Regulations 2015, Utilities Regulations 2016, and Concession Contracts Regulations 2016, will be merged into a single set of regulations in the future.

**Public procurement principles**

Public procurement is to be conducted on the basis of six core principles:
*Public good, value for money, transparency, integrity, fair treatment of suppliers, and non-discrimination.*

The **'public good'** principle is in effect a development of the 'social value' model, recently set out in Public Procurement Note PPN 11/20 {see also The Public Services (Social Value) Act 2012}. This concept is seen as supporting innovation and the development of 'social value' in procurement so as to engage wider benefits for society, all of which will be reflected in a National Procurement Policy Statement.

Does this hint at a more centralised direction of procurement policy, leading to potential tension between local and central government, manifesting itself as an impediment to achieving a level playing field within UK markets?

**Value for Money;** is a well-known concept but here it is connected to the revised evaluation proposals from MEAT to MAT ('most economically advantageous tender', to 'most advantageous tender), aligned with the General Procurement Agreement (GPA). Wider benefits may be taken into account in bid evaluations, but this does not mean a material departure from the fundamental position that evaluation criteria must still relate to the core contract objectives and subject matter.

**Award Procedures;** are being radically overhauled, with seven procedures being reduced to three. The current open procedure will be retained for the more simple, straightforward, 'off the shelf' procurements, which require a price set against a fixed specification and contractual terms and conditions.

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A new flexible competitive procedure is proposed allowing contracting authorities the freedom to negotiate and innovate to achieve the best results possible. This might be more attractive in the context of regeneration projects should they fall within the scope of public procurement regulations. Thirdly, a limited tendering procedure retaining the current negotiated procedure without prior publication, but that is rarely applicable anyway.

OJEU notices have of course gone. Contracting authorities will be required to advertise opportunities via a new 'Find a Tender Service' (FATS) and observe minimum time periods for receiving expressions of interest and tenders, providing space for contracting authorities to design their own processes, such as staged negotiations with bidders, or reverse auctions where appropriate.

**Selection Criteria;** the distinction between selection and award criteria has been maintained, probably to ensure compliance with the GPA. However, the selection stage is simplified to permit bidders to submit basic information via a centralised registration system thus avoiding the need for repeatedly supplying the same information to various contracting public authorities. The success of this proposal may rely upon the assurance of a verifiable and accurate system being set up by government.

**Grounds for Exclusion;** the government's proposals include the adoption of mandatory grounds to exclude bidders, such as criminal convictions for fraud, non-disclosure of beneficial ownerships, including a new discretionary ground to exclude for tax evasion and where a deferred prosecution agreement has been entered into, and where it would also be proportionate to include such grounds. Subject to further investigation, the government may introduce a centrally managed list of banned contractors with the objective to reduce cost and time both for bidders and contracting authorities, particularly where the issues may relate to overseas bidders. Again, this proposal may depend upon the efficacy of centralised systems.

**Past Poor Performance;** excluding bidders from a procurement process on the basis of past poor performance is not new, but the government is now proposing using it even where it did not lead to a contract termination, damages or formal sanctions. They will relate this to publicising Key Performance Indicator performance to be recorded on a central database, linked to possibly acceptable thresholds, which if not met, could result in exclusion from public tender opportunities. Once more, the efficacy of a central database resource may be critical to this proposal's success.

**Revisions to Dynamic Purchasing Systems (DPS's) and Framework Agreements;** where the proposals are to make these processes, of frequent current use, more flexible and attractive to use. The current DPS system is to be replaced by a DPS+ which will not be time limited nor restricted to just the simpler supplies or services. Contracts awarded under DPS will be awarded under the competitive flexible procedure, and prospective bidders can submit to be included at any time.

Framework Agreement rules will be relaxed and two categories proposed: 'open' and 'closed'. The latter being for up to four years duration but the 'open' framework up to eight years after an initial closed period of three years, after which new participants can be added.

Contract award notices will continue to be registered on a central platform (another feature of centralisation), which might raise issues of compatibility between local and central government systems?

**Transparency;** some commentators consider the existing procedures involve an imbalance between contracting authorities and bidders in the provision of information. The objective of the proposals is for great transparency. An obligation to publish basic information at the same time as a contract award notice (including the information required by Regulation 84 of the current Public Contracts Regulations). How contracting authorities balance their obligations and continue to respect bidders' commercially sensitive information, especially that of a successful bidder, will continue to be an issue.

Contracting authorities, however, will no longer be asked to provide feedback letters, sometimes called 'Alcatel' letters, to bidders, who in turn will be expected to formulate their own feedback conclusions from the information made available. This may be disturbing to bidders who will naturally wish to minimise published data from their tender submissions.

Contracting authorities will be required to publish procurement and contracting data via the Open Contracting Data Standard (OCDS), such as procurement pipelines, market engagement notices, and contract award notices. Complaints and legal challenges relating to procurement practices will also be published. The Contract Finder Service (CFS) is to remain available for potential bidders to search for contract opportunities.

**Legal Challenge Process;** many of those involved in the current procurement processes and the basis of legal challenge might well agree that it has been time consuming and expensive. The Green Paper proposes working with the Ministry of Justice and the Technology and Construction Court to reform the court system to provide for an expedited trial process for legal challenge based solely on written pleadings, and also to consider a tribunal system to deal with procurement challenges with lower claims being fast tracked and managed at less cost.

A greater emphasis will be placed on pre-contractual remedies based on an accepted preference of bidders having the opportunity to actually perform the contract, rather than receiving an award of damages as compensation after the successful tenderer enters into contract. This preference will be in regulations and aligned with a shortening of court timescales, caps on contractual damages (legal fees and one and a half times bid costs), thereby dissuading vexatious litigants, with the option to remove the cap where a claimant was not able to challenge a contract award decision. For example, where a contracting authority fails to publish a contract award notice.

Worthy of note is the omission of any proposal to remove or modify the existing 'remedy' of a 'declaration of contract ineffectiveness'.

**Contract Modifications and Amendments;** concerns proposals aimed at enabling easier use, allowing contracting authorities more flexibility to amend contracts in times of crisis and extreme emergency. This is subject to publishing an amendment notice and observing a standstill period. Amendment notices will replace voluntary ex ante (VEAT) notices. The Green Paper also proposes a limit on the amount payable arising from a contract extension following a contract award suspension, aimed at removing the perverse incentive for profit for incumbent providers by raising a challenge.

**Deadline for consultation;** there are in total 42 questions asked in the consultation Green Paper. The consultation period closed on the 10th March 2021. The responses and government response will need monitoring particularly as they impact upon the development and regeneration sector.

## STATE AID

Again the popular misconception that we could say goodbye to regulation where 'public subsidy' is given, that is, no more 'state aid' type rules, is misplaced. 'Subsidy' is the new 'state aid', based on broadly the same meaning as the definition as in Article 107 in T.F.E.U (Treaty on the Functioning of the European Union), albeit in modified language. Under the TCA, the UK has committed to adopt a new form of subsidy control system, and also an independent regulator. Transitional measures include the UK maintaining a modified form of state aid law, but with no jurisdiction for the EU Commission or Court. This will be replaced by a new form of UK subsidy control system. This will need to take account of the TCA subsidy principles.

The UK government will be able to react to crisis situations in giving aid, but it will need to regulate public bodies to control public subsidy and also comply with its obligations under the TCA. The UK government may require public bodies to give subsidy in accordance with pre-approved conditions (similar to the pre-approved state aid block exemptions), or maybe via consent from the proposed independent regulator.

New UK public subsidy regulations will reflect principles previously applied, for example to support specific public policy objectives, or an equitable purpose, such as social or distributional concerns; subsidies will also need to be proportionate as to what is needed to achieve a specific objective or subsidies that are designed to bring about a change of economic behaviour to securing a particular objective. A subsidy should not normally compensate for costs that the recipient would have covered in the absence of subsidy and that is not otherwise provided for in appropriate policy instruments, nor should the subsidy's positive impacts outweigh the negative. Those subsidies that are prohibited will be further developed, but will no doubt reflect earlier provisions (e.g. unlimited state guarantees).

The UK government's ambition to respond expeditiously to new circumstances and economic opportunities, reduce the timescales for legal challenges from the ten- year period that applied to state aid, will no doubt be fleshed out in more regulations. But one thing is clear: those who contract with public bodies will need to be aware that the public subsidy rules may apply to their transactions, where the disposal of assets are at a discounted valuation, or where there is a form of subsidy or guarantee from the public body, which may be a material factor in a regeneration or development project.

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## CONCLUSION

The new procurement and public subsidy arrangements that emerge from the government's proposals will have significant impacts upon the commercial interface between the public sector bodies and their contracting and investor partners. Post Brexit, regulations have not disappeared but, as modified, will materially affect the promotion and structure of regeneration projects. Therefore, all relevant parties need to be aware of them.

Davitt Jones Bould will continue to monitor responses to the Green Paper on Procurement and the debate relating to the public subsidy regime, especially to track whether they deal with the juxtaposition of public works contracts and development agreements and the need for clarity as set out in this paper. If you have any comments or contributions on any aspect of this discussion paper that you wish to discuss we would welcome hearing from you.

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