

## Group Briefing

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# If You Build it They Will Come – Structuring Development Agreements Outside of Public Procurement Rules

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Finding ways to develop land without engaging public procurement rules is challenging. The public body may have land which it wants developed and developers who are happy to take the risk of developing it, but often these arrangements are structured to trigger obligations on the public body to tender the development proposal as works contracts. This can often delay or even prevent development opportunities from being realised. In an environment where demand for development is at crisis levels (be it in the area of social housing, student accommodation or nursing care, for example), delivering developed infrastructure in the most efficient way possible is key to addressing demand. A recent UK case has offered a path to allow developers and public sector counterparts to enter into development agreements without engaging public procurement requirements: *Faraday v West Berkshire Council* ([2016] EWHC 2166 (Admin)). Briefly the background is:

- » West Berkshire Council (the “Council”) was owner of lands and wanted it comprehensively developed
- » The developer was appointed by the Council as a master and plot developer and estate management advisor in relation to the proposed project.

- » The main objective was to maximise the returns from the property and development potential of development sites within it.
- » A “Steering Group” was established (with representative from both the Council and developer) to monitor project implementation with functions including approving business plans and acquisitions.
- » There were a number of procedural mechanisms to go through before any development could be actioned. These included approval of business cases and site appraisals
- » The developer had unconditional obligations in relation to master-planning while others were conditional.
- » Among the conditional obligations was the option (following approval of business cases and plot appraisals by the Steering Group) for the developer to acquire certain sites and to develop them.
- » The Council did not tender the development agreement because it did not consider public procurement rules applied. This was one of the main grounds of challenge.

Where a public body engages a third party for purposes which include the “realisation of a work by whatever means”,

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this can be considered as a works contract. A works contract valued at greater than €5,186,000 must be offered for tender through OJEU. In Ireland, Department of Finance guidance also requires works contracts valued in excess of €50,000 to be tendered through the national procurement (www.etenders.gov.ie) website.

By contrast, contracts between a public body and a third party for the acquisition or rental of land do not engage public procurement rules. Development agreements can fall into this category.

The Court in this case considered that the development agreement put in place did not constitute a works contract because:

- » No specific development was set out – what was provided for was a framework within which to agree developments.
- » It was up to the developer to put forward development plans, not the Council.
- » The plans were subject to a Steering Group where the Developer had an equal voice to the Council.
- » Planning applications were for the developer to make.
- » The developer has a choice not a legal obligation as to whether to acquire a site and to develop it.

As a result of this, the Court agreed with the Council that public procurement rules did not apply and dismissed Faraday's challenge that the development agreement should have been tendered as a works contract.

This case confirms that there are workable structures for agreements between developers and public sector counterparts which should sit outside of procurement rules.

#### WHY ARTHUR COX?

The Procurement and Property Groups at Arthur Cox offer leaders in their fields of expertise and who are particularly focused at delivering commercial solutions for both developer and public body clients alike. We are advising a number of clients in this area and would be happy to assist you in devising structures which maximise development opportunities and promote efficient delivery of key infrastructure responding to the high demands in sectors such as social housing, student accommodation and nursing care.

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