

WHEN IS AN OJEU OR OTHER COMPETITION REQUIRED FOR A LAND DEAL?

As the European case of C-220/05 Auroux v Commune de Roanne made clear, land transactions are not always exempt from the EU public procurement regime and related tendering obligations.

This complex, evolving and often confusing area of law is regarded by many as a real barrier to redevelopment in the UK.

This chart is designed to provide high-level guidance to both contracting authorities and developers on the strategic choices open to them. For ease, tenders that are subject to the full tendering requirements of EU Procurement Directives are referred to as "OJEU" procurements or tenders. This chart identifies the most common structures used in land developments and, through a combination of colour coding and key questions, is designed to help users identify factors that indicate **OJEU tenders will normally be required**, **situations where some lesser form of competition may be required** and **circumstances where the EU procurement rules are unlikely to apply**.

Additional "Notes" boxes provide more detailed explanations of key legal concepts. Even if there is no legal obligation to hold an OJEU or other competition, there may be other factors such as ensuring eligibility for EU funds which may prompt parties to opt for some form of tender process. The risks associated with each of the options below may differ, but none of the options are entirely risk free. As ever, much depends upon the particular circumstances of each deal and this guide is not intended as a substitute for specific legal advice. Remember, material changes to the terms of an existing deal can trigger fresh OJEU obligations. Other legal obligations will also need to be considered on a case-by-case basis. The chart is based on the law as at April 2016. Further guidance can be obtained from the Cabinet Office (www.gov.uk), amongst others.



- Question to help you work through the flowchart
- OJEU procurement required
- Likely to require a degree of competition
- OJEU not required

NOTES

1 Definition of contracting authority

The EU procurement rules contain a long list of public bodies which are "contracting authorities", including central government, local authorities, police and fire authorities, schools and health bodies. Other quasi-public or publicly funded bodies, such as Registered Providers / housing associations and universities, are also contracting authorities. A body which is wholly or partly owned by another contracting authority, e.g. a joint venture company, may itself be a contracting authority depending on its objectives and functions and the level of control exercised and/or funding provided by the owning contracting authority.

2 Additional requirements for works or services

EU case law makes clear that land deals which also include elements of works or services will often need to be the subject of OJEU tender processes. This may include deals where the developer provides project management services to the contracting authority, builds new buildings where the contracting authority has detailed input into the specification/plans, or where significant, bespoke fit-outs of premises are required before leasing to contracting authorities.

3 Active and passive roles in a Joint Venture Company (JV)

Passive investors can typically prevent the sale or winding up of the JV or changes to the level of capital. Active investors will normally have a more hands on role including influencing the budget and/or day-to-day operations as well as veto rights over other strategic commercial behaviour.

4 What constitutes an economic benefit?

Works are likely to be carried out for the economic benefit of the contracting authority where they are of direct and immediate benefit to the authority (beyond those benefits which it would derive from the exercise of its planning powers). The most obvious examples are where the authority will own part or all of the development or receive income from it. Community facilities (e.g. a school or library) or public realm provided as part of the development which would otherwise have been paid for by the authority may also constitute an economic benefit, although recent UK case law indicates that section 106 agreements will not trigger OJEU tendering obligations.

5 Incidental works

Works will be incidental to a disposal of land where their scope and value is insignificant compared to the total size and value of the area being disposed of. Another relevant factor is if the works would not have been carried out in absence of the disposal. Works which are of significant value (e.g. above the OJEU threshold) or extensive in terms of scope and programme may require greater scrutiny.

6 Exclusive rights

One exception to the tendering obligations is when, due to "exclusive rights", no-one else can perform the contract. In land transactions, the fact that a developer owns some or all of the land to be developed may trigger this exception. However, in addition to owning the land it is generally necessary to show there is no alternative site where a similar development could occur. In other words, owning the south side of a street won't help if a similar development could occur on the north side. The ability of a local authority to purchase the site under a CPO may also be a relevant factor.

7 Assessing contract value

The thresholds are updated every two years by the European Commission. Valuations should be based on good faith estimates, exclude VAT and must take account of revenues generated from third parties, not just payments by a contracting authority. EU rules prevent the artificial splitting up of contracts to depress the valuation.

8 Non-OJEU competitions

Even if particular deals are not subject to OJEU tender obligations, other rules may still require a tender to be run. EU court rulings make clear that wider EU Treaty obligations do require EU-wide tenders for below threshold contracts. The Public Contracts Regulations 2015 also impose advertising obligations for low value contracts. Equally, there may be a requirement under domestic legislation or other duties to demonstrate best market value on disposal. One way of doing that might be to hold a competition. Such competitions do not have to follow any particular OJEU process or timetables and might, therefore, provide greater flexibility. Best value can also be established by independent valuations.

9 Assessing and managing risk

There are risks whichever approach a public body takes to market. Burdensome tendering obligations may reduce bidders' willingness to respond. EU funding, such as ERDF, is however often conditional on contracts being awarded via an OJEU process.

Failure to run an OJEU tender, if it is required, runs the risk of an ineffectiveness challenge (the requirement for the courts to set aside a contract) which will be an important issue for all parties. Ineffectiveness challenges must be brought within 6 months of the contract entered into unless a contract award notice was published in the OJEU, which reduces the time limit for challenge to 30 days.

Other ways to mitigate procurement risks include: i) the publication of a voluntary transparency notice (VTN) in the OJEU before entering into the direct award. Waiting 10 days from the day after publication of the notice before entering into the contract, means the ineffectiveness remedy will no longer be available; ii) including provisions in the contract to allocate the procurement risk between the parties in the event of challenge; and iii) running a voluntary tender process to help mitigate the risk that a developer is later alleged to have been "over-compensated" and thus in receipt of illegal state aid which should be repaid.

Changes to the terms of a deal after an OJEU process may also trigger obligations to hold a fresh tender.

Publication of notices is intended to draw attention to the award of the contract and may increase the risk of challenge. Careful risk assessment and legal advice is crucial.

10 OJEU options

The EU procurement regime is designed to provide fair, transparent and uniform processes for selecting developers to undertake opportunities. There are advantages of OJEU, including mitigation of both state aid and ineffectiveness risk. It is however important to ensure that the appropriate procedure is selected to avoid unnecessary burdens on bidders.

There are several processes to choose from: ranging from the open procedure to those permitting negotiation, as well as the voluntary use of OJEU. Whichever process is used it is crucial to follow best practice and run the competition in an efficient way. The pre-OJEU planning and market testing stage will be particularly important. Concession contracts are now subject to a separate Directive with more flexible processes. See also Note 9.

