

## The impact of Brexit on procurement and State aid issues in the development sector

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### Part 1: Public procurement - the *bête noire* of the Brexiters?



*“If we vote leave we can scrap the EU’s foolish rules on how Whitehall runs procurement processes, which add billions to the cost of government every year”*

-Rt Hon Michael Gove MP, 28.5.16

News &gt; UK

## De La Rue boss joins Brexiteers in fury after blue post-Brexit UK passport contract is handed to French firm



### 1. Public procurement in the development sector: where do procurement issues currently arise?



- 3rd Party Challenges
- Development agreements
- Material amendments to projects during the contractual term
- EU Institutional Funding

## Are 3<sup>rd</sup> Party procurement challenges still an issue post *Wylde*?



- ***Wylde v Waverley Borough Council*** [2017] EWHC 466 (Admin)
- 3<sup>rd</sup> party objectors to scheme lacked standing:

*“The public interest is no doubt served by these aims and objectives of the 2006 Regulations (for instance, by fostering value for money and the objective evaluation of bids for public works), but that is very different from saying that it follows that any member of the public could have an interest in the enforcement of those Regulations which should be recognised by the grant of standing in judicial review. It is in my view entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who “can show that performance of the competitive tendering procedure... might have led to a different outcome that would have had a direct impact on him” (at [105])*

## Are development agreements caught by the PCRs: the High Court judgment in *Faraday*



- ***Faraday Developments Ltd v West Berkshire District Council and St Modwen Developments*** [2016] EWHC 2166 (Admin)
- Development Agreement with the Interested Party, St Modwen “to facilitate the comprehensive regeneration” of an area of land at the London Road Industrial Estate, Newbury, Berkshire of which WBDC was the freehold owner.
- Bid process (but not PCR compliant) carried out by Council for a development partner
- St Modwen selected. DA contained (a) unconditional obligations regarding master-planning, preparing strategies and obtaining planning approvals (b) Other obligations only arose if SMDL elected to exercise its option to draw down interests in the land in question.
- Issues was whether DA a public works contract for purpose of 2015 PCRs

## High Court judgment in *Faraday*: how direct does the obligation to carry out works need to be?



- The test for a works contract is: “*is the contractor under an enforceable legal obligation to carry out that main object (e.g. works) which is legally enforceable by the contracting authority?*” (see the Midlands Co-Operative [2012] EWHC 620 (Admin))
- In Auroux v Roanne [2007] ECR I – 387 CJEU confirmed that sufficient that works are to be carried out by 3<sup>rd</sup> party.
- Midlands Co-Operative: section 106 agreement to provide a community facility did not satisfy the “enforceable obligation” requirement for procurement purposes, because that obligation only arose if the purchaser decided to implement a particular planning permission and, like the decision whether to complete the purchase of the site, that was an option for the purchaser.
- AG Quidnet Hounslow v LB Hounslow [2012] EWHC 2639 (TCC): grant of long lease not a public works or services contract

## The High Court’s decision in *Faraday*



- No engagement in anti-avoidance principle by seeking to use the option mechanism to avoid conducting a PCR compliant competition – intention of the parties irrelevant: [188].
- On the facts, not a directly enforceable obligation: “*SMDL was free under the DA to “walk away”, in the sense that it can choose not to come under an obligation to acquire and carry out works on any of the redevelopment land in the LRIE*” (at [195])
- Decision under appeal (due to be heard late June/early July) on the question of engagement of the anti-avoidance principle

## 2. Public procurement post Brexit



### Clear indication of direction of UK procurement policy in the UK Trade Bill



Secretary of State for International Trade (Hansard, HC Deb, 9 January 2018, Col 213):

“we want to maintain UK businesses’ guaranteed rights to access global public procurement markets worth approximately £1.3 trillion per year. The GPA, or government procurement agreement, is a plurilateral agreement within the framework of the WTO that aims to create an open market for Government procurement among participating nations. They include many of the world’s major economies, such as the United States, Japan and Canada, as well as the EU states. Currently, we participate in the GPA through our membership of the EU. It is worth pointing out that the UK creates around £68 billion of procurement opportunities within the GPA annually—over 25% of the total EU offering. After we leave the EU, **the UK will need to join the GPA as an independent member, not only to safeguard continuity of access for UK companies overseas, but to ensure that we can tap into international expertise and obtain the best deal for the taxpayer here in the UK. The powers in clause 1 will allow us to make regulations implementing our obligations under the GPA as an independent member, reflecting our new status within the GPA.** Parliament will be able to scrutinise the terms of our membership of the GPA through the Constitutional Reform and Governance Act 2010 before we join



## Procurement under the WTO Government Procurement Agreement: regressive or better flexibility?

- No requirement for damages
- Greater flexibility in terms of procedures
- Similar general procurement principles



## The revised GPA: general principles under Article IV

### Non-discrimination:

1. *With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, **treatment no less favourable than the treatment the Party, including its procuring entities, accords to:***
  - a. **domestic goods, services and suppliers; and**
  - b. **goods, services and suppliers of any other Party.**
2. *With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:*
  - a. *treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or*
  - b. *discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.*

## The revised GPA (2): general principles



### Transparency:

*A procuring entity shall conduct covered procurement in a transparent and impartial manner that :*

- is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;*
- avoids conflicts of interest; and*
- prevents corrupt practices*

## Revised GPA (3): Review procedures



### Article XVIII (Domestic Review Procedures):

Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

- a breach of the Agreement; or
- where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement, arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

## The draft Withdrawal Agreement



- Commission draft published 19 March
- Articles 71 – 74 cover procurement
- EU procurement rules will continue to apply for procurement competitions and framework agreements commenced prior to UK withdrawal date
- Article 73 proposes continued application of Remedies Directive (coded yellow = policy objective agreed but drafting changes still required)
- No provision re contracts already being performed (so uncertainty about regulation of material amendments of contracts already awarded)

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## Public procurement post Brexit: latest position in a nutshell



- All the indications are that UK will accede to WTO GPA in its own right
- Direction of transitional arrangements now reasonably clear
- Key issue remains as to remedies for breach of procurement rules – the main issue is whether damages will remain as a remedy.
- So development agreements with local authorities still likely to be regulated



## Part 2: State aid in the development and real estate sector



### What is State aid: the criteria under Article 107(1) TFEU



- (1) there must be an “aid” in the sense of an economic advantage;
- (2) it must be granted directly or indirectly through state resources (government at any level);
- (3) it must confer an advantage on the recipient by favouring certain undertakings or the production of goods (“selectivity”);
- (4) it must be liable to distort competition and affect trade between Member States

## Where do State aid issues arise in the development context?



- Public authority land disposal
- Regeneration schemes
- Environmental schemes
- Funding of construction of infrastructure and recreational facilities
- CIL relief
- Variation of section 106 agreements?
- CPOs and payment of compensation?

## State aid and land disposal



- European Commission Communication on State aid elements in sales of land and buildings by public authorities (**97/C 209/03**) ("the Commission Guidance")
- "A sale of land and buildings following **a sufficiently well-publicized, open and unconditional bidding procedure**, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid" OR:
- "If public authorities intend not to use the [unconditional bidding procedure], **an independent evaluation** should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid"



## The future of State aid post Brexit

- State aid differs from merger and anti-trust legislation in that virtually no UK-made rules exist at present (i.e nothing contained in Competition Act 1998 and Enterprise Act 2002)
- What are the options:
  - “Parallel” State aid system (similar to Ukraine- EU Association Agreement
  - WTO Plus system (eg EU-Korea FTA)
- Current WTO Regime – Agreement on Subsidies and Countervailing Measures (ACSM).
- Need for domestic State aid framework to avoid distortion of internal UK market

## What is the current UK policy position?



- “It cannot be right that a company situated would be heavily subsidised by the state but still have unfettered access to the UK market. And vice versa. The UK has long been a vocal proponent if restricting unfair subsidies to ensure competitive markets...these principles are true across the globe and will continue to be true in the UK-EU relationship”
  - David Davis, Vienna Speech, 20.2.18
- “The UK has much to gain from maintaining proper disciplines on the use of subsidies and competitive practices...we may choose to commit some areas of regulations like State aid and competition to remaining in step with the EU’s”
  - Theresa May, Mansion House Speech, 2.3.18
- “UK will establish a full, UK-wide subsidy control framework and CMA will take on role of State aid regulator” (letter from Minister for Small Business, Consumers & Corporate Responsibility to House of Lords EU Internal Market Sub-Committee, 28 March 2018)

## The future of State Aid regulation post Brexit: a summary



- EU State aid rules preserved wholesale in the EU(Withdrawal) Bill
- No change during implementation period: UK will continue to apply EU State aid rules and Commission will remain responsible
- CMA will become regulator after end of implementation/transition period
- Issues remain over precise boundaries of Commission's competence over current State aid investigations
- All indications are that State aid rules broadly similar to existing regime likely to remain: key difference will be enforcement and notification procedures.



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