

Real Estate: Public procurement and development agreements

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The preliminary guidance provided by the Office for Government Commerce (OGC) in October 2009 on public procurement and urban planning has been revised and updated to take account of the March 2010 ruling by the European Court Justice in the Helmut M \ddot{a} lller case. New guidance is also given on the application of public procurement rules to s106 agreements.

The OGC suggests that a 'development agreement' between a public body and a developer may be less likely to comprise a public works contract if it meets some of the following characteristics:

- The proposed development (or a significant part of it) is to be undertaken at the initiative and autonomous intention of the developer, particularly if the developer already owns or has control of the land;
- The development agreement is ancillary to a transfer or lease of land from the public authority and is intended to protect the interests of a contracting authority which is the lessor or otherwise retains an interest in the land or property;
- The development agreement is based on proposals put forward by the developer, rather than requirements specified by the contracting authority, even if those proposals may be sought and the winner chosen by the public authority;
- There is no pecuniary interest passing from the contracting authority to the developer as consideration for undertaking the development, either through direct payment or indirectly, for example by the assumption of obligations such as contributions towards project finance or guarantees against possible losses by the developer;
- The development agreement does not include specific contractually enforceable obligations on the developer to realise works, even if those works are recognised as being the general intent of the parties;
- The development does not consist of or contain works for the direct economic benefit of the contracting authority;
- The involvement of the contracting authority consists only in the exercise of statutory land-use planning powers.

The advice is that section 106 agreements for works entered into in connection with the grant of planning permission will not normally be subject to the public procurement, even though such agreements have some characteristics of public works contracts.

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