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

As the European case of C-220/05 Aurox 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 Public 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.

In addition, 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.

**NOTES**

- **Definition of contracting authority**
  - Procurement law distinguishes between the public bodies which are ‘contracting authorities’, including central government, local authorities, police and the army authorities, and the health authorities, and other public bodies. Other quangos or publicly funded bodies, such as regulated professions (e.g. nursing or social workers), are not considered to be public authorities and are not covered by the public procurement regime. This means that public bodies which are not contracting authorities are able to enter into contracts that would otherwise be subject to OJEU.

- **Active and passive roles in a Joint Venture Company (JV)**
  - Where a public body acts as a passive investor in a JV, the passive investor can typically prevent the landlord going to a lower tender. These ‘no one worse off’ rules are widely applied in practice. For example, in a JV to enable the public landlord to enter into a property development contract, the passive investor could reject any tender or accept a lower tender. Where the passive investor is entitled to reject any tender, the public landlord would not have been carried out in the absence of the tender process. While this is regarded as a client who never enters into a contract, the public landlord would have been able to enter into a contract with a private sector developer, which is not within a public authority at all. The client could have been a public authority or a state-owned entity, for example, in a public sector led development.

- **Incidental works**
  - Works that are incidental to a main contract may be at risk of OJEU procurement. The threshold is generally a £15,000 per year expenditure. If the works are under £15,000, they may be considered to be incidental. However, if the works exceed £15,000, there may be an obligation to hold an OJEU competition to help mitigate the risk that the client may be found to be undertaking procurement work 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 and a loss of award to the public authority. Where the goods or services are valued over £15,000, the public authority must ensure that the appropriate procedure is selected to undertake opportunities. There are advantages of OJEU, including provisions in the contract to allocate the procurement risk to the successful tender, as well as the ability to contract with the successful tender. Failure to run an OJEU tender may also result in the ineffectiveness remedy being available; ii) including provisions in the contract to allocate the procurement risk to the successful tender, as well as the ability to contract with the successful tender. Failure to run an OJEU tender may also result in the ineffectiveness remedy being available; ii) including provisions in the contract to allocate the procurement risk to the successful tender, as well as the ability to contract with the successful tender.