



Muller - light at the end of the tunnel?

April 2010

The recent decision of the European Court of Justice in the Muller case¹ provides useful guidance for developers and local authorities alike on when a development amounts to a “public works contract” for the purposes of the requirement to tender under EU procurement rules.

Following an earlier ruling of the European Court in the Roanne case², it had been feared that **any** development agreement to which a public authority was party, or subcontracts for works done under a s.106 agreement, could be challenged by rival developers if a formal tendering process for public works contracts had not been followed.

The Court in Muller confirmed that to be a public works contract and so subject to tendering through the Official Journal of the European Union (if of sufficient value):

- a public authority must derive **an immediate economic benefit** from the development agreement; and
- the contracting developer must be under an **enforceable obligation** to a public authority to carry out works **specified in detail by the public authority**.

The fact that a local authority party to the development agreement would exercise planning control over the development scheme did not of itself satisfy either condition.

So the mere presence of a s.106 agreement or a public authority as a party to a contract does not mean the OJEU process will always be triggered.

However, if the intention is that the public authority derives a direct financial benefit from the scheme, perhaps from social housing provision, or the execution of works for public use, then the parties should take a careful look at the EU procurement laws at the outset.

Guidance is also provided on the extent to which a public authority's involvement in a development will meet the third limb of the test relating to “works corresponding to the requirements specified by a public authority”. The European Court found that a public authority must do more than just approving the use of land or building plans in line with planning laws and take an active role in listing its requirements or having a decisive influence on the design of the works.

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¹ Helmut Muller GmbH v Bundesanstalt fur Immobilienaufgaben C -451/08 dated 25 March 2010

² Auroux v Commune de Roanne C -220/05 dated 18 January 2007

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