



The Faraday case: could this put the brakes on land led deals?

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Basics: when do you need to procure?

- Public Contracts Regulations 2015 (PCRs)
 - Contracting authorities
 - Public contracts:
 - Supply contract – purchasing products
 - Services contract – purchasing services
 - **Works contract – purchasing works**
 - **Exception – for land transactions (reg. 10(1))**
- Thresholds
 - Public works contract - £4,551,413
 - Public supply and services contracts - £181,302

Faraday – what was it about?

- Development of Faraday Road in Newbury Town Centre by West Berkshire Council for regeneration
- Council appointed St Modwen as developer in 2015 without a full procurement process although a limited competition was carried out to secure good value
- Faraday Development Limited (FDL), a rival developer, objected on two main grounds:
 - Not best consideration under s123 LGA 1972
 - Public works contract therefore should have been procured under the PCR's
- Council argued that it was exempt as a land deal. No works obligation.

Faraday – what did the Court say?

- First instance – Holgate J – not public works contract – developer could decide whether or not to do works.
- Court of Appeal disagreed – public works contract (judgment 14 November). Need to look at the wording of the development agreement – was there a works obligation?
- St Modwen were under no obligation to undertake works until procedure had been followed agreeing design, planning and viability and even then, the developer had an option to proceed not an obligation.
- However, an obligation to carry out the works arose if the developer drew down the land.
- Therefore, was a public works contract. Should have been put out to tender under the PCRs.

Faraday – what did the Court say (2)?

- It was necessary to look at the substance of the contractual arrangements (paragraph 60)
- *“once it has drawn down the land, [it] will be bound to develop it in accordance with the development agreement”* (paragraph 50)
- The Council had *“committed itself to procuring the development from St Modwen. The development agreement constitutes a procurement in its result, and a procurement without a lawful procurement procedure... The procurement crystallizes when St Modwen draws down the land.”* (paragraph 61)

Faraday – Court of appeal

- *“it was only at that stage, at the time when the development agreement was being entered into, that the council had to consider whether it was under a duty to conduct a regulated procurement – because otherwise a timely procurement procedure, or any procurement procedure, was going to be impossible. The touchstone, then, is whether, in substance, the agreement in question, at the date it is concluded, provides for a relevant procurement.” [60]*
- *“By entering into the development agreement, therefore, the council effectively agreed to act unlawfully in the future. In effect, it committed itself to acting in breach of the legislative regime for procurement.” [62]*

Faraday – implications for public authorities



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News

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Council's Faraday Road court costs top £363,000

Local authority has spent six figure defending itself against legal challenges



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LEGAL disputes over plans to regenerate Newbury's London Road Industrial Estate (LRIE) have cost West Berkshire taxpayers £363,545.66.

Source: Newbury Today

Practical guidance from Faraday

- Be careful with procurement analysis – look at the substance of transaction – is it a contract for works?
- Line between development agreement and an exempt land transaction is a fine one. Get legal advice where appropriate.
- Council had attempted to use a VEAT notice which was held to be invalid:
 - Described transaction as exempt land transfer which was “more than mere over-simplification” (paragraph 89)
 - Did not alert third party to the real nature of the transaction and potential for works.
- First declaration of ineffectiveness in England – contracts can be set aside in practice
- Damages are available to claimant – nominal civil financial penalty payable of £1 in *Faraday* – could be more in future cases

Practical guidance from Faraday (2)

- Possible mitigations
 - Follow the PCRs
 - Use framework agreements
 - Consider risk of challenge
 - Consider VEAT notices
 - Delay contract to flush out challenges
 - Take legal advice

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