

# Real Estate Adviser: Development agreement variation successfully challenged

Published 6 March 2015

Many town centre regeneration projects have stalled due to the economic downturn and local authorities are keen to restart those developments by adding incentives for the developer, for example, by agreeing to vary the development agreement in order for the scheme to be economically viable and kick-start the regeneration.

A tempting prospect for an authority against the alternative of seeking a new developer through a fresh OJEU procurement process, but if these changes are "material" in procurement law terms, then this can put the entire agreement at risk of cancellation if challenged.

## What is a material change?

In a recent High Court decision in *R (Gottlieb) v Winchester CC & Anr [2015] EWHC 231 (Admin)*, a variation to an urban development agreement has been successfully challenged on the basis that the changes were so substantial that they amounted to the award of a new agreement which should have been procured under the Public Contracts Regulations 2006 (the "Regulations").

The original development agreement, entered into in 2004, was never procured under a compliant OJEU process. The time limit for any challenges on that basis had long since passed, but the challenge which the court had to consider was whether the changes to the development agreement made in 2014 were so substantial that the Council should have terminated that agreement, and awarded a fresh agreement (on the amended terms) through a compliant process under the EU procurement regime.

In this instance, the changes provided more opportunities for the developer to maximise its own profits from disposals to third parties. The changes removed unprofitable elements of the scheme which affected the viability of the development, for example, by reducing the number of residential units required, removing the requirement for some of the public realm elements and the substitution of a requirement for a contribution in respect of affordable housing based on the future viability of the scheme.

The court confirmed that the tests as to whether a change to an existing agreement is "material" (in procurement terms) are as follows (in line with existing EU Case law):

- Does the change introduce conditions which, had they been part of the original award process, would have attracted other tenderers or produced a different result?
- Does the change extend the scope of the contract considerably to encompass services not initially covered?
- Does the change alter the economic balance of the contract in favour of the supplier/developer?

Using the tests set out above, the court said that the changes to the development agreement in this case did introduce conditions which, if present when the agreement was originally awarded, would have attracted other developers, or produced a different result (hypothetically, because of course, in this case there was no original tender process), and clearly the changes altered the economic balance of the agreement in favour of the developer.

## Will this impact existing development agreements?

Yes, where changes are being considered. Until now there was little case law on variations to development agreements and many changes have gone "under the radar" and escaped challenge. This case will serve as a salutary tale to developers and authorities considering changing current schemes and may result in extra vigilance from the market where they see an opportunity to challenge (which if successful can lead to cancellation of the agreement) and become involved in a scheme in a subsequent re-tender.

With the new Public Contracts Regulations 2015 now in force, this is all the more relevant although these generally only apply to new contracts awarded via procurement processes commenced after 26 February 2015. The 2015 Regulations include, for the first time, express provisions providing guidance on what types of changes to contracts are permitted, and our specialist team of procurement lawyers is well placed to provide pragmatic and practical advice on how these will be applied in practice.

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