

Public works contracts – where is the line drawn?

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Regulation 2:

- Public contracts

contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services... ”.

- Public works contracts are public contracts which have as their object any of the following:

“(a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work”.

The (6) elements of public contracts (Regulation 2 and case law):

- Contract in writing
- For pecuniary interest
- Between a contracting authority and an economic operator

- Object of the contract is the execution of works/ the realisation of a work corresponding to specified requirements:
 - Authority specifies its requirements by taking measures to define the type of work or by having a decisive influence on its design.
 - The mere fact that an authority, in the exercise of its urban planning powers, examines building plans or takes a decision in the planning sphere does not amount to specifying its requirements

- Direct or indirect obligation to carry out the works which is legally enforceable

- Direct economic benefit:
 - Authority is to become the owner of the works
 - Authority is to hold a legal right over the use of the works in order to be made available to the public
 - Authority (i) may derive economic advantages from the future use or transfer of the work, (ii) has contributed financially to the realisation of the works or (iii) has assumed the risk of the work being an economic failure
 - Not the mere exercise of regulatory urban planning powers

When is a contract not a public works contract?



- When it's a mere exercise of urban planning powers
- A section 106 agreement
 - Was not the kind of transaction that is governed by the public procurement regime
 - By its very nature was not a public works contract
 - Essential object was to ensure that the community facilities would be replaced if the planning permission were implemented

(CA in *Faraday* on the section 106 agreement in *Midlands Co-Operative*)

➤ Still fact dependent?

➤ Annex to OGC's PPN 12/10 of 30 June 2010

“...the arrangements which may be entered into by local planning authorities can be complex, both in terms of the possibility of additional connected agreements to a section 106 agreement, and also the breadth of what can be provided for in one agreement using the powers in section 106 (and other powers). Therefore it is important that, in each case, the intended arrangements are reviewed in the light of the public procurement rules to establish whether it is proper to conclude that the public procurement rules do not apply because there is no pecuniary interest, no direct economic benefit and no legally binding contractual obligation.”

➤ No pecuniary interest

AG in *Commission v Spain* (2010) C-306/08

“86.In my opinion, for pecuniary interest to exist it is necessary that the contracting authority bears the economic detriment either positively in the form of a payment obligation towards the economic operator, or negatively as a loss of income or resources otherwise due.

...

89. Thus, the pecuniary interest requirement implies that the contracting authority needs to use its own funds either directly or indirectly. Direct financing will occur when the contracting authority uses public funds to pay for the works or services in question. Indirect financing will occur when the contracting authority suffers economic detriment as a result of the method of financing the works or services.”

- No specified requirements - where is the line drawn?

Roanne (2007) C-220/05

- The work - leisure centre, including cinema, car park, possibly hotel
- Roanne was seeking to reposition and regenerate the area around the railway station

Impresa Pizzarotti (2014) C-213/13

- Framework of requirements
- Specified the various technical and technological characteristics of the planned work
- Listed specific requirements of each of the courts

Commission v Germany (2009) C-536/07

- Detailed specifications imposed
- Not merely a description of the fixtures and fittings

➤ No legally enforceable obligations:

➤ *Flensburg*

“In the view of the Commission, such a land sale can neither be considered as a public works contract nor as a public works concession, because the contract in question did not contain a legally binding obligation to execute works specified by the contracting authorities. The mere right for the public authority to (re-purchase the land in case of non-construction) is not, in the Commission’s view, a sufficient sanction that could give rise to a legal obligation to execute the works”

- When is an obligation a legally enforceable obligation?
- *Faraday v West Berkshire* [2018] EWCA Civ 2532
 - Obligation was contingent
 - Fulfilment of contingency in hands of developer (when drew down land)
 - Once drawn down, there were mutually binding obligations
 - Not yet a public works contract where the obligations to develop are contingent
 - But unlawful to enter into the agreement because it would become a public works contract once the option was triggered

- Land transactions:
 - *AG Quidnet* [2012] EWHC 2639
 - Agreement for long lease
 - No express obligation to develop the site
 - *Midlands Co-Operative* [2012] EWHC 260
 - Sale of land
 - Overage agreement
 - Section 106 agreement (contingent obligations)

- *Commission v Germany* (2009) C-536/07
 - Described as a lease
 - Building works not started
 - Main purpose could only logically be construction of buildings to be leased

- No direct economic interest
 - Owner of the works
 - Legal right over use of the works – to be made available to the public
 - May derive economic advantages from the future use or transfer of the work
 - Has contributed financially to the realisation of the works
 - Has assumed the risk of the work being an economic failure

- Contracts which may be treated as a unity:

- *Helmut Muller* (2010) C-451/08

- Prudent not to exclude from the outset the application of Directive 2004/18 to a two-phase award procedure in the form of the sale of land which will subsequently form the subject of a works contract, by considering those transactions as a unity (para 82)

- *Remondis* (2016) C-51/15

- Multi-stage operation must be examined as a whole, taking account of its purpose (para 37)

➤ *Faraday*

Court must consider the transaction as a whole (para 59)

- The anti-avoidance risk (Regulation 18)

Where is the line drawn?



- The right side of the line:
 - Section 106 contracts
 - No legal obligation to carry out works

- No legal obligations means no legal obligations

- Beware:
 - Being too clever
 - Spending too much time and money in avoidance

- Wait for the post-Brexit world – when all will be clear?

VEAT notices

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Are VEAT notices still a reliable means of reducing risk and if so in what circumstances?



VEAT Notices protect against the First Ground of Ineffectiveness



The first ground of ineffectiveness does not apply if all of the following apply:

- The contracting authority considered that awarding the contract without prior publication was permitted by Part 2 of the PCR;
- The contracting authority has published a VEAT notice; and
- The contracting authority has observed the 10 day standstill after publication of the VEAT notice.

PCR 2015 Reg 99 (3)

VEAT must contain the following information



- (1) the name and contact details of the contracting authority,
- (2) a description of the **object** of the contract,
- (3) a **justification of the decision to award the contract without prior publication** of a contract notice,
- (4) the name and contact details of the economic operator to be awarded the contract, and
- (5) where appropriate, **any other information which the contracting authority considers it useful to include.**

PCR 2015 Reg 99(4)

The position regarding VEAT Notices was reviewed by the EC in *Fastweb*. The Court held:

- The exception under the notice procedure must be “interpreted strictly”
- The body responsible for the review procedure should, when verifying whether the conditions [in 99(4)] have been fulfilled, carry out an effective review

The EC held that

“the justification must disclose clearly and unequivocally the reasons that moved the CA to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review.”

Echoing that, the CA in *Faraday* held that

the VEAT Notice must provide enough by way of **relevant objective detail about the contract to enable the third party to decide**, in the short period allowed to him, **whether to launch proceedings**. Necessarily, such a decision must always be a properly informed decision.

Faraday VEAT – the object of the contract



The description of the object of the contract

- Describing the “*main object of the agreement*” as “*an exempt land transaction*” was incorrect, or at best misleading
- The development agreement extended further than a transaction for the disposal or transfer of land. It contained **intricate provisions for the design and execution of a large development**, which St Modwen would carry out, in accordance with arrangements provided

Faraday VEAT – the justification



- Describing it as imposing no binding obligation on St Modwen left too much unclear. **Nothing was said about the obligations borne by St Modwen, including to undertake works, contingent only on land drawdown.** It would be easy to infer from the notice that no such obligations had been included
- The description of the development as an “*exempt land transaction*” was presented as not only the object of the agreement, but also the justification. As it was a mistaken understanding of the object of the contract, that undermined the justification

The statements that the council

- *“has not specified the requirements for any works”* and *“does not exercise a decisive influence on the type or design for any works”* reinforced the implication that there was no obligation on St Modwen to carry out any works.
- The statements **did not alert a third party to the real nature of the transaction.**

- Nothing was said about obligations for master planning, preparing “Project Plans”, applications for outline planning permission, subsequent preparation of “Development Strategies”, the obtaining of approval for details etc.
- The only part of the justification that purports to explain what the development actually was, rather than what it is not, was the statement that it *“is an exempt land transaction”*.
- The rest was all in negative terms and **left no picture of the contract as it truly was**

What must a notice do to be effective?



- The VEAT notice is likely to be interpreted strictly by the Court

- The VEAT must provide a clear and unequivocal disclosure of
 - the objects of the contract; and
 - the CA's justification for a lawful award without prior publication

It must

- State what the contract is, not what it is not
- Include **relevant objective detail about the contract** to allow a third party to make a properly informed decision about its rights
- Include **sufficient facts to alert a third party to the real nature of the transaction**

And to check:



- The harder it is to write, the more likely it is that it does not meet the requirements; or
- If a CA cannot clearly explain what it is doing and why it probably means that it should not be doing it
- Especially if the reason for the difficulty is that it opens the CA to peril...

Be very careful



Recurring issues following *Faraday*

James Frampton

Public Works Contracts

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Introduction: recurring issues following *Faraday*.



1. Can Regulation 32 be used for contracts now caught by *Faraday*?
2. Relevance of the Regulation 18 anti-avoidance rule.
3. How real is the post-*Faraday* risk given the reduced pool of potential challengers following *Wylde*?

1. Can Regulation 32 be used for contracts now caught by *Faraday*?



➤ Public Contracts Regulations 2015, reg 32 (UCR, reg 50):

“(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—

(a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:—

(i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance,

(ii) competition is absent for technical reasons,

(iii) the protection of exclusive rights, including intellectual property rights,

but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.”

1. Can Regulation 32 be used for contracts now caught by *Faraday*?



- Exception (a):
 - (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;

- Not a true exception from the PCR.

1. Can Regulation 32 be used for contracts now caught by *Faraday*?



- Exception (b)(i):

- (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance,

- Applies to a limited scope of public works contracts.

1. Can Regulation 32 be used for contracts now caught by *Faraday*?



- Exception (b)(ii):

 - (ii) competition is absent for technical reasons,

- Note the express clarifications/ limitations.

- What are “technical reasons”?

 - “eg there is only one supplier with the expertise to do the work, produce the product or with capacity to complete on the scale required”

 - Procurement Policy Note - Responding to COVID-19 PPN 01/20**

- Unlikely to apply to public works contracts.

1. Can Regulation 32 be used for contracts now caught by *Faraday*?



- Exception (b)(iii):
 - (iii) the protection of **exclusive rights**, including intellectual property rights,
- Again, note the clarifications/ limitations
- Is ownership of the land an “*exclusive right*”?

1. Can Regulation 32 be used for contracts now caught by *Faraday*?



- Exception (c):

“(c) insofar as is strictly necessary where, for reasons of **extreme urgency** brought about by **events unforeseeable** by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation **cannot be complied with.**”

- Reg 32(4):

“The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.”

- Limited to where need to act immediately and impossible to comply with the usual timescales in PCRs.

2. Relevance of the Regulation 18 anti-avoidance rule.



➤ Regulation 18:

“(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.

(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.”

2. Relevance of the Regulation 18 anti-avoidance rule.



- Regulation 18 was an alternative ground of appeal in *Faraday* considered at [66] to [69].

“66. In the alternative to his arguments on both of the previous issues, Mr Giffin submitted that, **by constructing the development agreement in the way that it did, the council had attempted deliberately to avoid the public procurement regime.**”

2. Relevance of the Regulation 18 anti-avoidance rule.



➤ This argument was dismissed by Lindblom LJ:

“68. I do not accept Mr Giffin’s argument here. **It cannot be said that the underlying purpose of the option provisions in the development agreement, or of the development agreement as a whole, was an unlawful purpose**, even if the development agreement itself ought to have been the subject of a procurement process in accordance with the legislative regime. It is perfectly possible in principle for the purpose of the development agreement, namely the development of the land by St Modwen in accordance with the objectives declared in its recitals, to be lawful, but the development agreement itself to be unlawful for the council’s failure to undertake a lawful procurement process.

69. It was not unlawful for the council to put in place a contractual relationship with a developer, or with St Modwen in particular, to secure the regeneration of the industrial estate. **Nor was it inherently unlawful for the council to seek to achieve, if it could, a lawful contractual relationship with St Modwen, or any other developer, that fell outside the reach of the public procurement regime.** It was lawfully entitled to attempt to find such an arrangement, without at any stage intending the arrangement to be unlawful. This was not, without more, an “abuse of rights”. It is not the same thing as an authority, or an authority and a developer, attempting to gain advantage for itself, or themselves, by deliberately entering into an **artificial** arrangement in an effort to **disguise** the “economic and commercial reality” of the transaction. That would likely be an “abuse of rights”.

70. There is no evidence in this case, and indeed **no suggestion, of the council having acted at any stage in bad faith**, or with any motive to create a mistaken understanding of its objectives in entering into the development agreement or of the “economic and commercial reality” of the transaction.”

2. Relevance of the Regulation 18 anti-avoidance rule.



➤ CoA in *Faraday*:

- Bad faith was required.
- Optional nature of the development agreement was for a legitimate purpose, because of the risks/ uncertainties in the scheme for the developer.

➤ The future?

- Is bad faith a true requirement? *Helmut Muller* [2011] PTSR 200 “clear evidence of an intention to evade the Community provisions on public contracts”.
- Attempts to change the nature or terms of similar contracts, so they fall outside of *Faraday*, could fall foul of Regulation 18.

How real is the post-*Faraday* risk given the reduced pool of potential challengers following *Wylde*?



- Who has standing?

- Challenge under the PCR = economic operator (Reg 2).
 1. Form/ substance: *“any person or public entity or group of such persons and entities”*

 2. Activity: *“offers the execution of works or a work, the supply of products or the provision of services on the market”*

(See: *Community R4C v Gloucestershire* [2020] EWHC 1803)

How real is the post-*Faraday* risk given the reduced pool of potential challengers following *Wylde*?



➤ Judicial review:

“40... It is in my view entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who “can show that **performance of the competitive tendering procedure . . . might have led to a different outcome that would have had a direct impact on him**”...

41. ... *In my view it is clear that a council tax payer, or concerned local resident, or member of the local authority cannot without more bring themselves within that test.*”

(Wylde v Waverley Borough Council [2017] PTSR 1245, at [40-1])

How real is the post-*Faraday* risk given the reduced pool of potential challengers following *Wylde*?



- Those with standing may not be interested in bringing a challenge: (1) lack of push factors, (2) procedural obstacles, and (3) difficulties on causation/loss (see: *Nationwide Gritting Services Ltd v Scottish Ministers* (2015) SCLR 367).
- NIMBYS/ interest groups will often lack standing.
- Most likely challenge may be from professional bodies/ trade unions.

**Thank you for listening.
Any questions?**

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