



Pinsent Masons

COUNTY OF HEREFORDSHIRE DISTRICT COUNCIL

RETAIL QUARTER DEVELOPMENT AGREEMENT

PUBLIC PROCUREMENT ADVICE

1. INTRODUCTION

- 1.1 The County of Herefordshire District Council (the **Council**) entered into a development agreement (**DA**) for the Retail Quarter development (the **Development**) with Stanhope Plc in November 2009 following a Competitive Dialogue procurement procedure. At the end of September 2012 documents varying the DA to reflect variations required by Stanhope's funding partner, British Land, were exchanged. Those variations were conditional on the DA becoming unconditional by the end of December.
- 1.2 British Land will only agree to going unconditional on their funding agreement with Stanhope if the yield in their funding deal with Stanhope is changed by 0.2%, which equates to a reduction of £3m, of which Stanhope has requested the Council 'contributes' £500,000.
- 1.3 We have been asked to advise urgently on the public procurement aspects of the reduction in the Council's receipt for the project.

2. OUR ADVICE

- 2.1 There has to be some degree of risk that the reduction in the Council's receipt could potentially be regarded as a material change to the DA for the purposes of procurement law, given that it changes the economic balance of the deal in favour of Stanhope. We have previously advised the Council on whether other proposed changes are material changes. In view of the urgent nature of the advice required, we do not repeat the detailed legal backdrop to material change here other than to say that material changes are, in procurement law terms, seen as giving rise to a "new" contract. Where a "new" contract arises, a tender process (commenced by way of a fresh OJEU notice) would be required.
- 2.2 In our view, it would be advisable to implement the 'contribution' by way of a standalone Deed of Variation rather than amending the DA itself. Isolating the change in that way would maximise the chances of being able to scrap the reduction and revert to the previous position under the DA in the event of a credible procurement law challenge. However, there is no guarantee that this strategy would protect the Council from the risk of a successful challenge. For example, any such claim could also try to challenge other recent changes to the deal, such as those documented at the end of September 2012. It is also unclear, given the lack of case law on the remedy of ineffectiveness, whether under a successful application for that remedy the ineffectiveness order would be applied just to the Deed of Variation, or to the DA as well. If the Deed of Variation could be regarded as making only ancillary changes at the edges of the DA, rather than attempting to re-write the DA, there would be good reason to believe that just the Deed of Variation would be impacted by a declaration of ineffectiveness.
- 2.3 One mitigation measure would be for the Council and Stanhope to enter into the Deed of Variation but to wait six months (the limitation period for an ineffectiveness claim) before commencing work and thereby incurring costs. It is understood that such an

option is unlikely to be palatable to Stanhope or British Land, Stanhope in particular having expressed its desire to begin work as soon as possible.

- 2.4 The Council would also have to be satisfied that the £500,000 contribution could not be regarded as the grant of unlawful State aid to Stanhope. Depending upon the make up of the £500,000 contribution, an assessment of the state aid position will be carried out before completion of the Deed of Variation. In addition, the separate Deed of Variation will include an obligation on Stanhope to repay this £500,000 contribution in the event that this sum was ever considered to be state aid. Even without this contractual provision, existing legislation already requires the Council to recover this contribution if it was considered to be state aid.

Pinsent Masons LLP

30 October 2012