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Standing the test of time: Top ten tips for project development agreements

Project Development Agreements (PDAs) are often used in urban regeneration and other development projects; they allow the government landowner to keep control of the precinct development and allow the developer to defer payment and land acquisition. Their implementation over the project lifecycle means that clauses will be tested, as will the relationship between the parties. It is important that the PDA is carefully negotiated and drafted to avoid pitfalls during project implementation.

In preparing a PDA, it is important to bear in mind that it will operate over a long period of time and referred to regularly in implementing the project, not simply put in the bottom drawer. The document needs to stand the test of time. Sometimes, in a bid context, the opportunity to make changes to the bid PDA is limited and risks need to be prioritised. This is our take on the top ten tips for developers entering into PDAs.

1. Right to land transfer must be clear (make sure the land to be purchased is clear and the put and call option mechanics are clear)

In a PDA, typically the developer acquires the interest in the land during the life of the project through a put / call option mechanism rather than upon entry into the PDA. Deferred land acquisition delivers cashflow benefits to the developer because payment for the land can also be deferred until a point in time closer to completion of the development. However, it does carry a completion risk. It is essential to make sure that the call option and put option work, that the dates for the start and finish of the call and put option periods are clear and based on objective events, that any conditions precedent can be satisfied and are within the control of the developer and that any template contracts for sale attached to the PDA will effectively transfer the land. The land to be bought and sold should be clearly described or indicated by reference to a draft plan of subdivision.

2. Pre-existing site conditions (potential for delays and cost blow outs: condition of land, contamination, existing infrastructure, new infrastructure, environmental, native title and heritage)

The developer will typically assume risk on the condition of the land. If the site is contaminated it is important to properly risk assess the extent of the contamination and if possible contain the risk – for example, by monetary cap on developer expenditure towards remediation or by defining the land area that the developer must remediate (including drafting for the possibility of leaching contamination).

Other site condition risks include removal of unknown existing infrastructure, discovery of relics and heritage items and geological risk. All of these can delay the project with consequences at different project interfaces. Time and cost caps can also help mitigate or limit these risks.

In May 2019, the NSW Government released the consultation draft 'Interactive Tendering Guidelines' (**Guidelines**) for use in large scale construction projects and public private partnerships. The NSW Government has indicated it wishes to adopt a more collaborative approach early on in the procurement process so there is an opportunity for refinement and information sharing with proponents on topics the Guidelines refer to as 'interactives'. These are typically:

- design / technical specifications;
- legal framework and the State's proposed risk profile; and
- key commercial issues.

The intention is that site condition and project specification surprises are avoided to allow for better risk allocation and pricing based on information that has been shared and refined between the parties.

3. Reimbursements or payments from the government landowner (make sure that obligation and timing of reimbursement/payment is clear to mitigate cashflow risk)

Often PDAs will include obligations on the developer to carry out certain works for the government landowner with the developer claiming payment from the government landowner for those works. The payment claim mechanism needs to be absolutely clear to minimise risk that the payment claim is disputed and to ensure that payment is received on time to avoid cash flow consequences for the developer. It is not always clear that a PDA is a 'construction contract' for the purposes of *Building and Construction Industry Security of Payment Act 1999* (NSW) and this should be considered further at the time of preparing the PDA.

4. Milestones, delays and extensions of time (ensure that extensions of time (**EOTs**) are wide enough to cover non-compliance or failure to give approvals)

PDAs will generally include milestones and all the usual EOTs for delays in completing the project. EOTs should be wide enough to include PDA non-compliance or action or inaction by the government landowner. An EOT for breach of contract will not necessarily help as the inaction might not strictly be a breach or the breach might not be established court. In any case, the developer is unlikely to want to litigate a breach except as a last resort.

5. Governance and approval risk (streamline approvals, clear timeframes for approval)

PDAs are designed so that a government landowner can maintain control of the precinct character for the benefit of the public. However, sometimes this can lead to unwieldy approval mechanisms in the PDAs which can potentially delay the project. This is especially the case when there are approval mechanics for preliminary designs with the government as landowner and then subsequent planning approval processes. Ideally PDA drafting should:

- include clear time frames for approvals with EOTs available if not met;
- minimise duplicative processes or approvals; and
- place limits around iterative requests for further information.

6. Termination risk (remove entirely if possible)

The events of default that give rise to termination will often be strongly contested in PDA negotiations. A developer will not wish to bear the risk that the PDA will be terminated and that a government landowner will step-in to the project and buy back the land after the developer has started the project. A government landowner will wish to avoid a 'World Square' situation – where the site is left half developed for a period of time. Termination, step-in and buy-back, if permitted at all, should be in limited circumstances and only available after the usual opportunities to cure. It should not be allowed for a failure to meet milestones, unless perhaps that failure is ongoing for a significant period of time.

7. Contributions, land payments and stamp duty (carefully consider before entering into the PDA)

Very often, a PDA will include categories of payments other than land payments, such as public art contributions or infrastructure contributions. In *Commissioner of State Revenue v Lend Lease Real Estate Investments Limited* [2014] HCA 51, the High Court found that the payments under the Contract for Sale of Land and the other contributions payable under the PDA were all consideration for the transfer of the land and dutiable. Payment structures and stamp duty consequences should be carefully considered at the time of negotiating the PDA.

8. Public interest obligations (social housing, art contribution, public domain, potential for delays due to delayed decision making)

PDAs will usually include public interest obligations on the developer, for example, social housing obligations, training obligations and public art contributions. These issues can become time consuming and delay the project, especially when decisions need to be made on matters that garner strong opinions – such as art! The government landowner's obligations in making decisions on these matters should be clear with EOTs available if not met. The cost of delivery of public interest obligations should be accounted for in assessing the project.

9. Timing between completion and leasing (manage gap risks)

There is always potential gap risk for the developer in the layers of documents: the PDA, the building contract and the agreement for lease. Very often the developer will not be able to pass down all of the obligations in the PDA to the builder and may owe additional obligations to the tenant. These gaps need to be managed, for example – the landowner could face large damages claims if there is a delay in practical completion of the building and the tenant cannot move in on time. Programmes in documents should align as much as possible with an appropriate gap between practical completion under the building contract and lease commencement date.

10. Subdivisions, Building Management Statement (**BMS***)*, interfaces with other authorities and adjoining landowners (responsibility allocated correctly; allow sufficient time)

The PDA should clearly define the proposed lots to be sold and provide a clear process for initial subdivision, final subdivision, boundary adjustments, creation of easements and any related title matters – these issues can end up being time consuming and the developer can be in a vulnerable position if there is any uncertainty around boundaries.

In complex urban regeneration projects, there can be a high level of shared facilities. Parties should allow enough time to negotiate the BMS, particularly if the government landowner will retain an interest in land in the precinct and be a member under the BMS after completion of the project.

The PDA should also clearly articulate responsibility for interacting with any adjoining landowners or authorities such as Sydney Trains or Sydney Water. It may be necessary to enter into tripartite interface agreements to regulate these arrangements.