

CAMBRIDGESHIRE GUIDED BUSWAY APPOINTMENT OF EDISCLOSURE CONTRACTOR

To: **Cabinet**

Date: **17th April 2012**

From: **Director of Legal Services: LGSS**

Electoral division(s): **The Hemingfords and Fenstanton, St Ives, Papworth and Swavesey, Willingham, Cottenham, Histon and Impington, Waterbeach, East Chesterton, King's Hedges, Petersfield, Trumpington, Gamlingay.**

Forward Plan ref: **N/A**

Key decision: **No**

Purpose: **To approve the use of an exemption from the Council's Contract Regulations for the appointment of expert contractors to manage the edisclosure process for the Council in the Busway dispute.**

Recommendation: **It is recommended that Cabinet approve an exemption under Section 3.7 of the Council's Contract Regulations for the appointment of expert contractors to manage the edisclosure process for the Council in the dispute with BAM Nuttall over the construction of the Guided Busway.**

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1 BACKGROUND

- 1.1 On 11th August 2011 Cambridgeshire County Council commenced legal action for the recovery of £52 million owed to the Council by BAM Nuttall in respect of the construction contract for the Cambridgeshire Guided Busway.
- 1.2 A Case Management Conference was held on 25th November 2011, following which an Order was made by the Judge setting the timetable for managing the dispute up to the trial date in January 2014.
- 1.3 An important part of the process is Disclosure. Disclosure requires the parties to the dispute to make available to the other party all the relevant documentation which they hold. Disclosure is to be completed by 21st December 2012. Collating, sorting and exchanging all the relevant documents is a complex and lengthy process and as a result electronic processes are now used to manage this process, which is known as edisclosure. The Order made following the Case Management Conference requires the parties to use the edisclosure process.

2 DETAIL

- 2.1 The County Council's legal advisers have recommended that we should now start on the edisclosure process and that we should be in a position to advise the judge at the next Case Management Conference on 11th May that arrangements are being progressed.
- 2.2 There are a number of suppliers able to provide this service, but our legal advisers advise that not all suppliers are able to provide the level of service that is needed. In consequence they have recommended two suppliers who have provided satisfactory service in the past.
- 2.3 Both in terms of timescales and the number of suppliers it is not possible to follow the Council's Contract Regulations and an exemption from the regulations is therefore sought. The relevant section of the regulations is attached as Appendix A. As the cost of this work is likely to exceed the threshold of £173,934 set in regulation 3.6, Cabinet approval for this exemption is required in accordance with Regulation 3.7.
- 2.4 Members should note that as these are legal services they do not fall within Priority Services (as defined in Contract Regulations) for the purposes of the European Union (EU) Procurement Regulations, and therefore, as with other legal services, they are exempt from the EU Procurement Regulations. Provision for the cost of edisclosure has been made in the estimate of legal costs in the current Busway cost forecast.

3 ALIGNMENT WITH PRIORITIES AND WAYS OF WORKING

3.1 Supporting and protecting vulnerable people when they need it most

Not applicable.

3.2 Helping people live healthy and independent lives in their communities

Not applicable.

3.3 Developing the local economy for the benefit of all

Not applicable.

3.4 Ways of Working

Not applicable.

4 SIGNIFICANT IMPLICATIONS

4.1 Resource and Performance Implications

The appointment of a specialist supplier will ensure that the management of the edisclosure process is effective and efficient.

4.2 Statutory, Risk and Legal Implications

The Council has a legal obligation to disclose all relevant documentation to the defendant in the dispute. The Court has ordered the edisclosure process. The appointment of a specialist supplier with the ability to search the Council's systems for relevant documents will enable compliance with the Court Order and will minimise the risk of inadvertently failing to disclose a document.

In order to comply with the Council's Contract Regulations Cabinet approval is required for an exemption from the procurement processes set out in the Contract Regulations. As these are legal services they are exempt from the EU procurement regulations.

4.3 Equality and Diversity Implications

Not applicable.

4.4 Engagement and Consultation

Not applicable.

Source Documents	Location
Agenda and Minutes, Cabinet 5/7/11	Major Infrastructure Delivery Box Number CC1211 Shire Hall, Cambridge

Appendix A

3. EXEMPTIONS

3.1 Exemptions are provided for in the *Constitution* (in the Financial and Contract Procedure Rules) but are subject to the detailed requirements set out in this Regulation 3. An exemption under this Regulation 3 allows a contract to be placed by direct negotiation with one or more suppliers rather than in accordance with Regulation 8. No exemption can be used if the EU procedure applies.

3.2 All exemptions, and the reasons for them, must be recorded using the form in the *Purchasing Guide*. Exemptions shall be signed by the *Officer* and countersigned by the *Chief Finance Officer*.

3.3 The following exemptions only need the signature of the *Officer* and the *Chief Finance Officer*:

3.3.1 the subject matter of the contract can only be supplied by one **specialist** firm

3.3.2 an exemption is necessary because of **unforeseen emergency** involving immediate risk to persons, property or serious disruption to Council services.

3.4 In addition to the signature of the *Officer* and the *Chief Finance Officer*:

3.4.1 the *Head of Legal Services* must be consulted where the purchase is to be made using **collaborative procurement arrangements** with another local authority, government department, statutory undertaker or public service purchasing consortium other than ESPO (see Regulation 3.10) and

3.4.2 the *Director* - Corporate Director (People Policy & Law) must agree and confirm that the exemption process has been duly completed where the contract is an **extension** to an existing contract where a change of supplier would cause:

- ☐ disproportionate technical difficulties
- ☐ diseconomies or
- ☐ significant disruption to the delivery of Council services.

3.5 The Procurement & Contract Management Service must be consulted and an Exemption to Contracts Regulations completed and signed by the *Director* - Corporate Director (People Policy & Law) prior to commencing any procurement process using Office of Government Commerce Buying Solutions Contracts (OGC). The Terms and conditions of Contract applicable to any OGC arrangement including the requirement to undertake competition between providers must be fully complied with.

3.6 In **exceptional circumstances** a *Chief Officer* also has the power, under the Scheme of Delegation in the *Constitution*, to dispense with any provision of these Contract Regulations, provided that **where the contract exceeds £40,000, the relevant Portfolio Holder is consulted**.

Where the contract exceeds the EU Threshold, a *Chief Officer* has no delegated powers and the matter has to be determined by the Cabinet or Council (see Regulation 3.7).

3.7 In **exceptional circumstances**, the County Council and its *Cabinet* have power to dispense with any provision of these Contract Regulations. Any such decision may

be a Key Decision. (There is no Exemption available for *Priority Services*, above the *EU Thresholds*.)

3.8 Any exemptions granted for more than one year must be reviewed annually and either reconfirmed or amended.

3.9 *Financial Officers* must monitor the use of all exemptions.

3.10 In order to secure value for money the Council may enter into **collaborative procurement arrangements**.

3.10.1 All purchases from ESPO are deemed to comply with Contract Regulations and no exemption is required. However, purchases above the *EU Threshold* must be let under the *EU Procedure*, unless ESPO have satisfied this requirement already by letting their contract in accordance with the *EU Procedures* on behalf of the Council and other consortium members.

3.10.2 Any contracts entered into through collaboration with other Local Authorities or other public bodies, where a competitive process has been followed that complies with the Contract Regulations of the leading organisation (but does not necessarily comply with these Contract Regulations), will be deemed to comply with our Contract Regulations and no exemption is required. However, advice must be sought from the *Procurement and Contract Management Service*. **DOCUMENT TITLE : SORDER Page 8**

3.11 The use of e-procurement technology does not negate the requirement to comply with all elements of Contract Regulations, particularly those relating to competition and value for money.