

MINUTES of the meeting of Cabinet held at The Council Chamber, Brockington, 35 Hafod Road, Hereford on Thursday 24 September 2009 at 2.00 pm and the reconvened meeting on 1 October 2009.

Present: Councillor RJ Phillips (Chairman)

Councillors: LO Barnett, AJM Blackshaw, H Bramer, JP French, JA Hyde, JG Jarvis, PD Price and DB Wilcox

In attendance: Councillors PA Andrews, WLS Bowen, GFM Dawe, PJ Edwards, TM James, RI Matthews and AT Oliver

24. APOLOGIES FOR ABSENCE

There were no apologies for absence.

25. DECLARATIONS OF INTEREST

There were no declarations of interest received.

NOTE: The Leader of the Council informed the Cabinet meeting of the news reports that Willmott Dixon has been one of the companies fined by the Office of Fair Trading (OFT). As Willmott Dixon has been part of the bidding process for the construction of the new livestock market, Cabinet has been advised by the Monitoring Officer to defer the matter of the livestock market, so that Cabinet can be assured that they can proceed as planned and recommended in the report before them. The Leader proposed that the meeting be adjourned at Agenda Item 7 and reconvened on 1 October at 2.00pm to consider the matter following receipt of advice from the Monitoring Officer. It was not envisaged that there would be any problems as the OFT had advised that those companies fined should not be precluded from such work in future. The Monitoring Officer was requested to publish her advice as soon as it was available, if it was not exempt from publication.

26. MINUTES

RESOLVED: That the Minutes of the meeting held on 10 September 2009 be approved as a correct record and signed by the Chairman.

27. INTEGRATED CORPORATE PERFORMANCE REPORT

Cabinet's attention was drawn to the full text of Appendix 3, which had been distributed separately prior to the meeting. Cabinet was reminded of the ratings for performance, from green, for performance in excess of target, through to red, indicating either not expected to achieve target or because either due data had not been reported or no action plan was yet in place. Cabinet was advised that some 60 indicators were now being used. These were grouped by reference to the themes of the Herefordshire Community Strategy and whether

their prime focus was on citizens, services, partnerships or meeting the Council's statutory duties. It was noted that the percentage of children subject to a child protection plan had improved and was slightly better than target. Improved figures to the end of August for the timely assessment of referred children strengthened the expectation that the year's target should be achieved. In addition reductions in delayed transfers of care from hospitals were reported and, although performance was behind target in respect of clients receiving self-directed support and people supported to live independently, both were moving in the right direction.

Cabinet went on to discuss:

- targets and action plans relating to affordable homes and organisational improvement and greater efficiencies.
- the increase in road accidents in the first five months of 2009, following the record low level in 2008, and the action in hand to continue the underlying downward trend, including through the use of safety cameras.

RESOLVED: That performance to the end of June 2009 and the measures taken to address areas of under performance be noted.

28. SCHOOLS' TASK GROUP UPDATE

The Cabinet Member ICT, Achievement and Education presented the report and informed Cabinet that the Task Group was reporting back to Cabinet following consultation with head teachers and chairs of school governing bodies. Following Cabinet's approval full consultation would be undertaken with the general public with feedback to the Cabinet meeting on 26 November 2009.

Cabinet was advised of the issues discussed by the task group as:

- Falling rolls;
- Statistical data;
- Financial implications;
- Possible alternative models e.g. federating schools;
- Governance and school leadership;
- Rural considerations.

Cabinet was reminded that the work the Schools Task Group was undertaking was part of a national strategy with a timeline for delivery and was fundamental to the future of schools in the county. It was noted that liaison needed to continue with school governors to ensure their continued involvement and provide training for governors.

Cabinet went on to discuss:

- The complexities School funding;
- Falling rolls;
- The high performance of county schools;
- Low national funding received by Herefordshire – 147 out of 149;
- The number of schools in the county and the percentage of small schools;
- How to make funding equitable and fair for all children in Herefordshire.

Cabinet emphasised the importance of Councillors attending parish council meetings to discuss the schools report with them and the community at large and to take back the views of the community to the directorate.

RESOLVED

THAT:

- (a) the process and timescale for consultation on Schools Task Group paper (Appendix 1) be approved;**
- (b) the process followed and progress made by the Schools Task Group in preparing the paper for consultation be noted.**

29. BUDGET MONITORING REPORT

The Acting Head of Financial Services presented the report and advised Cabinet on the overall position on the revenue budget which showed a projected overspend of £1.34m, which was 1% of the Council's £137.718m net revenue budget, excluding dedicated schools grant funding. Cabinet was reminded that directorates had been instructed to keep spending within budget. Income from investments had not been reached due to the economic downturn.

In discussing the Capital Programme Cabinet was advised the forecast outturn for 2009/10 totalled £84.443m, which was an increase of £17,005k from the original programme. The increase was due to slippage identified as a result of the 2008/09 close down and the inclusion of additional funding allocations. Cabinet was advised of early indications of pressures for the year; however, recovery signs were in place and by highlighting now should bring the budget in line by year end.

Cabinet also discussed:

- Potential savings against pay awards;
- Write-offs report;
- Business rates and the fall in the national pool;
- Herefordshire Connects budget.

RESOLVED

THAT:

- (a) the report be noted;**
- (b) the forecast outturn for 2009/10 be agreed with Directors based on service and financial performance in the report, be noted.**
- (c) The continuing efforts of Directors to ensure service targets are met within approved budgets be endorsed.**

Cabinet adjourned at 3.15 pm and agreed to reconvene on 1 October 2009 at 2.00pm to discuss Agenda Item 7 Livestock Market.

30. LIVESTOCK MARKET (Pages 1 - 12)

Reconvened Cabinet Meeting 1 October 2009.

This item was deferred to enable the Cabinet to receive advice from the Monitoring Officer.

Cabinet Members Present: AJM Blackshaw, H Bramer, JP French, JA Hyde, JG Jarvis, RJ Phillips, PD Price, DB Wilcox.

Apologies received from Councillor LO Barnett Cabinet Member Social Care Adults.

The Leader of the Council reminded Cabinet of the reasons for the adjournment of the meeting on 24 September, which related to the recent guidance received from the Office of Fair Trading (OFT) and to receive advice from the Monitoring Officer in relation to the guidance. A copy of the Monitoring Officer's advice is attached at Appendix 1 to the minutes.

The Monitoring Officer reminded Cabinet of the two decisions they were being required to take, namely:

- To approve the allocation of funding for the construction of the new livestock market and associated transport improvements; and
- To delegate authority to the Director of Regeneration to proceed with the procurement and appointment of a contractor to develop the new livestock market.

The Monitoring Officer reported to Cabinet on the guidance from the OFT stating that Willmott Dixon Construction Ltd had been one of the companies that had been fined by the OFT and the guidance had stated that contractors should not be automatically precluded from the tendering processes as a result of being fined, for the reasons set out in her advice note.

The Director of Resources explained the decisions that the Cabinet were asked to consider, the nature of the SCAPE framework contract and the advantages to the Council of using that framework to enter into a contract with the preferred contractor, Willmott Dixon Construction Limited. The Director of Resources also explained that this provided some assurance that local sub-contractors would be used on the contract and that undertaking a full tender process instead of using the established SCAPE framework contract would not secure such reassurance.

The Monitoring Officer made it clear that if the Council chose to utilise the SCAPE framework contract that it was not possible to preclude Willmott Dixon Construction Limited from putting forward a proposal for this work because it was an established contract.

The Monitoring Officer went on to advise Cabinet that even if the Council chose to undertake a full tender exercise instead of using the SCAPE contract it would not be prudent to exclude Willmott Dixon Construction Limited from any tender exercise on the grounds of the OFT fines and in the light of the OFT advice. She added that:

- some companies similar to Willmott Dixon had participated in the OFT leniency programme;
- the levels of fines imposed did not necessarily reflect the level of inappropriate activity by companies;
- Willmott Dixon press release advises of the remedial steps put in place to prevent further occurrences in the future;

- to exclude those companies fined from the procurement process would remove a lot of the market that would normally compete and might effect the quality of the response; and
- companies might seek to take action if excluded for this reason.

The Monitoring Officer went on to state that there was nothing in the OFT report that should stop Cabinet from going ahead with the proposals outlined in the livestock market report and using the SCAPE framework contract.

The Cabinet Member Resources reiterated the significance of the livestock market project to the Council and the county livestock sector and emphasised the contract was designed to control costs and time management of the project. The Cabinet Member went on to emphasis the wish of the authority to use local sub-contractors as part of the overall project. He added that there would be close monitoring of the costs and that under the SCAPE framework agreement the level of additional cost to be met by the Council is “capped” should any overspend arise. A Ward Member raised a question on funding and requested that funds were ringfenced for the development of the infrastructure.

RESOLVED

THAT:

- (a) the allocation of funding for the construction of a new livestock market and associated transportation improvements be approved; and,**
- (b) delegated authority to the Director of Regeneration to proceed with the procurement and appointment of a contractor to develop the new livestock market be approved.**

The reconvened meeting of Cabinet finished at 3.00 pm

CHAIRMAN

CABINET

24 SEPTEMBER 2009

RECONVENED MEETING

1 OCTOBER 2009

ITEM 7 – NEW LIVESTOCK MARKET

ADVICE NOTE

AUTHOR: CHARLIE ADAN, ASSISTANT CHIEF EXECUTIVE – LEGAL AND DEMOCRATIC AND MONITORING OFFICER

DATED: 30 SEPTEMBER 2009

1. This advice note relates to Item 7 on the Cabinet agenda for the meeting held on 24th September 2009 relating to the new Livestock Market. The item is due to be considered at a reconvened meeting of Cabinet on 1st October 2009 following an adjournment of the meeting to enable the Cabinet to receive further advice in relation to this matter.
2. The report at Item 7 asks the Cabinet to take two decisions:
 - a. To approve the allocation of funding for the construction of the new livestock market and associated transport improvements; and;
 - b. To delegate authority to the Director of Regeneration to proceed with the procurement and appointment of a contractor to develop the new livestock market
3. The report recommends that the most timely and cost effective route to procure a contractor to develop the scheme is to make use of the existing local government SCAPE framework agreement. The contractor that will deliver the scheme within the framework are Willmott Dixon Construction Limited.
4. Willmott Dixon Construction Limited is one of the companies who were fined by the Office of Fair Trading (OFT). A copy of the relevant press report is attached at Appendix 1 to this advice note. Willmott Dixon Construction Limited have issued a response which is attached at Appendix 2. The Office of Fair Trading has stated in guidance that contractors should not be automatically precluded from tendering processes as a result of being fined and you are advised later in this report why it would be imprudent to do so.
5. Cabinet are advised therefore that the proposal in the report at Item 7 (Recommendation (b) above) can still be agreed and the Cabinet should have regard to the following additional advice.
6. Recommendation (b) is based on a full assessment by Council officers of the procurement options available to the Council which demonstrates clearly that this is the

most timely and cost effective route to procure a contractor to develop the scheme. In the light of the OFT issues, and in order to reassure the Cabinet, the options and a summary of the pros and cons of each are set out in Appendix 3. The fine imposed on Wilmott Dixon Construction Limited by the OFT does not alter that assessment]

7. The OFT has offered the following advice:

“Parties should not be excluded automatically from future tenders on the grounds that they are Parties to the Decision (meaning the imposition of fines) or be the subject of similar measures making it more difficult for them to qualify for such tenders.”

The reasons for this and the factors that the Cabinet should consider are:

- i. The OFT openly state that many other firms were implicated but resources meant that the OFT focussed on a limited number of companies. Given this, to disqualify those named could be discriminatory.*
- ii. Some of the companies fined participated in the OFT leniency programme by co-operating with the OFT and therefore the level of fines imposed may not reflect the level of inappropriate activity. This could distort the view of the impact of any particular company’s activity and make it difficult for the Council to make a proper assessment of suitability simply on the basis of the fine imposed in each case.*
- iii. The OFT’s view is that the investigation process raised awareness with the companies involved and may have already put in place remedial steps to prevent future occurrences. Wilmot Dixon has confirmed in its press release that it has done so.*
- iv. Practically, exclusion of those companies fined from procurement processes will remove a lot of the market normally available to compete and may have an effect on the quality of the response.*
- v. Companies may well seek to take action if excluded for this reason on grounds of discrimination, particularly in the light of the OFT advice.*

8. The SCAPE framework is an existing contract and it is not possible under the regulations at this stage of this type of proposed procurement arrangement, therefore, to consider whether to disqualify Wilmot Dixon from the procurement. Nor is it recommended that the Cabinet should seek to disqualify the company given the advice from the OFT and the factors set out at paragraph 6 above.

7. It would be possible to choose an alternative procurement option but as set out in paragraph 6 above, the SCAPE framework is the best option. The Cabinet should consider whether the OFT’s actions, the advice from the OFT and the factors at paragraph 7 are sufficient to warrant the use of an alternative procurement process. The

advice from legal and procurement officers is that it is not and that the Cabinet should proceed as planned.

8. The proposed use of the SCAPE framework agreement, the identification of Wilmot Dixon as the preferred contractor and the further procurement process which if authorised by Cabinet will be taken by the Director of Regeneration under the delegation at Recommendation (b) is a lawful procurement method and will ensure that the Council meets its obligations in relation to value for money. The fine imposed on Wilmot Dixon by the OFT does not affect the legality or value for money of this proposal per se.
9. In all the circumstances, the Cabinet are advised to proceed and to agree recommendation (b) in the report at Item 7.

Charlie Adan
Interim Assistant Chief Executive
29 September 2009

Construction firms fined for illegal bid-rigging

114/09 22 September 2009

The OFT has imposed fines totalling £129.5 million on 103 construction firms in England which it has found had colluded with competitors on building contracts.

The decision follows an OFT Statement of Objections in April 2008 after one of its largest Competition Act investigations.

The OFT has concluded that the firms engaged in illegal anti-competitive bid-rigging activities on 199 tenders from 2000 to 2006, mostly in the form of 'cover pricing'.

Cover pricing is where one or more bidders in a tender process obtains an artificially high price from a competitor. Such cover bids are priced so as not to win the contract but are submitted as genuine bids, which gives a misleading impression to clients as to the real extent of competition. This distorts the tender process and makes it less likely that other potentially cheaper firms are invited to tender.

In 11 tendering rounds, the lowest bidder faced no genuine competition because all other bids were cover bids, leading to an even greater risk that the client may have unknowingly paid a higher price.

The OFT also found six instances where successful bidders had paid an agreed sum of money to the unsuccessful bidder (known as a 'compensation payment'). These payments of between £2,500 and £60,000 were facilitated by the raising of false invoices.

The infringements affected building projects across England worth in excess of £200 million including schools, universities hospitals, and numerous private projects from the construction of apartment blocks to housing refurbishments.

Eighty-six out of the 103 firms received reductions in their penalties because they admitted their involvement in cover pricing prior to today's decision.

The OFT has also informed nine companies originally listed in its Statement of Objections that it will not pursue allegations of bid-rigging against them as it considers it has insufficient evidence to proceed to an infringement finding.

Related guidance issued today by the OFT in conjunction with the Office of Government Commerce cautions procurers against excluding the infringing firms from future tenders, as the practice of cover pricing was widespread in the construction industry and those that have already faced investigation can now be expected to be particularly aware of the competition rules.

Simon Williams, the OFT's Senior Director for this case, said:

'Our investigation has uncovered significant infringements of competition law on nearly 200 projects across England. Bidding processes designed to ensure clients and in many cases taxpayers receive the best possible choice and price were distorted, creating a real risk of increased prices. This decision sends a strong message that anti-competitive and illegal practices, including cover pricing, must cease. The OFT welcomes initiatives by the leadership of the construction industry to add weight to that message through a clear compliance code which we hope will help to embed more fully a culture of competition within the construction sector.'

News release

Willmott Dixon statement on OFT investigation

22 September 2009 – This morning the Office of Fair Trading has concluded its investigation into ‘cover pricing’ in the construction industry.

‘Cover pricing’ was the term used to describe the situation where a tenderer submitted a bid at a price intended to avoid winning a contract, perhaps because the tenderer already had too many projects or was unhappy with the quality of tender information provided, usually with the intention of not upsetting a client and so staying on future tender lists.

Because the OFT had evidence that ‘cover pricing’ was endemic in the sector, involving thousands of companies right across the country, we understand that for practical reasons it decided to limit the scope of its investigation to a sample of contractors operating within a defined geographical region. As Willmott Dixon Construction’s operations fell within this sample area, we were investigated and, we regret to say, implicated alongside 102 other contractors in the OFT’s findings.

Having received the OFT’s decision this morning, we note that Willmott Dixon Construction has received a fine of £4.5 million payable over three years. Whilst the Group will now need to carefully consider the detail of the OFT’s findings and contemplate whether any further action is required, including any grounds for appeal, we can confirm that:

Cont’d....

2.

- Of the many thousands of tenders we submitted during the six year period in question, Willmott Dixon Construction was implicated in relation to 3 tenders, each of which was submitted several years ago
- In respect of all three incidences, the price paid by the client was not alleged or found to have been increased
- Willmott Dixon Construction did not, and was not found to have made any financial gain whatsoever
- Willmott Dixon Construction was not alleged or found to have made or received any compensatory payments

The practice of 'cover pricing' has always been in contravention of our working practices and since the three incidences were brought to our attention by the OFT, the company has done everything that it can to ensure that breaches will never occur again.

This included the introduction of a more robust Competition Law compliance policy backed by comprehensive Competition Law training of all relevant staff and new recruits. Willmott Dixon has also adopted and fully supports the Competition Law Code of Conduct for the construction industry promoted by the UK Contractors Group.

We hope that our customers, our staff and our shareholders will recognise that to have been implicated in this investigation 'flies in the face' of everything Willmott Dixon Group stands for.

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For more information, please contact

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APPENDIX 3

The Livestock Market procurement process was driven by the requirement to keep the site build within the quoted cost. There was also a secondary requirement to keep the time to procure as short as possible.

The initial decision was with regard to whether a “design and build” or straightforward “build” contract should be used.

The appraisal of this was carried out by the council’s strategic procurement manager in December 2007. (Results below)

PROCUREMENT ROUTE OPTIONS

DESIGN AND BUILD

An arrangement where one contracting organisation takes sole responsibility, normally on a lump sum fixed price basis, for the bespoke design and construction of a client’s project.

ADVANTAGES:	<ul style="list-style-type: none">❑ Complete service from a single source – one point of responsibility.❑ Easier to integrate the design and construction components resulting in better time and cost performance.❑ Fewer defects due to closer working relationship.❑ Strict adherence to agreed programmes and budgets.❑ Less administrative work for the client (post contract award).❑ Full understanding of design and client requirements.
POINTS TO WATCH:	<ul style="list-style-type: none">❑ Changes to requirements can be very expensive and destroy price certainty.❑ Output specification must be very clear to prevent a reduction in the finished quality of the facility.
RISK:	<ul style="list-style-type: none">❑ Risk of design not working is passed to the supplier.
COST MANAGEMENT:	<ul style="list-style-type: none">❑ Cost certainty with fixed lump sum payment.❑ R.I.C.S. research states 20% cost reduction achievable throughout project.
TIMESCALE CONSIDERATIONS:	<ul style="list-style-type: none">❑ Lost time from re-starting procurement process (PQQ stage and OJEU notice issue = 37 days).❑ End to end procurement time period will be 5 calendar months est.

BUILD ONLY

ADVANTAGES:	<ul style="list-style-type: none"> ❑ Easier to assess and evaluate the tender responses as all based on the same design
POINTS TO WATCH:	<ul style="list-style-type: none"> ❑ Lack of understanding of the design process. ❑ Poor planning of design (budget and time). ❑ Conflict of perception of design between contractors and designers. ❑ Uncertainty over cost and build time.
RISK:	<ul style="list-style-type: none"> ❑ Risk of design not working remains with the Council.
COST MANAGEMENT:	<ul style="list-style-type: none"> ❑ Uncertainty over final build cost. ❑ Cost may be driven down but possibly reducing the quality of the facility. ❑ May not be able to reduce costs without significantly changing the design plans.
TIMESCALE CONSIDERATIONS:	<ul style="list-style-type: none"> ❑ PQQs ready to evaluate then further 3.5 calendar months to contract award.

With the approval of the Council's Property Services department the decision was taken to go down the "Design and build" route in January 2008. At this time the PB looked at using a framework contract as a means of ensuring a rapid "design and build" contractor engagement with a capped cost.

Comparitive Key Issues/Advantages –

Pre-Existing Framework Versus Traditional New Tender Process :

Existing Framework	New Process
Much quicker to establish, simply sign up to use the Framework agreement. Deadlines re vacating the old site make this a vital Issue. Also note it saves Officers a significant amount of time.	Will take three months or more longer to award a Contract from 'scratch' (including the option to set up a new, specific, Framework Agreement). Complex tenders can take many months to conclude.
Opportunity (as in this case) to select a Framework and Supplier set up by Local Authorities and with experience of working with LA's.	In a new Tender Process it would not be allowed to exclude bidders that do not have Public sector experience which adds risk in the suitability of suppliers coming forward .
Opportunity (as in this case) to select ; a). open book arrangement, and b). a capped cost, thus increasing budgetary control and the	Both would have to be negotiated/offered by winning bidder and therefore not guaranteed.

ability to achieve best value.	
Early engagement is possible with the Supplier (as soon as signing up to use the Framework), Thus enabling advice to be sought on ; a) The Programme; b) Costings; c) Specific project details, immediately.	Cannot start on this until after Contract award which would be several months later (see above).
Selecting a suitable Framework offers the chance to include work on Flood Alleviation and seek cost efficiencies on both projects.	Setting up a new Contract that allows this opportunity would take longer (as above), and is not a guaranteed outcome. May require each Project to be separate processes and Contracts. The key benefit of a clean start is, it offers the chance to set up a highly-tailored solution, but takes longer, is not guaranteed re timescales, and quality of outcome, and is only an advantage if a suitable Framework is not already available.

After concluding that a framework contract would be best suited to the needs of the project the SCAPE framework was proposed by the council's property services department as a suitable partner.

The council's strategic procurement and legal departments examined the SCAPE agreement and process. The following assessment was made:

Scap Construction Framework Agreement

What is it?

Scap is a Local Authority controlled company offering a framework agreement for design, build, consultancy for bespoke projects as well as "system build" technology.

The framework supplier is Wilmott Dixon, who have local sites at Birmingham, Bristol and Cardiff.

Flexibilities within the framework

- Ability to conduct pre-build dialogue and use Wilmott Dixon in a consultative capacity to discuss aspects of the project.
- Customer nominated design team or contractor nominated design team.

Legal and procurement considerations

- The framework has been through an "OJEU" tender satisfying requirements of EU Procurement Directives.
- Accessible by any UK public sector organisation.
- Open book costing ensuring VfM can be demonstrated.

- All sub-contract work subject to competitive tendering allowing local suppliers to bid for aspects of the project.

Principle features of the framework

- Cost control and ordering procedures.
- Engaging the client in the process.
- Simple process to follow.
- Risk management.
- Open book and transparent.
- Performance monitoring procedures.

Target costs

- Savings up to 100% of target cost – shared 50:50.
- 100-105% target cost – client pays.
- Over 105% target cost – contractor pays.

Key benefits of framework

- Reduced procurement timescales.
- A framework developed by Local Authorities understanding the needs of Local Authority projects.
- Cost certainty and cost management.
- Value for money
 - Use of open book accounting providing thorough audit trail
 - Works packages subject to competitive tendering
- Buildings which fit the client's needs.
- Pre-build discussions allowed.
- Commitment to sustainable development.

In an update to Community Services Scrutiny committee on 18/04/08 Members were advised that work had started with the SCAPE framework organisation on driving down the cost of constructing the new livestock market.

Informal meetings between officers and lead councillors took place in order to guide officers in taking preliminary steps. It was agreed that the framework contract initial stage be commenced with SCAPE for Willmot Dixon to provide an estimate of the works and other pre-construction services. A contract for these initial stage services was entered into on 4th November 2008.

The result of this initial stage is a capped quote for £7.1m.