

**CABINET**

**24 SEPTEMBER 2009**

**RECONVENED MEETING**

**1 OCTOBER 2009**

**ITEM 7 – NEW LIVESTOCK MARKET**

**ADVICE NOTE**

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**DATED: 30 SEPTEMBER 2009**

1. This advice note relates to Item 7 on the Cabinet agenda for the meeting held on 24<sup>th</sup> September 2009 relating to the new Livestock Market. The item is due to be considered at a reconvened meeting of Cabinet on 1<sup>st</sup> 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  
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29 September 2009