

*Legally Privileged and Confidential*

*Winchester City Council*

*Station Approach, Procurement Advice*

*6th August 2019*

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## 1 Background

- 1.1 We have been instructed by Winchester City Council (the “Council”) to provide procurement law advice in respect of the Station Approach project (“the Project”).
- 1.2 We have seen and reviewed various reports in relation to plans for a mixed use scheme on the Carfax site. This includes a draft of the Cabinet report for the meeting scheduled for 28<sup>th</sup> August 2019.
- 1.3 That report addresses allocation of LEP money towards improvements to the public realm around the Carfax site, and the means by which the site is taken to market. The report recommends disposal to a selected purchaser by way of a long leasehold sale, on terms to be agreed.
- 1.4 We have been asked to examine whether the Council may proceed to a disposal not involving an OJEU process under the Public Contracts Regulations 2015.
- 1.5 The Project is on land owned by the Council, and has involved extensive public consultation, detailed reports, and member consideration. A “business case” has been prepared and endorsed. The conclusion reached was that through further market engagement, the Council explore (i) a sale with the benefit of planning, and (ii) an income strip. The preferred disposal route, as recommended to Cabinet, is by way of long lease.
- 1.6 In parallel, and with an eye on the LEP grant deadlines:
  - 1.6.1 The Council is conscious that many prospective developers do not readily, if at all, participate in OJEU-run procurements. That is due to the time and cost in bidding.
  - 1.6.2 Equally, the Council does seek to regulate the means by which it selects a developer, and exercise measures to protect itself against the chosen developer not undertaking development (either as envisaged or within desired timescales).
  - 1.6.3 The Council recognises that during any process to select a developer, and after selection, there will need to be suitable flexibility to accommodate changes to the Project.
- 1.7 Accordingly, the Council is keen to understand how it may pursue disposal without carrying out a full OJEU procurement, whilst still having the ability to deal with the factors in paragraph 1.6.
- 1.8 It is envisaged that the Council would carrying out a market exercise to identify the purchaser (i.e. developer) to whom it will transfer the site by way of a land sale. That sale would be subject to certain negative covenants. These negative covenants would, for example, require the purchaser to:

- 1.8.1 obtain all necessary further planning and other consents needed to carry out the development, and to do so by a long-stop date;
- 1.8.2 commence (and possibly complete) development by a long-stop date;
- 1.8.3 carry out the development in accordance with the planning consent and related planning policies;
- 1.8.4 not to vary the development (including by way of new planning application) without Council agreement;
- 1.8.5 work with the Council in circumstances where, due to viability or similar “external” factors, a variation to the Project is necessary;
- 1.8.6 offer the site back to the Council where it has an intention to dispose of the site - by way of pre-emption rights.
- 1.9 In addition, the Council may be looking to preserve its ability to pursue an “income strip”.
- 1.10 The Council instructed us to advise on:
  - 1.10.1 the circumstances in which it would be under a legal duty to follow a competitive procurement process in accordance with the Public Contracts Regulations 2015 (“PCR”);
  - 1.10.2 what legal structure(s) may be adopted to facilitate the range of controls that, as land-owner, it would seek to apply, if not following the PCR; and
  - 1.10.3 the nature of a competitive process to select a purchaser - so as not to be in breach of the PCR.
- 1.11 We have touched on related factors, including the duty of the Council to obtain best consideration for the disposal of land.

## **2 Legal position**

- 2.1 The report to Cabinet envisages a further report being taken on the detail of how disposal process is conducted. We advise that the process must adhere to our advice on how to ensure that the requirements of the PCR are not engaged.
- 2.2 We agree with statement in the Cabinet Report describing the Council’s statutory powers to dispose of land.
- 2.3 The Council is not seeking “control” over what the Developer builds and how it builds it, through a design specification, for example. However, it will seek a purchaser (as developer) that is suitable, i.e. having the necessary financial standing and capabilities.
- 2.4 It is intended that the Council will prepare the planning application, and that it will sell the site with the benefit of outline consent.

- 2.5 The Council will independently apply the LEP funding towards public realm around the Carfax site, as well as towards site preparation works, including archaeology, decontamination and utility enhancement. The purchaser may carry out that site preparation work under the terms of the disposal.
- 2.6 In terms of legal analysis, if the Council sought to maintain control by imposing enforceable obligations to carry out the development according to an agreed specification, then any legal agreement entered into with the purchaser would tend to have the character of a “works contract”. As such, the deal would be caught by a requirement for a competitive procurement under the PCR (i.e. via OJEU in common parlance).
- 2.7 Accordingly, a contract will be subject to the PCR (and OJEU) where there is an enforceable legal obligation on a developer to perform specified works in return for a pecuniary benefit. It is, however, possible to structure deals in such a way that there is no enforceable obligation - and therefore outside the PCR.
- 2.8 However, to ensure that the Project satisfies Council objectives, certain “negative controls” would need to be introduced. In this context, a negative control is one which is designed to head off, or prevent altogether, certain outcomes which are incompatible with the Council’s objectives.
- 2.9 It is therefore our view that:
- 2.9.1 Given the desire, based on market feedback, not to procure a developer by way of an OJEU process, such approach possible, but provided the transaction is, in essentials, a land transaction;
  - 2.9.2 To avoid legal challenge under the PCR, the deal would have to be structured as a “land deal” not containing enforceable obligations to carry out specified works;
  - 2.9.3 That said, the land deal may include negative controls, of the kind we describe in paragraph 1.8;
  - 2.9.4 The proposed legal agreement transferring the land interests may therefore serve to regulate the transfer of Council’s land interest to the purchaser so that they may carry out the development based upon the outline planning permission for which they will secure reserved matters planning permission(s);
  - 2.9.5 Equally, the competition to select a developer, as well as the land transaction itself, may cater for possible variations to the Project - where necessary due to market conditions, or in some way desirable;
  - 2.9.6 The retention of a right for the Council to buy into the Project (e.g. with a view to an “income strip”) is not incompatible with a land transaction approach; that is subject to avoiding any “requirement” on the developer to build for the Council, and might best be dealt with as an option (or right of first refusal) which the Council may take up but with the agreement of the developer;

- 2.9.7 The Council should be mindful of the risks in awarding a contract outside of the PCRs. This being the risk of other developers making a challenge and seeking the remedy of ineffectiveness. That risk is mitigated by the running of a competitive process;
- 2.9.8 Other avenues of legal challenge exist; the main risk being of judicial review based on an argument that the Council is acting irrationally or unreasonably (in the Wednesbury sense). That might include an argument that the Council has failed to ensure best value, not obtained best consideration (see below), or just acted in a wholly unjustifiable way;
- 2.9.9 Judicial review risk is low when it comes to challenge solely based on breach of the PCR;
- 2.9.10 The inclusion of the site preparation works in the disposal will not alter this overall analysis; the main object of the transaction is land disposal, and the value of these works (at circa £1m) is below the threshold for works contracts which are subject to the PCR;
- 2.9.11 No services are proposed to be provided by the potential purchaser to the Council for payment. Therefore, the PCR will not apply (in respect of services being procured);
- 2.9.12 The disposal will be subject to the duty on the Council to obtain best consideration on the sale of land (under s.123 of the Local Government Act 1972). Valuation advice on the competing offers made will aid ensuring that this duty is met. The disposal process may take into account non-financial factors. By carrying out a competitive process to select a purchaser to acquire the site, the Council will be in a stronger position to demonstrate compliance with the duty to obtain best consideration.

### **3 Conclusion and risk mitigation**

- 3.1 The Council's proposed route for disposal of the site is lawful.
- 3.2 Legal risks we identify relate to a potential challenge brought under PCR on the basis of ineffectiveness and a risk of a judicial review challenge to the direct award. Recent case law has set a high bar for bringing such a judicial review and steps may be taken to mitigate the risks, namely:
  - 3.2.1 Ensuring there is a fully documented audit trail to justify the transaction being undertaken outside of the PCR.
  - 3.2.2 Conducting the competitive process to select a purchaser in a manner which clearly demonstrates the intention to enter into a land transaction.
  - 3.2.3 Ensuring that the legal agreement entered into satisfies the relevant tests and is therefore not a contract for works or services.

- 3.2.4 If/when an agreement with the selected purchaser is successfully negotiated, publishing a “voluntary transparency notice” in the Official Journal of European Union, describing the nature of the agreement to be entered into and the reasons for not publishing an OJEU.

**6/08/2019**