



Appendix 1 NWRWTP - Procurement Process Legal Advice

As Supplied by the Partnerships external legal advisors by email 18/01/13

Legal Summary

The Authority is at an advanced stage of dialogue with WTI in respect of the Project Agreement and Schedules and the majority of the Authority's proposed commercial positions have now been accepted. There remains a requirement for some dialogue before any call for final tender (in line with what would be expected at this point) but there are only a limited number of commercial issues that remain. The majority of the remainder of the dialogue will involve work to ensure that the terms of the Project Agreement accurately reflect the final proposed WTI technical solution, including the final position in relation to property matters, site conditions and the extent of any hand back obligations upon expiry or early termination. The main outstanding issues relates to the effect on the Project of the Authority (or any Partner Authority) altering its current collection process. The Authority continue to resist any attempt to restrict their ability to alter such process. Discussions are also continuing in relation to Welsh Government's continued energy efficiency requirements in respect of the Project (although it should be noted that this issue has been driven by Welsh Government and not WTI).

As was always the case, the final WTI derogations from the Authority's base Project Agreement will require sign-off from Welsh Government.

Sole Bidder Situation

Although the Regulations don't deal expressly with the issue of single tenders arising under a competitive dialogue, they do state that at the final tender stage the authority "shall ensure that the number of economic operators is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so". Guidance from the European Commission says that "reduction [of bidders/solutions] by application of the award criteria might ... show that there is only one appropriate candidate or solution, which does not prevent the contracting authorities from continuing with the procedure".

The Council should proceed with the procurement within the confines of the terms of the procurement. This is to avoid the risk of another bidder complaining that the Council has changed the terms of the procurement in a way that might have impacted on its decision to withdraw.

UK guidance says that in the absence of two acceptable bids, the authority needs to stop and consider whether it should invite bids at all, as a single bidder is "not appropriately incentivised to offer its best price terms and conditions". The guidance advises that other steps be taken to secure value for money, but that a procurement should not automatically be stopped as a result of market failure. Some general principles that the Council might consider:

- reviewing the strength and quality of the remaining single bidder and the extent to which the competition so far has been able to drive out and demonstrate value for money; and



- ensuring that there is transparent competition in the bidder's supply chain – "if the bidder will not agree to market testing its subcontracts, the procurement is unlikely to deliver value for money and should be halted".

Finally, as discussed, notwithstanding anything in the guidance or regulations, it is important that the Authority ensure that Welsh Government continue to support the Project and, to the extent they do, confirm whether WG themselves expect any additional safeguards or processes to be included within the procurement.

Set out below is and extract from guidance issued by HM Treasury relevant to procuring authorities left with a sole bidder following the premature and voluntary withdrawal of a bidder

Value for Money Assessment Guidance November 2006 HM Treasury

Section 5.10

It would be difficult, and inappropriate, to provide a set of definitive rules to follow in the event of market failure. It is inevitable, and appropriate, that each case should be considered on its merits. It is however possible to identify some general principles that should be adopted:

- if the market failure occurs early on in the procurement process (i.e. before bids have been received), the procurement should be halted unless there are systemic market failures which would equally affect any alternative procurement route;
- where failure occurs after bids have been received, the procuring authority will wish to consider the strength and quality of the remaining or only credible bid, and will need to consider the extent to which the competition has been able to drive out and demonstrate VfM; and
- in any circumstance where a procuring authority considers it is appropriate to continue with a single bidder it should ensure there is transparent competition in the bidder's supply chain. Benchmarking is not an adequate alternative to market testing. If the bidder will not agree to market testing of its subcontracts, the procurement is unlikely to deliver VfM and should be halted.