

 <b>Executive – 14 March 2012</b>		<b>Agenda Item No.</b> <h1>14</h1>
<b>Title</b>	Code of Procurement Practice: Exception Request	
<b>For further information about this report please contact</b>	Bill Hunt Deputy Chief Executive 01926 456014 <a href="mailto:bill.hunt@warwickdc.gov.uk">bill.hunt@warwickdc.gov.uk</a>	
<b>Wards of the District directly affected</b>	Leamington Clarendon	
<b>Is the report private and confidential and not for publication by virtue of a paragraph of schedule 12A of the Local Government Act 1972, following the Local Government (Access to Information) (Variation) Order 2006?</b>	No	
<b>Date and meeting when issue was last considered and relevant minute number</b>		
<b>Background Papers</b>		

<b>Contrary to the policy framework:</b>	No
<b>Contrary to the budgetary framework:</b>	No
<b>Key Decision?</b>	No
<b>Included within the Forward Plan? (If yes include reference number)</b>	No
<b>Equality &amp; Sustainability Impact Assessment Undertaken</b>	No
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<b>Officer/Councillor Approval</b>		
<b>Officer Approval</b>	<b>Date</b>	<b>Name</b>
Deputy Chief Executive		Author
Head of Service		n/a
CMT	12/3/12	Chris Elliott, Andrew Jones, Bill Hunt
Section 151 Officer	11/3/12	Mike Snow
Monitoring Officer	12/3/12	Andy Jones
Finance	12/3/12	Melanie Gillman
Portfolio Holder(s)		Cllr. Hammon
<b>Consultation &amp; Community Engagement</b>		
n/a		
<b>Final Decision?</b>		Yes
<b>Suggested next steps (if not final decision please set out below)</b>		

## **1. SUMMARY**

- 1.1 The purpose of this report is to request an exception from normal procurement procedures, as set out in the Code of Procurement Practice, to enable specialist legal and commercial advice to be obtained in respect of the proposed Clarendon Arcade development.

## **2. RECOMMENDATION**

- 2.1 That Executive approve an exception from the Code of Procurement Practice to enable Hill Hofstetter to be engaged to provide specialist legal advice in respect of any necessary revisions to the Development Agreement, with Wilson Bowden, for the proposed Clarendon Arcade development.
- 2.2 That Executive approve an exception from the Code of Procurement Practice to enable CBRE to be engaged on fixed fee to provide a professional opinion on the commercial and financial information provided by Wilson Bowden.
- 2.3 That authority is delegated to the Deputy Chief Executive (BH) and s151 Officer in consultation with the Procurement Manager, the Council's internal legal advisor and the Leader, Deputy Leader and Development Portfolio Holder, to enter into the necessary legal agreements in relation to the above appointments.

## **3. REASONS FOR THE RECOMMENDATION**

- 3.1 The Code of Procurement Practice defines an exception as a permission to let a contract without complying with one or more of the procedures within the Code. It states that an exception may be granted subject to conditions but cannot be granted where a breach of UK or EU legislation may be incurred.
- 3.2 The Code provides for an exception to be sought if:
- There are exceptional circumstances in which it would not be in the Council's best interests to follow the tender or quotation procedure
- 3.3 In this instance an exception is sought to enable the work necessary to progress the proposed Clarendon Arcade development in respect of the following recommendations that were approved at the December 2011 Executive:
- 2.4 That Executive delegates authority to the Deputy Chief Executive (BH), in consultation with the Leader, Deputy Leader, Development Portfolio Holder and s151 Officer to undertake negotiations with Wilson Bowden to establish the nature and implications of any revisions that may prove necessary to the existing Development Agreement to facilitate a suitable and appropriate revised retail led development scheme being brought forward on a realistic timescale.
- 2.5 That, subject to approval of 2.4 Executive approves the potential use of up to £40,000 from the Contingency Budget to fund specialist retail or legal advice, with authority to utilise the funding delegated to the Deputy Chief Executive (BH) and s151 Officer, in consultation with the Leader, Deputy Leader and Development Portfolio Holder should the progress of the proposed negotiations demonstrate a need.

- 2.6 That, subject to approval of 2.4 and the outcome of the proposed negotiations, Executive receives a further report to enable it to consider approval of any necessary revisions to the Development Agreement.
- 3.4 Discussions held by the Deputy Chief Executive, s151 Officer and Procurement Manager with Suzanne Burrell, Senior Solicitor and Team Leader at Warwickshire County Council (WCC) have concluded that in respect of the necessary legal advice required to agree any necessary revisions to the Development Agreement the Council should re-engage the partner at Hill Hofstetter LLP who represented the Council when the agreement was initially negotiated.
- 3.5 An exception is therefore requested to ensure that this appointment can be made on the grounds of this individual's unique knowledge of the terms of the current Development Agreement and, more importantly, their understanding of the history of the previous negotiations and their relationship with the senior partner at Wragges LLP who will, once again, be representing Wilson Bowden. It is considered that this utilising this knowledge will be in the best interests of the Council and that the proposed appointment therefore represents the exceptional circumstances that would warrant an exception.
- 3.6 The officer discussions have also highlighted the need to obtain specialist commercial and retail advice to review the financial options currently under discussion with Wilson Bowden and concluded that this would be best obtained from CBRE who, like Hill Hofstetter have a unique understanding of the proposed development based on their past involvement with the development of the project.
- 3.7 A separate exception is therefore requested to ensure that CBRE can be engaged on an entirely new, specific study to validate the commercial assumptions and test the soundness of the cost plan for the proposed development, as recently updated by Wilson Bowden. Once again officers consider that the benefits of CBRE's understanding of the previous negotiations and the value of relationships developed with senior staff at Wilson Bowden mean that their proposed engagement represents an exceptional circumstance.
- 3.8 Both exceptions are requested at this stage as it has become apparent that the specialist legal advice on the nature and implications of any changes to the Development Agreement and retail advice on the financial model for that development will be required to produce the next update report on the proposed Clarendon Arcade scheme. To ensure that Executive is able to make an informed decision on how the proposed development can be brought forward the report will need to include any proposed revisions to the Development Agreement and financial model for the scheme, requiring the specialist advice to be obtained in advance of the report being produced.
- 3.9 Subject to approval of 2.1 and 2.2 it is proposed that the necessary appointments are made under delegated authority. In the case of the legal advice it is not yet known how much advice will be required from Hill Hofstetter. It is therefore recommended that an appointment is made that will allow for the initial advice, necessary to enable the detail of any proposed changes to the Development Agreement to be presented to a future Executive, to be obtained. That future report will then specifically consider the budgetary implications of

any further legal advice required in respect of any recommendations contained within it.

- 3.10 In the case of the retail and commercial advice it is recommended that a specific appointment is made to commission the work necessary to bring forward the update report and, again, that report considers if any further subsequent work is required and, if so, how it should be procured.

#### **4. POLICY FRAMEWORK**

- 4.1 The use of exceptions is set out within section 5 of the Council's Code of Procurement Practice.

#### **5. BUDGETARY FRAMEWORK**

- 5.1 The December 2011 Executive approved a budget of £40,000 to cover the cost of specialist legal and/or retail advice.
- 5.2 The cost of engaging CBRE for a specific brief to examine the current commercial and financial assumptions for the proposed development plans is not anticipated to exceed £20,000.
- 5.3 The cost of engaging Hill Hofstetter is estimated as being considerably less than the remaining £20,000 for the initial work, in relation to the Development Agreement, necessary to bring forward the next update report to Executive. It is recognised that further legal work may be required as a result of that report but the budgetary implications of any such work will be considered as part of that report.
- 5.4 The Deputy Chief Executive and s151 Officer have agreed that, to minimise the legal costs of the project, Suzanne Burrell will be the Council's internal lead on all commercial and procurement issues associated with the renegotiation of the Development Agreement and the negotiation of any supplemental agreements that may be required. WCC would therefore, subject to approval of 2.1, instruct Hill Hofstetter to undertake only the specialist legal advice that could not be undertaken in-house, an arrangement that would minimise the costs of the proposed procurement by exception.
- 5.5 The anticipated costs associated with the proposed exceptions can therefore be contained within the approved budget. Neither would breach of any UK or EU legislation.
- 5.6 The next update report to Executive will present a detailed appraisal of how the proposed development can be brought forward. This will include details of any necessary revisions to the Development Agreement and the financial implications of any such revisions. Agreement of these matters, required before any revised planning application could be brought forward, could potentially have significant financial consequences for both the Council and its development partner. The use of the £40,000 budget to procure specialist advice is therefore necessary to ensure that the Council's position is protected in all negotiations and that the proposals presented in this future report are in the Council's best interests.
- 5.7 Whilst it is in the Council's best interests to ensure that this next update report is brought to Executive as soon as possible the nature of the negotiations and

the need to seek and analyse the specialist advice highlighted in this report may mean that the report has to slip from the intended April Executive to the next scheduled meeting in May. The proposed timetable is under regular review by officers and an amendment will be made to the Forward Plan as necessary.

## **6. ALTERNATIVE OPTION(S) CONSIDERED**

- 6.1 The alternative option is not to approve the recommended exceptions.
- 6.2 The required legal advice would then need to be sought solely from WCC or a procurement exercise undertaken to source an alternative, external, specialist provider. This option has been rejected as not being in the Council's best interests. The Senior Solicitor at the County Council has advised that utilising the partner, within Hill Hofstetter's Commercial and Real Estate team, who has a unique understanding of the previous negotiations would be of significant value to the current negotiations as their expertise and knowledge could not be obtained from another source.
- 6.3 The required specialist retail and commercial advice would also need to be sought through a competitive procurement exercise. This too has been rejected as not being in the Council's best interests as officers consider that the past involvement of the Senior Director of CBRE's UK Development Consultancy team on this scheme provides significant benefits that would be lost were an alternative provider to be engaged.