

North Devon Council

Title of Decision Requested: The Procurement of a contractor to deliver works at 36/37 Boutport Street

Decision requested by decision maker: To enable us to utilise paragraph 15.5 & 24.1 of our internal Contract Procedure Rules to change our procurement process to that of awarding a Contract by Negotiation Without Prior Publication of the FTS notice (shadowing Regulation 32 and 72 of PCR 2015) & thereby allowing non-substantial changes to be made to the proposed contract via negotiation.

1. BACKGROUND / REASONS FOR THE DECISION REQUEST

1.1 In order to utilise the first part of this process under paragraph 15.5a of the CPR, it is necessary to prepare a report for the Chief executive, who will seek advice from the Monitoring Officer, to set out that *“15.5a – no tenders/suitable tenders or requests to participate have been received”* in response to the procurement run under the Restricted Procedure. We stated the budget both in the FTS Notice & in the Tender documents as £5,000,000 (the Invitation to Tender document specifically saying at paragraph 3.1 that *“Tenderers should be aware that the Contracting Authority has a Budget, set pursuant to councillor approval, of £5,000,000 for the Works which cannot be exceeded and it does not have approval to accept a higher value Tender”*). The Council only received 1 Tender Return - that Tender Return was received significantly over budget which is *“manifestly incapable of meeting the Contracting Authority’s requirements”*. As such, we need to be able to change our procurement process to enable negotiation and value engineer the project.

1.2 It is noted that we have two other options:

- OPTION 1 – Abandon this Tender process, revisit the drawings & specifications and re-advertise with amended documents
- OPTION 2 – Accept the Tender submission (subject to final clarifications) and obtain funding to bridge the gap

It is not considered that Option 1 is appropriate. We used a two stage tender process and whilst 4 companies past the gateway criteria only 1 submitted a return – this project is complex and is an 18 month project – others have been given the opportunity to tender but have withdrawn from the process. Very little changes can be made to 36 Boutport Street – it is a renovation project that works within the existing structure. There is a little more scope with 37 Boutport Street but the scheme needs to deliver 9 residential units, commercial space and a link from the car park to the High Street – these parameters dictate the bulk of the design. They are required both as outputs of the FHSF programme and to meet the revenue model. The time and cost

in fees of redesigning ahead of another procurement process would start to put the FHSF Programme under threat where monies have to be committed by September 24 and defrayed by March 25 (assuming we are successful with our extension application). The external design team and internal officers working on the project consider amending the procurement process to be the most appropriate way forward.

- 1.3 We do not believe finding the funding to bridge the gap is an appropriate way forward either as described in option 2. We may be able to find some funding but not that would bridge the gap in its entirety.
- 1.4 Allowing officers to negotiate with the tenderer by changing the procurement process will allow us to value engineer the project and likely achieve a deliverable solution.
- 1.5 In order to be legally compliant with procurement legislation alongside the Council's own Contract Procedure Rules, the Council must be able to evidence that there are no suitable tenders in this instance and that any changes to the contract agreed must not be a substantial modification from the contract as advertised in the Council's FTS notice previously published by the Council. The Council should consider the substantial modification tests in PCR 2015, reg 72 as a guide to whether any change may be substantial. The first point, that no suitable tenders were received, is met given the clearly specified budget which could not be exceeded and Council Officers will ensure that the second point is adhered to whilst undertaking negotiations with the Contractor.
- 1.6 We are concerned that waiting until Strategy and Resources on the 4th December 2023 would lose us valuable time to push this project forward where timescales are already tight and the single tenderer could lose interest – the tenderer that we intend to enter into negotiation with has already put in significant amounts of work to tender their return diligently.
- 1.7 The intention would be for the negotiation process to start with the Contractor prior to Strategy and Resources so that, at that meeting, members can be given a full update on what negotiations have taken place and one of the options open to Members will be to grant a contract on the basis of the negotiated tender.
- 1.8 Whilst there is always a potential for the previous bidders involved in the tender to pursue a legal challenge, ie by stating that the contract entered into is substantially different to that offered at tender stage, that they would have taken a bid forward for that contract and have therefore been disadvantaged by the action taken by the Council, the Council will have met the criteria needed in this instance to change the procurement method and could thereby respond to any such legal challenge robustly.



2. FINANCIAL IMPLICATIONS: (NOTE: Please state if there are any financial implications. If so, state whether there are sufficient funds within the agreed budget. If there are insufficient funds please state how the decision will be financed).
 - 2.1 The amendment to the procurement procedure would provide the opportunity to deliver a project within or closer to the prescribed budget.
3. ANY ALTERNATIVE OPTIONS CONSIDERED AND REJECTED?
 - 3.1. As set out in the body of the report, 2 other options have been considered and rejected.
4. ANY CONFLICT OF INTEREST DECLARED?
 - 4.1. N/A
5. DISPENSATION IF GRANTED
 - 5.1. N/A
6. BACKGROUND PAPERS

The following background papers were used in the preparation of this request (The background papers are available for inspection and kept by the author):

 - 6.1. The tender return is confidential and so can't be made readily available.
7. CONSULTATION UNDERTAKEN (Please note all who have been consulted on this decision):
 - 7.1 Simon Fuller; Monitoring Officer and Helen Bond; Property Manager
8. OFFICER REQUESTING DECISION TO BE TAKEN: SarahJane Mackenzie-Shapland, Head of Place, Property and Regeneration
9. NAME OF DECISION TAKER: Ken Miles, Chief Executive
10. DATE DECISION TAKEN: 14th November 2023
11. APPROVED BY DECISION TAKER: Yes (*Please delete as appropriate)
12. DECISION TAKER'S COMMENTS: I am happy to approve the decision on the basis that we have not received any suitable tenders. It is now appropriate to move to a negotiated process.

