

## Report of Finance Manager, Resources and Housing

## Report to Chief Officer of Highways and Transportation

**Date: 11 September 2018**

**Subject: Request for approval to award a contract to Johnston Publishing for the publication of Statutory Highways Notices and other statutory notices in the Yorkshire Post, by using the negotiated procedure without publication of a notice under Regulation 32 of the Public Contracts Regulations 2015**

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

## Summary of main issues

1. The Council in undertaking its' statutory functions as both Highway and Traffic Authority promotes a large number of traffic orders, schemes and events under the powers and provisions contained within various enabling Acts i.e. The Highways Act 1980 and The Road Traffic Regulation Act 1984. The promotion of these matters is governed by regulations and directions which require the Council to publish their proposals in a 'newspaper circulating in the locality'. At present we do not have a contract with a supplier enabling us to publish such notices.
2. The cost of publishing the notices will vary depending on the number produced but in 2017/2018 Highways and Transportation spent in excess of £225,000 on such notices. In addition to the Highways and Transportation notices, other departments within the council place statutory notices in the local press. These include City Development (Customer Services); Resources and Housing (Legal Services) and Communities and Environment (Licensing) amongst others. Council-wide spend over a period of twelve months in 2017/2018 equated to £378,537.
3. Johnston Publishing is technically the only organisation that can perform the contract due to the fact that their publications are the only ones available on a daily basis and which meet the Council's legal requirements. As there is no reasonable alternative, the Council is seeking approval to use Regulation 32 (b) (ii) of the Public Contract Regulations 2015 - negotiated procedure without publication of a notice.

## **4 Recommendations**

- 4.1 The Chief Officer of Highways and Transportation is recommended to approve the award of a contract to Johnston Publishing using Regulation 32 (b) (ii) of the Public Contract Regulations 2015 - Negotiated procedure without publication of a notice - on the technical grounds that the advertising of Statutory Notices in the Yorkshire Post can only be provided by Johnston Publishing due to the fact that their publications are the only ones available on a daily basis and which meet the Council's legal requirements in ensuring that the various statutory legal Notices are 'published in a newspaper circulating in the locality', meaning that there is no reasonable alternative; and
- 4.2 It is further recommended that the contract is awarded to Johnston Publishing for five years to commence on the 1<sup>st</sup> April 2019 with provision to extend for up to a further five year period (and can be cancelled at any time). It should be noted that the contract can also be cancelled and not binding if legislation changes to allow notices to be advertised by other means.

## **1 Background information**

- 1.1 The Council in undertaking its statutory functions as both Highway and Traffic Authority promotes a large number of traffic orders, schemes and events under the powers and provisions contained within various enabling Acts e.g. The Highways Act 1980 and The Road Traffic Regulation Act 1984. The promotion of these matters is governed by regulations and directions which require the Council to publish their proposals in a 'newspaper circulating in the locality'.
- 1.2 Notices published include temporary road closures for works or events taking part in the city, stopping up orders, amendments to traffic regulations and compulsory purchases. It also includes planning notices, other statutory legal notices and licensing applications.
- 1.3 In 2004 the ODPM published a study entitled 'a Review of the Publicity Requirements for Planning Applications'. Many of the recommendations were concerned with replacing a manual method of publicity by an electronic one and allowing local authorities to decide whether to use local newspapers. Following a period of consultation, the Government (in 2009) concluded that the statutory requirement to publish in newspapers should be upheld as it was not convinced that good alternative arrangements could be readily rolled out.
- 1.4 Furthermore, failure to publicise road closures could call into question the Council's commitment to transparency and accountability with the risk of adverse publicity and reputational damage should notices go unseen.
- 1.5 Johnston Publishing are able to accommodate the Council's instructions to publish its Notices quickly thereby providing an important service which is often required by the Council when working towards tight and strict deadlines in satisfying its statutory legal obligations. The notices are placed in the Yorkshire Post.

## **2 Main issues**

- 2.1 Leeds City Council does not currently have a contract with a publisher to place statutory notices. This is an issue both in terms of the Council's Contracts Procurement Rules and the Public Contract Regulations 2015.
- 2.2 In terms of auditability and accountability, this also means that any spend with Johnston Publishing is recorded as 'non-contracted' spend across various departments, the main one being Highways and Transportation.
- 2.3 This has become increasingly problematic, particularly since the introduction of the Council's 'No Purchase Order, No Pay' policy. In the absence of a formal contract, it is becoming more difficult to place compliant orders for the publication of statutory notices on the Council's Financial Management System FMS.
- 2.4 Discussions with Procurement and Commercial Services have concluded that the most appropriate procurement route would be the 'Negotiated Procedure without Prior Publication' of a notice.
- 2.5 This procedure can only be used in very exceptional circumstances. In this instance the exception being relied upon falls under Regulation 32 (b) (ii) of the Public Contract Regulations 2015 - Negotiated procedure without publication of a notice - on the technical grounds that the advertising of Statutory Notice in the Yorkshire Post can only be provided by Johnston Publishing due to the fact that their publications are the only ones available on a daily basis and which meet the Council's legal requirements in ensuring that the various statutory legal Notices are 'published in a newspaper circulating in the locality' meaning that there is no reasonable alternative.
- 2.6 Where the Chief Officer and the Chief Officer - Financial Services agree that the negotiated procedure without publication of a contract notice applies or the Council is entering into a contract with another public sector body in accordance with Regulation 12 of the Public Contracts Regulations there is no requirement to obtain a waiver of CPRs 9.1 and 9.2.

## **3 Consequences if the proposed action is not approved**

- 3.1 Should the Chief Officer of Highways and Transportation not approve the proposed procurement route with Johnston Publishing, then the Council would fail to meet its statutory duties contained in the various legal Acts. Failure to publish such notices would place the Council in breach of current legislation which requires statutory notices to be published in a 'newspaper circulating in the locality'.
- 3.2 Case law has concluded that complaints made to the local government Ombudsman amounts to maladministration entitling complainants to compensation. (Carlisle City Council 'Maladministration causing injustice').

## **4 Corporate Considerations**

### **4.1 Consultation and Engagement**

- 4.1.1 This report will have no impact to service users and therefore requires no public consultation.

- 4.1.2 Following a spend analysis, consultation has taken place with other key users of Johnston Publishing services throughout the Council and there have been no objections to the proposed procurement strategy.

## **4.2 Equality and Diversity / Cohesion and Integration**

- 4.2.1 Equality and Diversity has been considered but it is not appropriate for this request.

## **4.3 Council Policies and City Priorities**

- 4.3.1 This decision is aligned to the Best Council Plan 2018/2021 'Safe, Strong Communities' and relates to the Council's outcome to 'more around a well-planned city easily'.

## **4.4 Resources and Value for Money**

- 4.4.1 The contract value, based on 2017/18, is approximately £380k per annum, however, where a third party is involved the cost of the notice is passed onto them. This figure, however, will fluctuate year on year depending on the Council's requirements.
- 4.4.2 It is difficult to establish value for money for the publication of statutory notices, however, council officers who liaise with Johnston Publishing regularly combine the road closure notices to keep costs to a minimum and challenge any annual increases which are placed on the Council.
- 4.4.3 There is the possibility that during the course of the contract period it may become permissible to place such notices on-line via electronic or digital media, in which case the cost of publishing notices will be considerably reduced. However, until such time as this is allowed the council must continue to incur the costs of advertising in the local press.
- 4.4.4 Although the Council are intending to negotiate without publication of notice we will still go through the process which we would normally undertake with any other contract award (see details and timetable attached)

## **4.5 Legal Implications, Access to Information and Call In**

- 4.5.1 This is a Key Decision and is subject to call-in under the provisions made in the Council Constitution. There are no grounds for keeping the contents of this report confidential under the Access to Information Rules.
- 4.5.2 Due to the level of spend it is considered that there is the potential risk of challenge that organisations interested in providing these services have not been provided with an opportunity to tender for this work. In addition, there is also a risk of challenge that interested organisations may argue that there are no real reasons justifying the use of the negotiated procedure without publication of a notice in accordance with the Public Contracts Regulations 2015, and that the Council are simply seeking to circumvent the application of the rules. However, due to the reasons set out in section 3 above these risks are perceived to be low.
- 4.5.3 In addition, these risks can be diminished somewhat by the publication of a voluntary transparency notice in OJEU immediately after the decision to award the contract has been taken and then waiting 10 days to see if any challenges are made. If no challenges are made the chances of a claim for ineffectiveness being brought are significantly reduced, and would only be successful if the Council had used the

negotiated procedure without publication of a notice incorrectly. Further, publishing such a notice will also start time running for any other potential claim for breach of the Regulations, which must be brought within 30 days of the date that an aggrieved party knew or ought to have known that a breach had occurred.

- 4.5.4 However, it should be noted that voluntary transparency notices themselves can be challenged. The recent case of *Italian Interior Ministry v Fastweb SpA (Case C-19/13)* highlights the limited protection that the voluntary transparency notice route can offer to contracting authorities wishing to make direct awards without following an OJEU process. A grey area remains around whether the protection of a voluntary transparency notice will be available where the contracting authority genuinely, but mistakenly, considers it was entitled to award the contract without notice. It shows that the safe harbour will only be 'safe' to the extent that the justification for the direct award is in itself sound and ready to stand up to the increased scrutiny that the publication of the voluntary transparency notice may well invite.
- 4.5.5 Provided no legal challenges are made, a contract could then be awarded which would formalise the arrangements with Johnston Publishing and the creations of a YORtender record and FMS record would prevent further instances of non-contract spend during the period of the contract. It should be noted that the contract can be cancelled and not binding if legislation changes to allow notices to be advertised by other means.
- 4.5.6 These comments should be noted by the Chief Officer of Highways and Transportation in making the final decision and should be satisfied that doing so represents best value for the Council.

## **4.6 Risk Management**

- 4.6.1 The Chief Officer of Highways and Transportation should note the risks highlighted in 5.5.2 and 5.54 above in taking the decision.

## **5 Recommendations**

- 5.1 The Chief Officer of Highways and Transportation is recommended to approve the award of a contract to Johnston Publishing using Regulation 32 (b) (ii) of the Public Contract Regulations 2015 - Negotiated procedure without publication of a notice - on the technical grounds that the advertising of Statutory Notices in the Yorkshire Post can only be provided by Johnston Publishing due to the fact that their publications are the only ones available on a daily basis and which meet the Council's legal requirements in ensuring that the various statutory legal Notices are 'published in a newspaper circulating in the locality', meaning that there is no reasonable alternative; and
- 5.2 It is further recommended that the contract is awarded to Johnston Publishing for five years to commence on the 1<sup>st</sup> April 2019 with provision to extend for up to a further five year period (and can be cancelled at any time). It should be noted that the contract can also be cancelled and not binding if legislation changes to allow notices to be advertised by other means.

## **6 Background documents<sup>1</sup>**

6.1 None.

## **7 Appendices**

7.1 Timetable of the negotiated procedure without publication of a notice.

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<sup>1</sup> The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.