

**DELEGATED POWERS REPORT NO.****1654****SUBJECT: Appointment of Addleshaw Goddard (for Street Lighting PFI Contract, Energy Saving Measures - Infraction Process)****Control sheet**

**All of the following actions MUST be completed at each stage of the process and the signed and dated report MUST be passed to the Governance Service for publishing**

| <b>All reports</b>  |                               |                                |
|---|-------------------------------|--------------------------------|
| 1. Governance Service receive draft report  | Name of GSO<br>Date           | Andrew Charlwood<br>07/06/2012 |
| 2. Governance Service cleared draft report as being constitutionally appropriate  | Name of GSO<br>Date           | Andrew Charlwood<br>11/06/2012 |
| 3. Finance clearance obtained ( <i>report author to complete</i> )  | Name of Fin. officer<br>Date  | John Hooton<br>18/06/12        |
| 4. Staff and other resources issues clearance obtained ( <i>report author to complete</i> )                                 | Name of Res. officer<br>Date  | N/A                            |
| 5. Strategic Procurement clearance obtained ( <i>report author to complete</i> )  | Name of SPO<br>Date           | N/A                            |
| 6. Legal clearance obtained from ( <i>report author to complete</i> )   | Name of Legal officer<br>Date | Sheila Saunders<br>06/06/12    |
| 7. Policy & Partnerships clearance obtained ( <i>report author to complete</i> )  | Name of P&P officer<br>Date   | Andrew Nathan<br>06/06/12      |
| 8. Equalities & Diversity clearance obtained ( <i>report author to complete</i> )   | Name of officer<br>Date       | Andrew Nathan<br>06/06/12      |
| 9. The above process has been checked and verified by Director, Head of Service or Deputy                                   | Name<br>Date                  | Shelia Saunders<br>18/06/12    |
| 10. Signed & dated report, scanned or hard copy received by Governance Service for publishing                               | Name of GSO<br>Date           | Andrew Charlwood<br>23/06/12   |
| 11. Report published by Governance Service to website   | Name of GSO<br>Date           | Andrew Charlwood<br>23/06/12   |
| 12. Head of Service informed report is published  | Name of GSO<br>Date           | Andrew Charlwood<br>23/06/12   |
|   |                               |                                |
| 13. Expiry of call-in period  | Date                          | N/A                            |
| 14. Report circulated for call-in purposes to Business Management OSC members & copied to Cabinet Members & Head of Service | Name of GSO<br>Date           |                                |

**ACTION TAKEN BY OFFICER(S) UNDER DELEGATED POWERS  
(EXECUTIVE FUNCTION)**

**Subject:** **Appointment of Addleshaw Goddard,  
Solicitors as Legal Advisers in relation  
to Street Lighting PFI Contract**

**Officer(s)** **Acting Head of Legal**

**Date of decision** **18 June 2012**

|         |  |
|---------|--|
| Summary | This report seeks a waiver of the Council's Contract Procedure Rules in respect of tender procedures and approval to appoint Addleshaw Goddard Solicitors to advise the Council in respect of the infraction notice, received from the Cabinet Office Energy Reform Group (ERG), together with the related Deed of Variation from the Senior Lenders for the CMS, regarding the procurement process for the Street Lighting PFI Contract variation for energy saving measures. |
|---------|--|

**Officer Contributors** Sheila Saunders – Acting Head of Legal  
Roger Gilbert – Street Lighting PFI Contract Manager

**Status (public or exempt)** Public

**Wards affected** All

**Enclosures** None

**Reason for exemption from  
call-in (if appropriate)** Not applicable

**Contact for further information:** Roger Gilbert – 0208 359 7506

Serial No. 1654

## **1. RELEVANT PREVIOUS DECISIONS**

- 1.1 Cabinet 3 April 2006 Decision 15 (Street Lighting Private Finance Initiative)
- 1.2 Cabinet decision relating to budget savings 13<sup>th</sup> December 2010
- 1.3 Council decision in relation to the budget savings 25<sup>th</sup> January 2011.
- 1.4 DPR 1330 Street Lighting PFI Contract – Energy Saving Measures – 16<sup>th</sup> June 2011.

## **2. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS**

- 2.1 Complying with the Timetable for Infraction Pilot Response, as instructed by the Cabinet Office Energy Reform Group (“ERG”) supports the Corporate Plan through the “better services with less money” priority.
- 2.2 Use of these solicitors, who have knowledge of the case, will secure specialist technical legal advice in the most rapid and timely way, thereby, ensuring that council money is spent most effectively and efficiently in dealing with this matter.

## **3. RISK MANAGEMENT ISSUES**

- 3.1 I do not consider the issues involved are likely to raise significant levels of public concern. However, failure to proceed may give rise to policy considerations and risks as further delay and/or cancellation of the Central Management System (“CMS”) project will both impact significantly on the Council’s forward budget and, potentially, necessitate further, additional contractual negotiations, with the associated costs, in respect of the Waiver assets.

## **4. EQUALITIES AND DIVERSITY ISSUES**

- 4.1 The Equality Act 2010 requires all Public bodies and all other organisations exercising public functions on its behalf to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; advance equality of opportunity between those with a protected characteristic and those without; promote good relations between those with a protected characteristic and those without. The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation. It also covers marriage and civil partnership with regard to eliminating discrimination
- 4.2 The Council’s Contract Procedure Rules are being complied with in the appointment of the provider for this contract. The Contract Procedure Rules ensure contracts are awarded using fair, reasonable and objective criteria.

## **5. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)**

- 5.1 The cost of external legal advice, for this infraction process, will be met from the Environment, Planning and Regeneration budget.
- 5.2 The estimated contract value is not expected to exceed £74,999.
- 5.3 The procurement implications are addressed under section 6, below.
- 5.4 There are no performance, staffing, IT, Property, or Sustainability implications of this decision.

## **6. LEGAL ISSUES**

- 6.1 For the purposes of European procurement rules, provision of legal services falls within Category B of Schedule 3 to the Public Contracts Regulations 2006. Therefore, whilst the EU treaty principles of non-discrimination, equal treatment, transparency, proportionality and mutual recognition do apply, procurement of Category B services does not trigger the application of the full European procurement rules.
- 6.2 Whilst the Council's Contract procedure rule 6.4 provides that for those contracts not subject to EU procurement regulations, tendering should follow the guidance set out in the procurement code of practice, the urgent need to appoint Addleshaw to advise the council necessitates waiver of the tendering provisions.
- 6.4 In accordance with the Council's Contract Procedure Rules, there will be a need for the Council and the contractor to enter into formal contract.

## **7. CONSTITUTIONAL POWERS**

- 7.1 Contract Procedure Rules 5.7 and 5.8 authorise a Director/Head of Service to take decisions on urgent or emergency matters including waiver of Contract Procedure Rules where the nature of the market for the works to be carried out or the supplies or services to be provided has been investigated and is demonstrated to be such that a departure from the requirements of Contract Procedure Rules is justifiable; or there are other circumstances which are genuinely exceptional. Given the urgent need to appoint legal advisers to deal with the complaint that the council has infringed the EU public procurement regulations, it is considered that these criteria are met.
- 7.2 Contract Procedure Rule 5 and Table 5-1 set out the Authorisation and Acceptance thresholds for works, supplies and services
- 7.4 On the basis of the estimated contract value (below £74,999) Contract Procedure Rule 5 and Table 5-1 permit a Director/Head of Service to Authorise a contract and to Accept a contract where it represents value for money and is the best available option for the council. In view of the expertise of Addleshaw solicitors in the

specific field and in light of their significant, previous, input and legal advice to the Council with respect to the original Street Lighting PFI Contract, it is the view of Officers that their appointment represents value for money and is the best available option for the council.

## **8. BACKGROUND INFORMATION**

- 8.1 DPR 1330 identified and authorised the measures required to vary the Street Lighting PFI Contract, by deferring the installation of a number of Core Installation Programme assets, in order to fund the commencement of the installation of a Central Management System (CMS).
- 8.2 The Council received an e-mail, dated 3<sup>rd</sup> April 2012, from Martin Leverington, Procurement Policy Division, Energy Reform Group (ERG), informing the Council that his department was acting on an infraction process notice from the European Commission in respect of the procurement of the energy saving measures.
- 8.3 The EU Infraction Pilot file states a complaint has been received regarding the procurement of energy saving measures and alleges that the London Borough of Barnet has infringed EU public procurement legislation by not tendering the 'contract'.
- 8.4 The Council have been provided with a Timeline for the Infraction Pilot Response and it must adhere to this timeline. A draft response to the complaint has been submitted to the Cabinet Office ERG. It is important to urgently appoint legal advisers to provide legal input into the process on behalf of the council.
- 8.5 The Director of Commercial Services has been consulted and has confirmed that the circumstances requiring the appointment of Addleshaw Goddard solicitors are urgent such as to justify the direct appointment of those solicitors.
- 8.7. The decision to appoint Addleshaw Goddard Solicitors is being made based on urgency, on their expertise in the specific field and in light of their significant, previous, input and advice as Legal Advisors to the Council with respect to the original Street Lighting PFI Contract.

## **9. LIST OF BACKGROUND PAPERS**

- 9.1 DPR 1330 – Street Lighting PFI Contract Energy Saving Measures:  
<http://barnet.moderngov.co.uk/documents/s2389/Street%20Lighting%20PFI%20Energy%20Saving%20Measures.pdf>
- 9.2 E-mail from Mark Leverington dated 3<sup>rd</sup> April 2012.
- 9.3 Timeline for Infraction Pilot Review.
- 9.4 Initial Letter re Barnet Council Street Lighting PFI Contract EU Pilot ref 2849 11 April 2012.
- 9.5 EU Pilot file ref 2849/11/MARK dated 02 April 2012.

**10. DECISION OF THE OFFICER(S)**

**I authorise the following action:**

- 10.1 Waiver of Contract Procedure Rule 6 and Table 6-1;
- 10.2 The appointment of Addleshaw Goddard, solicitors to advise the Council in respect of the Cabinet Office Energy Reform Group ("ERG") infraction notice and the related Deed of Variation from the Senior Lenders for the CMS, regarding the procurement process for the Street Lighting PFI Contract variation for energy saving measures.

|               |                                  |
|---------------|----------------------------------|
| <b>Signed</b> | <b>Shelia Saunders</b>           |
|               | <hr/>                            |
|               | <b>Acting Head of Legal</b>      |
| <b>Date</b>   | <b>18<sup>th</sup> June 2012</b> |
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