

## Legal comments - Catering Concession Contract Award - Woodthorpe Park Plant Nursery Catering Concession Contract Award

This report seeks a decision to approve the award of a concession contract, following a compliant procurement process to secure a concession contract for the supply of Catering Services at the Woodthorpe Park Plant Nursery for 5 years' duration, to Homemade Cafe Pavilion Ltd.

The opportunity can be regarded as a true concession as it involves the transfer to the concessionaire of an operating risk in exploiting the services encompassing demand or supply risk or both over the term proposed, as confirmed by the report author. The risk transferred to the concessionaire must mean real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire is not merely nominal or negligible. The concessionaire is deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in providing the services which are the subject-matter of the concession contract. The fact that the opportunity is being offered over a longer period as opposed to a shorter period is intended to mitigate the risk of failing to attract suitable concessionaire bids, and balanced the Council's best value interests and bidder's commercial interests, as the proposed 5 year duration is seen as a time period over which a concessionaire/bidder could reasonably be expected to recoup and make a return on any investment that may be necessary initially, and during the term proposed, while achieving both parties contractual objectives.

Calculation of the value of a concession opportunity is based on the total turnover of the concessionaire generated over the duration of the contract (net of value added tax but inclusive of VAT from 1 January 2022) as estimated by the Council, in consideration for services which are the object of the concession contract and the supplies incidental to such services. The estimated value must be calculated using an objective method specified in the concession documents.

The value of the decision is below the financial threshold at which the Concession Contract Regulations 2016 must be applied strictly, nevertheless the general principles applicable to procurement must be followed. Although there is discretion to follow the Concession Contract Regulations 2016 full tender process, the Council's Contract Procedure Rules allow for inviting a minimum of three quote process given the value of the opportunity concerned. Adherence to this process ensures the Council treats economic operators equally and without discrimination and in a transparent and proportionate manner throughout its procurement process.

It is understood that the market was encouraged to offer quotes including any proposed financial modelling and that formal evaluation has been undertaken against relevant criteria, ensuring that Best Value is achieved. It is understood invites were made to 4 providers, although only one formal response was returned, which ensures an exemption or a direct award is not required.

The department awarding the contract will need to ensure that the concession contract contains adequate provisos in relation to termination, modification, possible sub-contracting and liability in particular. Alongside any Concession Contract the department awarding the concession should obtain any necessary property law advice to ensure the council's legal proprietary interests are protected during the period of the concession relation to its land to be utilised by a concessionaire and prior to the formal award of a concession contract.

It is understood that there are no existing/ extant contractual relationships with previous operators of a catering operation/ service at the Woodthorpe Park Plant Nursery and so no notice or other relevant termination provisions apply.

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