

Delegated Cabinet Member Decision Report

Decision Maker(s) and Portfolio area:	Sayyed Osman, Deputy Chief Executive Cllr Abdul Jabbar, Cabinet Member for Finance and Corporate Resources
Date of Decision:	14 March 2023
Subject:	Grid Connection Works for Wrigley Head Solar Farm
Report Author:	Andrew Hunt, Green Energy & Sustainability Manager
Ward(s) Affected:	Failsworth

Reason for the decision: To award a contract for works for the grid connection for Wrigley Head Solar Farm to Electricity North West Limited (ENWL), at a cost of circa £170K. Given the exclusive nature of this work and specialist provision from the Distribution Network Operation for North West England, this work needs exemption approval from the Council's Contract Procedure Rules.

Summary: Grid connection works for Wrigley Head Solar Farm have been quoted for by Electricity North West Limited (ENWL), the Distribution Network Operator (DNO) for the region. The works are split into non-contestable and contestable elements. The non-contestable element (at a value of around £54K) must by law be carried out by the DNO. The contestable element (at a value of around £116K) can in theory either be carried out by the DNO or by an Independent Connection Provider (ICP). This report seeks an exemption from the need to tender the contestable element of the works and to award it directly to ENWL along with the non-contestable element. There are a number of reasons for this.

Only NERS (National Electricity Registration Scheme) accredited contractors are permitted to carry out the contestable works. DNOs

themselves follow the public procurement regime (Utilities Contracts Regulations) if sub-contracting the work. Given this, the risk of any grievance being raised with the Council is low if we award to the DNO (ENWL), as only the NERS accredited contractors could possibly have a grievance, and they typically prefer to be appointed/instructed by the DNO directly, as they 'speak the same language'. There is evidence of low numbers tendering for local government projects: Rochdale Council tried to tender their contestable works in June 2022. They issued an open tender c£500k in value and received one response which was unsatisfactory. As the tender failed, they directly awarded to ENWL. Further, Salford Council tried to tender their contestable works in Nov 2022 after receiving a quote from ENWL for c£100k for the contestable works. They received three bids from ICPs, each being over twice the cost of ENWL's quotation.

ENWL do not engage in public sector tendering processes. Rochdale and Salford Council's procurement processes confirm this – ENWL did not participate in / bid for either. ENWL (by email dated 17.01.2023 to Emma Tweedie, Senior Category Manager, Corporate Procurement Team) confirmed this is because they do not have the time or resources to engage in tender processes and are typically unwilling to amend their contract terms to suit the conditions of the tender. They confirmed that if Oldham Council tendered the contestable works requirement for Wrigley Head Solar Farm, they would not bid.

ENWL must deliver the 'non-contestable' works. It is operationally efficient, lower risk and more cost effective for ENWL to also undertake the contestable works package, rather than tender and award this separately (which is likely to cause delays). This approach would mitigate Health and Safety risks as there would be two parties on site (ENWL and the EPC (Engineer, Procure, Construct) contractor) rather than three (+ICP) and the contestable and non-contestable works would be undertaken simultaneously. Whilst it could be possible to include the contestable works in the main EPC contractor package, it may dissuade some from bidding and additionally cause project delays owing to the need to secure wayleaves over third party

land. This view is supported by professional advice received from Nathan Wicks, Project Director, Local Partnerships.

In respect of the requirement for a wayleave for cables across third party land between the solar farm's sub-station and the grid connection point, ENWL have advised as part of the contestable works that they would obtain the necessary consents from the third party land owner for the substation lease and cable access (wayleave / easement) as they would legally own the cables. An ICP cannot do this and so could not cost for it. ENWL would negotiate and secure the wayleave, but ICPs cannot do this, and so the Council's Legal Team would need to negotiate the wayleave. Additionally, ENWL have special rights to put cables across highways which ICPs do not have.

Whilst using ICPs for contestable works (in comparison to ENWL) can in *some* circumstances offer greater choice, greater flexibility, faster delivery, and be competitive in costs, these greater efficiencies and economies of scale (cable and staffing costs) are more prevalent on longer connections than that required for Wrigley Head solar farm. The connection length for our project is only circa 300m so these efficiencies and economies of scale are highly unlikely to be realised for our project. This view is supported by professional advice received from Nathan Wicks, Project Director, Local Partnerships.

If the Council was to be required to tender for an ICP to deliver the contestable works, we would not have the in-house expertise to draft the specification or evaluate the responses. Further, owing to limited Council resources, this would likely mean a delay to the procurement of the Owner's Engineer and EPC contract, and therefore the start on site date.

The value of the contract for both non-contestable and contestable works together (circa £170K) is below the Public Contracts Regulations 2015 threshold, and so there is no risk of challenge thereunder.

No ERDF or other funding is applicable to the works, and so there is no risk of non-compliance

with funding requirements.

In view of the circumstances set out above, it is proposed that the direct award of contracts for both non-contestable and contestable works be exempt from the Contract Procedure Rules (CPRs) as permitted by rule 21.3 of the CPRs. Part of the works (non-contestable) would be subject to Rule 21.3(c) (*are of such a specialist nature that they can only be carried out by one entity (e.g., statutory undertakers)*) and part of the works (contestable) would be subject to other exceptional circumstances.

What are the alternative option(s) to be considered? Please give the reason(s) for recommendation(s):

Option 1: do not exempt the award of grid connection contracts to ENWL from the Council's CPRs. Under this option, the non-contestable element of grid connection works will be awarded to Electricity North West Limited (ENWL) and the contestable element of the works will need to be procured separately via an open competition process which ENWL will not participate in.

Option 2: to exempt the award of grid connection contracts to ENWL from the Council's CPRs. Under this option, both non-contestable and contestable works associated with the grid connection for the solar farm will be awarded to Electricity North West Limited (ENWL), the Distribution Network Operator for the region.

Recommendation(s):

Option 2: to exempt the award of grid connection contracts to ENWL from the Council's CPRs. Under this option, both non-contestable and contestable works associated with the grid connection for the solar farm will be awarded to Electricity North West Limited (ENWL), the Distribution Network Operator for the region.

Implications:

*What are the **financial** implications?*

The £170k cost of the works will be Capital Expenditure and will be a charge against the Creating a Better Place Capital Programme. The costs can be financed from within the existing capital allocation for the Wrigley Head Solar Farm project.

(James Postle)

What are the **procurement** implications?

Procurement supports the proposal to exempt the contract for the contestable and non-contestable works to Electricity North West on the basis of the reasons outlined above in the report.

In compliance with CPR 21.2 an exemption would not contravene the Public Contracts Regulations 2015 as the value of the contestable and non-contestable works combined is below the applicable monetary threshold. No grant funding conditions apply.

The non-contestable portion of the works are of a 'specialist nature' and can only be carried out by ENW as statutory undertakers, which is clearly provided for as an exemption to the Council's CPRs under 21.3 (c).

Regarding the contestable works, having consulted in advance with Legal Services, it is proposed that there are 'exceptional circumstances' which justify a departure from the CPRs, noting that the list of examples expressly provided for in CPR 21.3 is not exhaustive and *other exceptional circumstances may exist*. Procurement supports the case outlined in this report that collectively exceptional circumstances exist, which do not directly align with the examples expressly provided for in CPR 21.3 (a) – (j) but which nonetheless exist.

Research (with Rochdale Council, Trafford Council, ENW themselves and Local Partnerships) indicates that a direct award to ENW will be the most cost effective, efficient and lowest risk approach to progress these works as a pre-requisite to the development of Wrigley Head Solar Farm.

Further, if the Council were to seek to run a competitive tender process for the contestable works, ENW would not bid, and there is a high probability we would receive nil or a very limited number of responses, possibly non-compliant responses (based on other Councils' experiences), and most probably more expensive responses than ENW (given the

absence of economies of scale associated with our very short connection length of 300m).

As ENW's practice is not to profiteer from delivering both contestable and non-contestable works, this provides the Council with a reasonable assurance of value for money.

In compliance with CPR 21.1 guidance from the Procurement Team has been sought, and no procurement activity has commenced regarding the works. Under CPR 21.4.4 no commitment has been made to ENW for any portion of the works.

(Emma Tweedie, Commercial Procurement Unit)

*What are the **legal** implications?*

Rule 4 requires a contract with an estimated value in excess of £100k but below the relevant financial threshold for the Public Contract Regulations 2015 to be subject to an open tender. As detailed in the procurement comments, Rule 21 of the Contract Procedure Rules governs exemptions. It is permissible under Rule 21 to exempt the requirement to conduct an open tender and to authorise a direct contract award to ENWL where "exceptional circumstances" exist. Rule 21.3 lists a number of examples of "exceptional circumstances", some of which would apply to this matter. However, Rule 21.3 and it is, therefore, possible to consider other objectively exceptional circumstances into account when making a decision on the application of Rule 21. Provided the decision maker is satisfied, acting reasonably, that the circumstances of this matter are exceptional and an exemption can be justified, there are no known legal implications.

(Sarah Orrell – Commercial & Procurement Solicitor)

*What are the **Human Resources** implications?*

N/A

***Equality and Diversity Impact Assessment** attached or not required because (please give reason)*

N/A

*What are the **property** implications*

The project implications for property have been set out in previous reports. The CPRs exemption

has no implications for property.

[Katy Webster – Assistant Director for Property & Projects]

Risks:

The way forward as set out in this scheme does not seem unreasonable from a risk perspective given the actual works required.

[Mark Stenson]

Co-operative agenda

This decision will enable the grid connection works which are key to the development of the solar farm at Wrigley Head. As well as the generation of renewable energy to cut carbon emissions and energy costs for the Council and / or local businesses, the project will improve the ecology and appearance (through the reduction of anti-social behaviour including fly tipping) of the former industrial landfill site which will benefit local communities. The adjoining Moston Brook Corridor provides ample open space for walking and other activities which will no longer be available on the solar farm site. The development of the solar farm will increase the overall quality of the Moston Brook Corridor.

[Andrew Hunt]

Has the relevant Legal Officer confirmed that the recommendations within this report are lawful and comply with the Council's Constitution?	Yes
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Has the relevant Finance Officer confirmed that any expenditure referred to within this report is consistent with the Council's budget?	Yes
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Are any of the recommendations within this report contrary to the Policy Framework of the Council?	No
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There are no background papers for this report

Report Author Sign-off:	
Andrew Hunt	
Date: 27 June 2023	

In consultation with

Deputy Chief Executive, Sayyed Osman



Date: 30th June 2023

Approved by

Councillor Abdul Jabbar
Cabinet Member for Finance and Corporate Resources



Date: Monday 3rd July 2023