

## Appendix: Review of Delta Lakes Procurement

### 1 Executive Summary

- 1.1 On 6 July 2018, Carmarthenshire County Council (the **Council**) entered into a collaboration agreement with Sterling Health Security Holdings Limited (**Sterling**) and Swansea University (the **University**). Under the collaboration agreement, Sterling and the University (the **Developer Parties**) collaborate with the Council to bring forward development projects that will form part of the Llanelli Wellness and Life Sciences Village at Delta Lakes, Llanelli (the **Project**).
- 1.2 The Council has instructed Acuity Legal to review its records in relation to the Project and to report on whether there are any issues of non-compliance with public procurement law in order to provide assurance to the Council that it conducted the process in a fair, robust and compliant manner.
- 1.3 We attended The Beacon Centre for Enterprise on Monday 3<sup>rd</sup> December 2018 and Tuesday 4<sup>th</sup> December 2018 and reviewed the project records provided by the Project Management Office (**PMO**). Subsequent to the review of the project records, we received by email a number of other documents.
- 1.4 The documents demonstrate that at all times the Council acted in accordance with the Public Contracts Regulations 2015 (**PCR**) and followed appropriate processes, including the recognised competitive dialogue procedure. Throughout the procurement process, the Council acted with the benefit of prompt advice provided by its external lawyers and senior officers, including specifically the Council's Head of Law and Administration (who is also the Council's Monitoring Officer) and the Council's Director of Corporate Services (who is the Council's Section 151 Officer). The Council's in-house team and external lawyers played a central role in the procurement, including attending meetings and workshops with Sterling and the University. The Council's external lawyers chaired the dialogue meetings.
- 1.5 The project records provide an audit trail of the procurement and the key decisions arising during the procurement. The project records demonstrate compliance with the PCR. In our view, the project records kept by the Council are robust and there are no gaps in those records when compared with the expectations for a procurement of a scheme of the size and nature of the Project.
- 1.6 The documentation provided demonstrates that the Council followed due legal process in the procurement and the award of the collaboration agreement to the Developer

Parties. The project records show good governance and regard by the Council to risk management.

- 1.7 We are aware that the Council has now terminated the collaboration agreement. We have received confirmation from the Council's Section 151 Officer that the Council has not paid any public funds to the Developer Parties under the collaboration agreement or otherwise in relation to this Project. In our view, there has therefore been no misuse of, and no risk posed to, public funds.

## **2 Analysis**

### **2.1 Kent Neurosciences exclusivity**

2.1.1 Following the Council's Executive Board approval on 23 May 2016, the Council entered into an exclusivity agreement / "lockout agreement" with Kent Neurosciences Limited (**KNS**). The lockout period commenced on 23 May 2016.

2.1.2 Under the lockout agreement, the Council was restricted during the period of the lockout from:

2.1.2.1 entertaining offers for the property from anyone other than KNS;

2.1.2.2 giving access to the property to any prospective buyer;

2.1.2.3 providing certain defined documents concerning the property to anyone other than KNS;

2.1.2.4 negotiating or agreeing any terms for the sale of the property other than with KNS; and

2.1.2.5 disposing of the property or entering into any contract to dispose of the property nor granting any option or right of pre-emption over it.

2.1.3 The lockout agreement was terminated on 7 February 2017, and so it was not in force when the Council published its prior information notice and subsequently its contract notice in relation to the Project. The lockout agreement was terminated because the Council intended to undertake a procurement exercise in relation to the Project.

2.1.4 The lockout agreement was not a "public contract" for the purposes of the PCR and as such, there was no obligation to follow a procurement process before the

Council entered into the lockout agreement. Further, there is no legal obligation to undertake due diligence prior to entering into an agreement which provided exclusivity. In such circumstances, and in our experience, it is common practice for the due diligence to take place at the time the land transaction becomes more certain or a transfer is triggered. As the lockout agreement did not result in any land transaction proceeding, the Council was not under an obligation to undertake due diligence.

- 2.1.5 There is no evidence that the existence of a pre-existing relationship with KNS (under the lockout agreement) had any adverse effect on the Council's procurement process.

## 2.2 Preliminary market consultation

- 2.2.1 A discretion exists under the PCR for a contracting authority to undertake a preliminary market consultation. As such, the Council was not obligated to carry out the preliminary market consultation, although it recognised that doing so was good practice and a step that offered benefits when planning to launch a procurement process. In particular, by undertaking a preliminary market consultation, the Council would have exposed the opportunity to the market and maximised knowledge of that opportunity.
- 2.2.2 The Council commenced a preliminary market consultation by publishing a prior information notice (**PIN**) on 18 March 2017. By undertaking a preliminary market consultation, the Council sought "advice"<sup>1</sup> from market participants, which could be and was used in the planning and conduct of the Council's procurement procedure.
- 2.2.3 The PIN sets out the Council's view of its requirements and sought views from the market in response to its published requirements. The Council sought views from the market by way of responses to a questionnaire prepared by the Council.
- 2.2.4 Following publication of the PIN, the Council received expressions of interest from two organisations and met with each:

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<sup>1</sup> Regulation 40(2) of PCR refers to "advice".

- 2.2.4.1 KNS, by way of letter dated 6 April 2017, together with a completed questionnaire and appendix and followed up with a meeting on 28 April 2017; and
- 2.2.4.2 BTY, by way of letter dated 7 April 2017 together with a completed questionnaire and brochure and followed up with a meeting on 27 April 2017.
- 2.2.5 The Appendix supplied by KNS includes references to ARCH (A Regional Collaboration for Health) and Swansea University. There is no evidence that individuals connected with ARCH or the University played any substantive role in KNS at the time the Council was undertaking the preliminary market consultation.
- 2.2.6 ARCH is described on its website as "health and science working together, to improve health, wealth and wellbeing of the people of South West Wales", and is a collaboration between Abertawe Bro Morgannwg University Health Board, Hywel Dda University Health Board and Swansea University, aiming to modernise healthcare. The parties collaborate with the aim of developing and implementing new models of care.
- 2.2.7 From the information contained in the Appendix supplied by KNS, it appears that the involvement of the University relates only to one project. There is no evidence of, and no suggestion in the Appendix that, the relationship between KNS and the University extend beyond this single project, nor that there is any longstanding relationship that continued whilst the Council was undertaking its procurement.
- 2.2.8 As already noted, the purpose of the preliminary market consultation is to obtain information from market participants in order to inform the Council's procurement procedure. As such, the Council was not required to consider the experience of KNS, nor the relationship with ARCH and/or the University, as part of the preliminary market consultation.

### 2.3 Procurement strategy and choice of competitive dialogue

- 2.3.1 Following the preliminary market consultation undertaken after publication of the PIN, the Council reviewed its procurement strategy so that the Council's strategy was informed by the information received during the preliminary market consultation.

- 2.3.2 The Council's procurement strategy was based on the use of the competitive dialogue procedure.
- 2.3.3 Use of the competitive dialogue procedure allowed the Council to engage with the market as part of the formal tender process, so that all material issues are dealt with during the dialogue phase of the procedure. The competitive dialogue procedure can be used where:
  - 2.3.3.1 the needs of a contracting authority cannot be met without adaptation of readily available solutions;
  - 2.3.3.2 the contract includes design or innovative solutions;
  - 2.3.3.3 the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of risks attaching to them; or
  - 2.3.3.4 the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference.
- 2.3.4 The competitive dialogue procedure is an iterative process with significant flexibility in the design and operation of the procedure provided the principles and restrictions under the PCR are met. During the process bidder solutions are developed, and improved, in dialogue with a contracting authority until the point at which it is able to identify the solution or solutions capable of meeting its needs.
- 2.3.5 The competitive dialogue procedure is a very robust procurement process when considering both the outcomes that can be obtained by using it and the resources and planning required to operate an effective competitive dialogue procedure.
- 2.3.6 The benefits of using that procedure when compared with the other more traditional forms (open and restricted) would include:
  - 2.3.6.1 a more detailed testing of all proposals, particularly the preferred proposal;

- 2.3.6.2 greater confidence in the quality of the solution and the submission, particularly if it has been progressively tested during the dialogue process;
  - 2.3.6.3 ability to generate alternative design proposals, giving greater potential for added value in project delivery; and
  - 2.3.6.4 the iterative process of solution development fits well with the development of complex solutions in public-private partnerships.
- 2.3.7 The Project is of the kind that would suit use of the competitive dialogue procedure. By adopting the competitive dialogue procedure, the Council used a recognised procurement process which was robust and was designed to ensure effective risk management and good governance given the complexities of the Project.
- 2.3.8 The procurement was launched by way of Contract Notice published on 10 July 2017.
- 2.3.9 The information provided in the response questionnaires as part of the preliminary market consultation was used to provide information for the formal part of the procurement process. The text contained in the Contract Notice is consistent with that contained in the PIN.

## 2.4 Selection stage

- 2.4.1 Expressions of interests in the opportunity were received from 38 organisations. A number of the members of the Sterling consortium individually expressed their interest within those 38, as did BTY.
- 2.4.2 Where a procurement has a broad range of elements and a contracting authority therefore needs to use a broad description in its contract notice, it is common for a large number of irrelevant / inappropriate organisations to express an interest in the opportunity. Usually this is either to gain insight into a contracting authority's requirements or because the organisation might be able to deliver a part or specific elements of the published requirements. This appears to be the case with the Project – a large number of those expressing an interest seem unlikely to be able to deliver the Project alone. All organisations expressing an interest were provided with the same information and treated fairly and equally.

- 2.4.3 It is good practice to ask organisations that have expressed an interest, but not submitted a response, to explain why they chose not to respond, and the Council made those enquiries. There is no obligation on an organisation to provide a response explaining why they did not respond, and it is common for organisations not to provide a response. Five organisations did provide an explanation. BTY are noted with the entry "not replied" in the Sell2Wales printout featured in the project records. BTY chose not to proceed with the project as they were interested in a project management role rather than design and delivery of the Project. The Council received only one bid in response to its Contract Notice, which was submitted by a consortium led by Sterling.
- 2.4.4 Although KNS is a different legal entity to Sterling, the engagement with each party was through a common representative. As such, it is reasonable to expect the Council to have been aware of the existence of a link between Sterling and the University. As noted above<sup>2</sup>, there is no evidence of that link being strong, longstanding or continuing at the time of submission of the PQQ.
- 2.4.5 The Council was aware of an historic relationship between a company within the same group as Sterling (i.e. KNS) and the University but as the University had not been named as part of the consortium in Sterling's PQQ response, there was no obligation to enquire further about the historic relationship.
- 2.4.6 Further, KNS (and by association Sterling) received no advantage because of the existence of the lockout agreement, nor by being involved in the preliminary market consultation.
- 2.4.7 The Council took political, financial and other factors<sup>3</sup> into account in arriving at a decision to proceed with the procurement.
- 2.4.8 The decision taken to proceed with Sterling as sole bidder was consistent with the PCR and is a reasonable and proportionate response to the situation faced by the Council.
- 2.4.9 Following the decision to progress the procurement with Sterling alone, the Council assessed Sterling against its PQQ requirements. The Council adopted the Supplier Qualification Information Database (commonly known as **the**

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<sup>2</sup> See paragraph 2.2.7.

<sup>3</sup> Factors considered by the Council included the timetable for progressing the City Deal funding application, balancing the costs of proceeding with the procurement versus abandoning and procuring in a different manner, retaining participation of the Local Health Boards and University term dates.

**SQuID)** for its PQQ, a set of questions produced by Welsh Government to simplify and standardise the selection stage of a procurement.

2.4.10 The purpose of the selection stage of a procurement process is to enable a contracting authority to identify a pool of qualified bidders who are potentially competent in performing the contract, i.e. a due diligence process. At the selection stage, in addition to certain mandatory and discretionary exclusions, the contracting authority considers the economic and financial standing of bidders, as well as technical and professional ability.

2.4.11 The use of a PQQ is a recognised part of the competitive dialogue procedure. The PQQ used by the Council, adopting the SQuID, provided an appropriate and robust mechanism to assess both the economic and financial standing and the technical and professional ability of the Sterling-led consortium. This included assessing the acid test ratios of each of the members of the consortium proposed by Sterling and the consortium met the required thresholds.

## 2.5 Award stage

2.5.1 The Council issued an Invitation to Participate in Dialogue (**ITPD**) on 3 October 2017, which detailed the timeframe for the procurement, details of the process, the Council's requirements and the requirements of a tender..

2.5.2 The ITPD foresaw a period for evaluation before finalising the contract with the successful bidder. The anticipated date of execution of the contract was 12 March 2018.

2.5.3 The Council worked with Commerce Decisions, a supplier appointed by Welsh Government under a Pan-Wales agreement, to develop the award criteria that were adopted by the Council, and published as part of the procurement process. Only Council officers were involved in the development of the award criteria. The outcome from the development work was a robust, transparent and non-discriminatory set of award criteria.

2.5.4 As there was only one bidder that submitted a PQQ, the Council would have been able to adopt a less formal process, albeit retaining what was necessary to ensure value for money. Although the flexibility existed, the Council proceeded in the same manner as it would have if there had been multiple bidders. By doing so the Council acted reasonably and followed a robust, recognised procurement process. The Council also acted with the utmost transparency by continuing with its published process.



- 2.5.5 During the procurement, the Council sought declaration of interest forms from those involved in the process (internal and external to the Council). A declaration was completed and submitted to the Council by each person before that person was allowed to participate in the evaluation process.
- 2.5.6 Following first evaluation of the bids on 7 and 8 November 2017, the Council provided feedback to Sterling on its initial tender to improve the quality of its submission in keeping with the recognised steps taken in a competitive dialogue procedure. The evaluation review was used to scope the agenda for the dialogue meetings. The first round of dialogue took place on 16 and 17 November 2017.
- 2.5.7 On 16 November 2017, Person A informed the Council that they would be participating in the procurement by supporting Sterling. The participation by Person A was formally announced in the meeting and was recorded in the minutes of the meeting. In our view, participation by Person A had no anti-competitive or discriminatory effect and proceeding with the procurement process was a reasonable and proportionate step.
- 2.5.8 As a result of this declaration, a "conflict of interest agreement" was entered into by the Council and the University. This was a result of the Council's insistence on implementing a robust governance structure to protect the integrity of the procurement process. This agreement implemented a process to allow the University to continue with its involvement in the project as a stakeholder, whilst authorising certain named individuals<sup>4</sup> to participate in the procurement process by supporting Sterling and restricting them from any involvement in the (Council) buyer-side of the procurement.
- 2.5.9 After the Council and the University entered into the conflict of interest agreement, the Council was notified by Person C, that it was necessary to declare an interest in relation to Person D. Person C was named as the University's principal representative in the governance of the procurement of the Project and the agreement contains an obligation to notify the Council if employees of the University are involved in assisting or advising Sterling in connection with the procurement. A declaration of interest dated 16 January 2018 was received from Person D on 25 January 2018.

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<sup>4</sup> Person A and Person B are identified in the Protocol.

- 2.5.10 The Council reviewed all the available information including its own records of Person D's participation in the dialogue before concluding that the integrity of the procurement process has not been compromised. This was a conclusion the Council was entitled to reach. Person D was removed from participating any further in the dialogue.
- 2.5.11 The PCR contains provisions on conflicts of interest<sup>5</sup>, and specifically, requires a contracting authority to "take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators"<sup>6</sup>.
- 2.5.12 In this context, the scope of conflicts of interest are defined to include "any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure"<sup>7</sup>. Further, the reference to "staff members" are those "involved in the conduct of the procurement procedure or may influence the outcome of that procedure".
- 2.5.13 A contracting authority has a discretion to exclude a bidder that is subject to a conflict of interest, although only where that conflict cannot be "effectively remedied by other, less intrusive, measures"<sup>8</sup>. Guidance produced by the Crown Commercial Service acknowledges that the provisions of the EU Directive on Public Procurement 2014, and therefore the PCR, is not prescriptive in the safeguards against conflicts, but the Guidance does suggest that "compliance could be achieved, for example, through a common current practice amongst many UK contracting authorities, where declarations are signed by procurement staff to confirm they have no outside interests with bidders"<sup>9</sup>.
- 2.5.14 The Council sought declarations before it became aware of the involvement of the University with the Sterling bid. Its actions in this regard are therefore appropriate and in keeping with recognised procurement practice.

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<sup>5</sup> Regulation 24, PCR.

<sup>6</sup> Regulation 24(1), PCR.

<sup>7</sup> Regulation 24(2), PCR.

<sup>8</sup> Regulation 57(8)(e), PCR.

<sup>9</sup> Paragraph 5.10, "A Brief Guide to the 2014 EU Public Procurement Directives":

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/560261/Brief\\_Guide\\_to\\_the\\_2014\\_Directives\\_Oct\\_16.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560261/Brief_Guide_to_the_2014_Directives_Oct_16.pdf)

- 2.5.15 Although KNS had an existing relationship with the Council, there is no evidence that KNS was involved in the development of the procurement. Further, although the Council had intended to involve the University in the procurement as a stakeholder, the award criteria and methodology were developed exclusively by the Council and without the involvement of the University. In light of this, a conflict of interest for the purpose of PCR had not arisen.
- 2.5.16 The Council took advice in relation to this position from its external lawyers before proceeding with any dialogue sessions with the Sterling (and the University). The adoption of a protocol between the Council and the University provided further safeguards which demonstrate good governance.
- 2.5.17 At all times, the steps taken by the Council are reasonable and proportionate steps to take and are consistent with those that would usually be expected of a contracting authority and which were consistent with the Council's own rules.
- 2.5.18 The Council was not obliged to consider its discretion to exclude KNS (or a connected company) from the procurement – indeed, as a conflict of interest had not arisen to do so could have constituted unlawful behaviour and would have exposed the Council to the possibility of a challenge from KNS or Sterling.
- 2.5.19 In addition to the formal dialogue sessions scheduled by the Council, the Council, Sterling and the University participated in workshops which focused on specific subject matters such as financial and design. Meetings of this nature are common in a competitive dialogue procedure. Further, meetings took place with funders identified as part of Sterling's consortium to provide detailed understanding on the proposed funding structure and deliverability. Again, meetings of that kind are common in a competitive dialogue procedure.
- 2.5.20 As already noted, although the Council had flexibility to adopt a less formal approach, it chose instead to retain the robust process which would have been followed if multiple bidders had been involved in the process. This demonstrates a good approach to governance and a commitment to transparency.
- 2.5.21 The Council provided feedback to Sterling on its initial tender to improve the quality of its submission, a fact that is a recognised part of the competitive dialogue procedure. As already noted, the competitive dialogue procedure is designed to improve the quality of submissions as the process proceeds towards a final tender stage. Neither this, nor the workshops undertaken

alongside formal dialogue sessions would result in any discrimination, nor be considered anti-competitive.

2.5.22 We are aware that the Council provided and received information other than through its procurement portal. That fact would not result in any discrimination, nor be considered anti-competitive, as no other bidder was involved in the procurement. The approach taken by the Council is again reasonable and proportionate in the circumstances of the Project.

## 2.6 Sterling and the University as Developer Parties

2.6.1 Following the second round of dialogue it was accepted that given the progress made, a collaboration agreement could be prepared and issued by the Council to enable joint working to move the Project forward effectively. As further detailed below, the approach of entering into the collaboration agreement provided the Council with enhanced control and a good governance structure, whilst at the same time appropriately managing risk.

2.6.2 During the competitive dialogue procedure, further details of the structure of the consortium and specifically the role of the consortium members, became clearer. In particular, the Council was told that Vinci would only be willing to take equity in the Sterling consortium when the Project reached the development stage (i.e. when construction would commence and other funders are approved and full financial business plans are in place). In order to ensure the continuing robustness of the consortium, Sterling brought the University forward as a member of the consortium.

2.6.3 Following discussions between the Council and Sterling, the Council considered the possibility of proceeding by approving the addition of the University to the Sterling consortium. The proposal would result in Sterling and the University both entering into the collaboration agreement as the Developer Parties. The decision to proceed in this way was compliant with the PCR and proceeding in this way was a reasonable and proportionate step.

## 2.7 The collaboration agreement

2.7.1 The collaboration agreement issued by the Council created a framework to agree contracts for the development of specific elements of the Project. The collaboration agreement also set out wider governance arrangements for the Project and was little more than an arrangement under which the Council and the Developer Parties would work together and collaborate in relation to the

Project. The collaboration agreement contained no commitment "to agree anything, or to carry out any specific works or services in relation to ... [the Project], or to pay any sums" and no guarantee that work would be undertaken by the Developer Parties. The Council had a right to terminate the collaboration agreement on notice and without liability to Sterling and the University.

2.7.2 The approach of using a collaboration agreement was compliant with the PCR. The approach also provided the Council with greater control and a more robust governance structure than might have been present under a development agreement. As already noted above, the competitive dialogue procedure has significant flexibility, and is designed to allow development and changes a solution as the procedure progresses. The award of a collaboration agreement in place of a development agreement is therefore within the scope of what would be permitted under the PCR.

## 2.8 Award of the collaboration agreement

2.8.1 The competitive dialogue procedure allows the award criteria to flex as the process advances so as to reflect the level of development of solutions as dialogue progresses. The Council benefitted from this flexibility by flexing its award criteria and in doing so was acting in compliance with PCR.

2.8.2 The Council concluded that the contents of Sterling's solution and the terms of a collaboration agreement met its requirements. Therefore, in place of the final tender, the Council required Sterling to confirm its agreement to the final version of the collaboration agreement, which was released on the portal at the same time as a notification of that fact by the Council. The confirmation was required from Sterling by no later than 12:00 noon on 26 June 2018.

2.8.3 As Sterling was the only bidder involved in the procurement, the Council decided to assess whether Sterling achieved the minimum requirements of each of the award criteria which applied at the final tender stage in place of allocating scores. Sterling's submission was evaluated against each of the final tender award criteria and the Council evaluated each of the award criteria as "approved" or "passed". This approach was robust and proportionate.

## 3 **Conclusion**

3.1 Although we have identified some points of note above, none of these points, either individually or collectively, constitute a material breach of the PCR or public procurement

law. Further, there is no anti-competitive or discriminatory effect in the actions of the Council.

- 3.2 The Council has followed a robust process, which demonstrates many facets of good governance and management of risk.
- 3.3 For these reasons, it is our conclusion that the Council followed due legal process in the procurement and ultimately when awarding the collaboration agreement to Sterling.
- 3.4 We are satisfied that the Council's decision-making and actions are reasonable and proportionate, compliant with the PCR and public procurement law, resulted in the effective management of risk and adopted good governance.
- 3.5 Finally, on the basis that no public funds were released to either of the Developer Parties under the collaboration agreement or otherwise in relation to the Project, there has been no misuse of public funds.

**Acuity Legal Limited**

**16.01.2019**