

Public Document Pack

Date: **1 December 2014**
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CABINET

11 DECEMBER 2014

A meeting of the Cabinet will be held at **7.00 pm on Thursday, 11 December 2014** in the Council Chamber, Council Offices, Cecil Street, Margate, Kent.

Membership:

Councillor Johnston (Chairman); Councillors: Nicholson, Everitt, D Green, E Green and Harrison

SUPPLEMENTARY AGENDA

Item
No

Subject

4. **MANSTON AIRPORT** (Pages 1 - 10)

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MANSTON AIRPORT EXPLORATION OF CPO INDEMNITY PARTNER

To: **Cabinet, 11th December 2014**

Main Portfolio Area: **All**

By: **Leader of the Council**

Classification: **Unrestricted**

Ward: **All wards**

Summary: To update Cabinet on the outcome of a soft-market testing exercise undertaken to identify a CPO indemnity partner for Manston Airport.

For Decision

1.0 INTRODUCTION

- 1.1 Cabinet resolved on 31st July 2014 to carry out a soft-market testing exercise to identify a CPO Indemnity Partner – a third party who could cover the costs of compulsory purchase of the Manston Airport site. A progress report was received by Cabinet on 16th October 2014.
- 1.2 The purpose of this report is to inform Cabinet on the results of the soft-market testing. It does not address the wider options around the future of site, which will be considered separately as part of the Council's Local Plan process.

2.0 PROCUREMENT PROCESS FOR A CPO INDEMNITY PARTNER

- 2.1 Expressions of interest were invited for a CPO indemnity partner. Counterparties expressing an initial interest were invited to respond to a questionnaire, composed of:
- Organisational and contact information
 - Project questions
 - Financial questions
- 2.2 The independent viability report produced by Falcon Consultancy was also made available to respondents.
- 2.3 Four counterparties requested a questionnaire; two submitted returns. (Parties A and B). Some discretion was shown over the 31st August 2014 deadline for questionnaire submissions. This allowed additional time for any party seeking to express an interest.
- 2.4 Both respondents submitting questionnaires were offered a meeting to discuss their responses more fully.
- 2.5 A meeting took place with Party A's principals on 18th September 2014 to discuss their responses. The meeting was attended by Cabinet members, Group Leaders

and the Council's statutory officers. Following the meeting, Party A was asked to respond to a written set of questions by 24th September 2014. This Party A did in a letter of 25th September 2014. Following the response, further clarification was sought from them on some issues. A further meeting attended by Cabinet members, Group Leaders and the Council's statutory officers took place on 29th October 2014. Discussions took place subsequently with Party A's solicitors and there followed various further meetings and correspondence with Party A.

- 2.6 The Council has entered into a confidentiality agreement with Party A. The Council is therefore prevented from disclosing the information provided by Party A for consideration.
- 2.7 Party B did not take up the offer of a meeting. Party B was sent the same written questions as Party A. No response has been received from Party B. It is therefore considered that Party B has conclusively not identified an interest in being the Council's indemnity partner.

3.0 RELEVANT CONSIDERATIONS

- 3.1 The objective of seeking an indemnity partner is to ensure that - if the Council determines to pursue a CPO - a viable airport comes into sustainable long-term operation as quickly as is reasonably possible without any residual cost to the Council.
- 3.2 A majority interest in the site was acquired by new owners in September 2014. The new owners state they intend to bring forward regeneration proposals for the site. The new owners have a business record that includes the Discovery Park Enterprise Zone.
- 3.3 The new ownership of the site and any proposals put forward would make it much more challenging to demonstrate an overwhelming case for compulsory purchase. This compares to the situation before September 2014 when the then outright owner had announced no specific proposals following the airport closure. Given the now increased challenge of securing a CPO, it is essential that the Council establishes thoroughly on objective grounds the financial status of any prospective partner. The assessment must have due regard to the potential scale of the project, and the need to demonstrate that resources are available to complete it.
- 3.4 Any viable indemnity partner needs to demonstrate the resources to acquire by private treaty well before the stage of seeking a CPO.
- 3.5 There are numerous local authority examples of stalled developments or developments where the partner proves not to have the financial capacity to complete the agreement. This experience in other local authorities emphasises the need to ensure a prospective indemnity partner has the resources in place to acquire the site and complete the development. Once the land transfers to the indemnity partner any redress for delay or non-completion could prove difficult to pursue. The main purpose of the CPO is for the authority to achieve a viable development, so the status of the indemnity partner to deliver the development in its entirety is highly relevant.
- 3.6 Counsel's advice is that the Council would need to underwrite any CPO acquisition to demonstrate to the Secretary of State the likelihood of completion. The availability of funds to the prospective indemnity partner is therefore a key factor.
- 3.7 The Council does not have the resources to proceed with any CPO and the subsequent development in the event the indemnity partner could not raise

investment resources. The Council's Capital Programme agreed 13th November 2014 is fully committed and already assumes prudential borrowing of £3.645m 2015-16 to 2018-19. The Council would have to borrow to fund acquisition of the airport and its subsequent development in the event an indemnity partner did not prove capable of proceeding. Assuming £20m of borrowing this would result in a revenue capital financing charge of £1.8m. The basic minimum costs (business rates; air traffic; fire and security) of operating the airport are estimated at £2m a year. These revenue costs would prove an unbearable burden for the Council's General Fund.

4.0 DUE DILIGENCE METHOD

- 4.1 Financial information was requested from Party A. Information was analysed in accordance with the Due Diligence Protocol attached at Annex 1.
- 4.2 Checks have been made with other local authorities that have recently sought and successfully identified CPO indemnity partners. Counsel's opinion has also been obtained on the CPO process and the validation of a prospective indemnity partner. The approach taken by Thanet is entirely consistent with both good practice and the process adopted by other local authorities.
- 4.3 In the event that the counterparty is able to fulfil the due diligence requirements, it would demonstrate a viable interest. Conversely if it cannot, no viable expression of interest is demonstrated. The information required is summarised in the table below.

<u>Financial information</u>
Last 3 years financial accounts
Auditor contact details
Financial Plan
Evidence of funds required to complete the project.
<u>Financial Ability</u>
Does the entity have the resources to fulfil its obligations through the contract?
Does the entity issue annual accounts?
Does the entity have a long track record, how many years has it been established?
Does the entity have a stable structure and good governance around financial decision making?

5.0 PARTY A

- 5.1 Party A is an established organisation incorporated outside the European Union. It is an investment limited liability company. Its adopted strategy is to pursue opportunistic and value-add asset purchases and operational opportunities on behalf of a diversified set of investors ranging from institutions to individuals. It does not of itself have a record of successful airport operation; some team members have experience with other organisations of airport operation and airport financing.
- 5.2 Party A proposes to approach the CPO acquisition a stage at a time. This would be inconsistent with the requirements of Circular 6/2004, sections 20 and 21.

'The timing of the availability of the funding is also likely to be a relevant factor. It would only be in exceptional (and fully justified) circumstances that it might be reasonable to acquire land where there was little prospect of implementing the scheme for a number of years. Even more importantly, the confirming Minister would expect to be reassured that it was anticipated that adequate funding would be available to enable the authority to complete the

compulsory acquisition within the statutory period following confirmation of the order. He may also look for evidence that sufficient resources could be made available immediately to cope with any acquisition resulting from a blight notice.'

6.0 ACCOUNTING AND INVESTOR INFORMATION

- 6.1 The information provided by Party A does not demonstrate that it has the appropriate financial status or has committed investors:
 - 6.1.1 to enable it - if required - to acquire the site by private treaty prior to a CPO process being commenced
 - 6.1.2 to fund the preparation of a robust case for CPO acquisition
 - 6.1.3 to meet the expected compensation costs
 - 6.1.4 to develop the airport and operate it viably in the long-term
- 6.2 The use of Party A as an indemnity partner on the basis of the financial information provided would therefore constitute a high risk option given the objective set out in 3.1 above and legal advice secured by the Council.

7.0 BUSINESS PLAN

- 7.1 The Business Plan provided by Party A is a short term (5-year) business plan and the scope is insufficient in the light of the objective set out in 3.1. The plan does not provide for the CPO compensation cost, and this could be substantial. The business assumptions appear to be optimistic as regards revenues and the known costs of operation.
- 7.2 The viability report issued with the soft marketing questionnaire states that 'The success of Manston revival must be proved through a 20-year business plan with financial projections based on the assumption that the trigger will be realised'. A 20-year plan has been requested from Party A but this was not provided. A 20 year business plan is required for a project of this scale to demonstrate long-term viability, and that the proposed operation is sustainable in the long term. Unless these requirements can be clearly demonstrated there is no prospect of achieving a CPO.
- 7.3 The use of such an indemnity partner would therefore constitute a high risk option given the objective set out in 3.1 above and legal advice secured by the Council..

8.0 INDEMNITY

- 8.1 The approach suggested by Party A is that funds would be transferred in tranches to a UK account managed by UK solicitors. The Council could then incur CPO costs to the value of funds in the account. The Council would not be obliged to proceed with further work until new funds were paid into the account by Party A.
- 8.2 The Council is not seeking a CPO on a speculative basis and would not wish to put itself in a position whereby full achievement and vesting of the site would depend on the partner's ability to generate investment in the project.
- 8.3 The use of such an indemnity partner would therefore constitute a high risk option given the objective set out in 3.1 above and legal advice secured by the Council..

9.0 CORPORATE IMPLICATIONS

9.1 Financial and VAT

9.1.1 Set out in the main report

9.2 Legal

9.2.1 This report has outlined the process undertaken following the decision of Cabinet on 31st July 2014 to seek expressions of interest.

9.2.2 It has also set out how we have considered the information provided by those interested parties and a thorough consideration of that information and the assurances provided by it.

9.2.3 The conclusions made by the Council's Section 151 Officer are that the information provided does not provide assurances which would satisfy him that a valid expression has been put forward and he is therefore unable to recommend moving ahead with this proposal.

9.2.4 Although the issues here are emotive Members should exercise extreme caution before seeking to move forward with any proposal which is at odds with advice from its officers particularly where there are likely to be significant risks which would affect the Council at a fundamental level.

9.2.5 The Council has secured further legal advice as summarised in 9.2.6 to 9.2.9 below on the financial assessment necessary to support the choice of an indemnity partner.

9.2.6 The Council need to be satisfied in promoting the CPO that it is able to meet the tests of Circular 06/2004 on the likelihood of the project going ahead. The Secretary of State will not confirm a CPO unless he is satisfied that there is a likelihood of the project going ahead.

9.2.7 If a scheme is not financially viable the S151 Officer would be expected to certify (e.g. in a witness statement) that he was satisfied that the project was viable and that the local authority would meet any funding shortfall if the partner investment was not forthcoming.

9.2.8 CPO is a last resort. It is necessary to make direct contact with the owners of the land with a view to determining whether a negotiated sale is possible.

9.2.9 The approach taken to determine whether the prospective indemnity partner is suitable before embarking on any CPO appears correct.

9.3 Corporate

9.3.1 An operational airport is consistent with the Council's economic development objectives. The decision taken here would not affect the status of the site as an Airport within the Local Plan and a separate process is followed in that regard.

9.4 Equity and Equalities

9.4.1 There is no issue arising from the report and recommendations which adversely affects any specific category of Equality group.

10.0 Recommendation

10.1 That no further action be taken at the present time on a CPO of Manston Airport, on the basis that the Council has not identified any suitable expressions of interest that fulfil the requirements of the Council for a CPO indemnity partner and that it does not have the financial resources to pursue a CPO in its own right.

Contact Officer:	Paul Cook Director of Corporate Resources and S.151 Officer
Reporting to:	Madeline Homer, Acting Chief Executive

Annex List

Annex 1	Due Diligence Protocol
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Background Papers

Title	Details of where to access copy
<i>None</i>	

Corporate Consultation Undertaken

Finance	Paul Cook, Director of Corporate Resources and S.151 Officer
Legal	Steven Boyle, Legal Services Manager and Monitoring Officer



Due Diligence Protocol

Thanet District Council

1.0 Introduction

1.1. What is Due Diligence?

- 1.1.1. Due diligence is firmly established as an element of corporate good governance and is an investigation of a business or person prior to signing a contract.
- 1.1.2. For the Council this contract can take a variety of forms, examples of these are a contract to provide services, an agreement in relation to a grant, a lease agreement or a joint venture/development partner agreement.
- 1.1.3. Why do it?
- 1.1.4. Both the Bribery Act 2010 and Money Laundering Regulations 2007 contain sections pertaining to the use of due diligence when establishing relationships with third parties.
- 1.1.5. In essence due diligence is undertaken to:
 - (a) Identify the entity and verify the entity's identity on the basis of documents, data or information obtained from a reliable and independent source;
 - (b) Establish the ability of the entity to deliver the contract
- 1.1.6. Due diligence is implemented to cut down on unpleasant surprises and reduces the chance that business practices of a service provider or grant recipient reflect poorly on the Council.
- 1.1.7. Due diligence will not provide a yes or no answer as to if the authority should use/partner with an entity. However, performing these types of investigation results in informed decision making through the use of enhanced information gathered during the process.
- 1.1.8. Decision makers can then analyse information and deliberate regarding costs, benefits and risks prior to entering into contracts.

2.0 What are the steps involved?

- 2.1. As due diligence is such an important part of the contract process, planning is essential as it may take some time to gather the appropriate information, consult experts, analyse the information and provide answers to questions.
- 2.2. Staff resource should also be considered, for example particular legal advice maybe required.
- 2.3. **STEP 1 – Planning**
 - 2.3.1. The steps of due diligence should be planned so that work can be completed before the contract discussions are too far advanced. For contract partners that present concerns it may be useful to consult with legal and finance colleagues to establish the best form of due diligence.
 - 2.3.2. The level of due diligence is likely to vary considerably from contract to contract depending upon the risk to the authority of the contract being entered into.
 - 2.3.3. Therefore planning is a key stage to ensure that all questions are answered and concerns alleviated, prior to contract award.
- 2.4. **STEP 2 – Gather Information**
 - 2.4.1. The first major step is to gather the information required in order to perform due diligence. The planning stage should of assisted in assessing the information that is likely to be required, but at the very least the information that should be gathered can be split into four categories:

2.4.2. Basic Information

- Name of organisation and directors/officers
- Registered address
- CVs of principals
- Contact details
- Group Structure (chart) showing how the contracting company fits into the overall corporate structure
- Company registration number and date of registration (where appropriate)
- VAT number
- Project outline
- Evidence the proposed project would not represent an excessive increase in the overall scale of the organisation's activities.
- Relevant experience of similar projects

2.4.3. Financial information

- Last 3 years financial accounts
- Auditor contact details
- Financial Plan
- Evidence of funds required to complete the project.

2.4.4. Web searches

- External credit rating
- Credit reference (taken by TDC)
- General search on company performance
- Press/media

2.4.5. Government policy

- Compliance with money laundering regulations

2.5. **STEP 3 – Analyse the Information gathered**

2.5.1. Analysis of the information gathered is essential in order make an informed decision regarding contract award.

2.5.2. Key questions that should be considered are:

2.5.3. Corporate image

- Has there been any negative publicity in the media around the company and how has the company dealt with and resolved these issues?
- Are there any pending legal cases against the entity?
- Is the entity only looking for a marketing opportunity by partnering with the Council?
- Is the entity looking only for procurement opportunities or money from the Council?
- Is the entity willing to engage in a transparent manner, with for example due regard to the Freedom Of Information Act?
- Is the entity willing to accept limitations around publicity of its relationship with the Council so that the Council is not perceived as endorsing the entity?

2.5.4. Social Responsibility

- Is the entity involved primarily in activities that the Council do not wish to align with, i.e. tobacco, firearms.
- Does the entity openly discriminate against race, sex or religion?
- Are there any concerns with the entity around corporate social responsibility?

- Is there any history regarding child or forced labour?
- Does the entity endorse standard Health & Safety requirements for workers?

2.5.5. Environmental Responsibility

- Does the entity assess the environmental impact of the project to be delivered?
- How does the entity monitor and set targets for improved environmental performance?
- Are there sufficient contingency plans to deal with emergencies relating to the contract?

2.5.6. Financial Ability

- Does the entity have the resources to fulfil its obligations through the contract?
- Does the entity issue annual accounts?
- Does the entity have a long track record, how many years has it been established?
- Does the entity have a stable structure and good governance around financial decision making?

2.5.7. Policy Compatibility

- Does the entity comply with all statutory regulations?
- Is it subject to any investigations by government, i.e. HMRC.
- Would entering into the contract cause the Council any issues with regards to its own constitution?

2.6. **STEP 4 – Further Specific and supplementary enquiries**

2.6.1. Further supplementary enquires may be required to answer the concerns or questions raised, however the level of these enquiries is likely to be dependent on:

- The scale of the proposed project or contract
- Responses to the initial enquires made

2.6.2. If the financial commitment is at a low level then enquires made will be restricted. The nature of the project and the level of risk are also considerations.

2.6.3. The planning stage of the due diligence process will allow you to assess the required level of further enquiries.

2.6.4. It is essential that a specific time limit is set for entities to respond, so that the awarding of the contract is not unduly delayed.

2.7. **STEP 5 – Decision making**

2.7.1. Once a comprehensive picture is built up of the entity concerned, an informed decision making process can occur using the information obtained.

2.7.2. An entity that has struggled to provide information or answer some of the key questions is likely to be unsuccessful in winning the contract.

2.7.3. When it comes to decision making, a final decision must be reached in a timely manner and in conjunction with advice received from other departments such as legal and finance.

3.0 **Conclusion**

3.1. Due diligence assists in the detection and treatment of risk in relation to a contract award.

3.2. The process can be lengthy, but ultimately leads to the reputational protection of the Council and its finances, as well as the protection and reputation of the decision makers.