

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

CABINET - 12 DECEMBER 2011

JOINT REPORT BY THE EXECUTIVE DIRECTOR OF TRANSPORT, ENVIRONMENT AND LEISURE SERVICES AND THE TOWN CLERK AND EXECUTIVE DIRECTOR OF FINANCE

METRO WIRELESS NETWORK

The report seeks the approval of Cabinet to award a service concession contract to O2 to deliver a Metro Wireless network using the borough's public realm assets, thereby generating significant income for the borough and providing a free wi-fi service on street to benefit residents, businesses and visitors.

FOR DECISION

1. INTRODUCTION

- 1.1 The Cabinet is requested to award a service concession contract to O2 to deliver a Metro Wireless network using the borough's street furniture for the guaranteed fees and net revenue share contained in their tender as described in this report. The service concession contract will generate total guaranteed revenues to RBKC over the life of the contract of £3 million and in addition a further estimated net revenue share of £557,000 over 6½ years. It will benefit residents, businesses and visitors by offering a free, good quality wi-fi access on street.
- 1.2 This award is the outcome of the joint procurement of a Metro Wireless network by Westminster City Council and the Royal Borough of Kensington and Chelsea. This report reviews the procurement and evaluation process and recommends the award of two separate service concession contracts (one for each Council) for a period of up to 6½ years to O2.

2. BACKGROUND

- 2.1 The Royal Borough and Westminster City Council have been co-operating on wireless considerations since the Greater London Authority proposed that boroughs should seek to facilitate an improved wireless infrastructure in preparation for the Olympic Games by offering access to their public realm assets.
- 2.2 Westminster had put in place a framework contract that any other London borough could use to call off wireless services. However, this option was not pursued as it was decided to 'test' the provision of

these services competitively to ensure that the council was obtaining value for money.

- 2.3 A separate procurement exercise was run for the provision of a Metro Wireless network to test the market and ensure that the council benefitted from the maximum possible revenue, and that future technology developments were included in any proposals. Given the specialist nature of these services a technology expert, Regional Network Solutions (RNS) were appointed to support the procurement. The two boroughs worked on this as a joint procurement.

3. NEED

- 3.1 The mobile phone networks in London are already approaching breaking point due the enormous demand for network capacity from smart phones connecting to the Internet, as a single Internet session is the equivalent of 10 simultaneous phone calls. In 2012 sales of smart phones are forecast to overtake ordinary mobiles. The Olympics will raise the number of mobiles in use in London to 80 million, many of which will be used for Internet access.
- 3.2 From the point of view of residents, business and visitors, mobile access to the Internet, especially free of charge, is very valuable, and can bring economic benefits. Particularly for visitors to the Olympics, being able to have mobile access to information around travel, events, accommodation and entertainment is a great benefit.
- 3.3 The income brought in to the Council by the service concession is significant, at a time of financial constraint, and the contract is structured so that the contractor can bring in more revenue to the borough through activities such as wholesaling spare network capacity to other mobile network operators, and Internet based advertising.

4. PROCUREMENT AND DECISION

- 4.1 Following discussions and advice from both Councils' legal advisors, it was agreed that the procurement would be for a Service Concession contract. This does not fall under EU regulations but the principles of openness and transparency are still adhered to.
- 4.2 The opportunity was published on 'CompeteFor' on 23rd August 2011 and received Expressions of Interest and completed PQQs on 1st September 2011 from:
- AWTG
 - BT
 - Horsebridge
 - O2

- Virgin Media Business
- The Cloud/BSkyB
- UK Broadband

4.3 Further details of the procurement are found in Part B, but following submission of a PQQ, dialogue and evaluation of tenders, O2 was identified as the operator providing the most attractive financial proposal along with the technical and operational capability to meet both Councils' requirements. Therefore this report recommends that O2 be awarded the contract.

5. PURPOSE OF CONTRACT

5.1 City of Westminster (WCC) and Royal Borough of Kensington and Chelsea (RBKC) propose to allow the contractor exclusive access to the public realm estate for two years to build a Metro Wireless network. The access will thereafter return to a non-exclusive agreement for the remainder of the service concession contract. In consideration for this access, the contractor will pay the Councils a fee and a percentage share of the total net revenue. The contractor will operate open-book accounting and will be liable for all costs and liabilities.

5.2 There will be separate contracts with each of the Councils and each contract will be let as a Service Concession contract within the meaning of Regulation 1(2) of the Public Contracts Regulations 2006.

5.3 The Network is to be implemented and commissioned in two phases with the first phase (including Exhibition Road) completed in time for the 2012 Olympic Games with these initial prioritised phase works having been completed by 31st May 2012 and the second phase being implemented as soon as possible in accordance with an agreed programme after the completion of the 2012 Olympic Games. Phasing of any additional works will be discussed with the contractor and agreed prior to the Commencement Date.

5.4 The design, installation, support, maintenance and monitoring (capital and on-going revenue) of the Network shall be provided at no cost to the Councils.

5.5 The contractor will meet all associated power costs.

5.6 The cost of the procurement with regard to officer time, legal advice and external consultancy will be met from the initial upfront guaranteed payment.

5.7 An Assurance Team (one member of staff in each Council) will be funded by the Operator during the implementation period. This is an additional cost to the contractor and is not included in the guaranteed concession fee.

- 5.8 The Concession Period is initially for a period from award of the Contract until May 2018, although the Councils reserve the right to extend the Contract on the same terms for a further period or periods up to an aggregate concession of 10 years.

6. SAFETY INFORMATION

- 6.1 In May 2000, the Independent Expert Group on Mobile Phones (IEGMP) – chaired by Sir William Stewart – concluded that the balance of evidence to date indicates there is no general risk to the health of people living near base stations as RF exposures are small fractions of international public exposure guidelines. His subsequent report has not changed his view.
- 6.2 The wi-fi units operate at very low power. An individual wi-fi antenna will typically operate at just 2 watts, about the same power output as a mobile phone. Even at full capacity, with several mobile operators using the same network, the power output is just six watts, resulting in emissions at street level between a thousand and a million times below that of a mobile phone, and typically 100 times below the established guidelines set by the International Commission on Non-Ionizing Radiation Protection (ICNIRP). The ICNIRP guidelines – recognised as a standard for safety by the World Health Organisation – are designed to protect everyone and include a large safety margin as a precautionary measure.
- 6.3 The typical exposure is 1% of the ICNIRP standards even on a fully loaded wi-fi system with several operators using each antenna. This has been independently verified using power levels equivalent to several operators using each antenna, on a 10 metre high lamppost installation. The results indicated a maximum exposure at the base of the lamppost of 0.14% of the ICNIRP standards.

7. LEGAL IMPLICATIONS

- 7.1 The structure of the Metro Wireless contract is that of a public service concession, i.e. the City Council grants an operator the right to use City Council street furniture to provide a wireless communications network. Rather than pay the operator for providing the network, the City Council transfers the opportunity to exploit the market to the operator, along with the demand risk (the risk that there will be little or no market to exploit). Revenue from fees paid by third party users to the operator is then used to meet the costs incurred and to make a profit.
- 7.2 Public service concession agreements are excluded from the scope of the 2006 Public Contracts Regulations and are therefore not formally regulated, although the EC Treaty principles of proportionality, mutual recognition, transparency, non-discrimination and equal treatment apply to the procurement

process. The Councils are therefore free to negotiate with tenderers, are not bound by minimum tender periods, are not required to adhere to a standstill period and are not obliged to advertise in the OJEU.

- 7.3 As a matter of good commercial practice the City Council has nevertheless chosen to follow a structured competitive tendering process, incorporating elements of competitive dialogue. Dialogue meetings took place with each bidder before final tenders were submitted, in order to discuss the bidder's draft proposals and to provide an opportunity for commercial negotiations. Each bidder's proposals were treated confidentially and a robust evaluation process was followed to ensure that equal treatment of bidders could be demonstrated. Feedback will be provided to all bidders upon announcement of the decision to award.
- 7.4 The risk of a successful challenge to the process by a disappointed bidder is therefore minimal and would almost certainly need to be brought within 30 days of the announcement of the decision to award.
- 7.5 The possible application of state aid to the project was reviewed however it was not considered to arise because:
 - 7.5.1 The Councils will receive the market price for access to their street furniture.
 - 7.5.2 The Councils have run a competition to establish the identity of the operator.
- 7.6 The Councils will receive a share of the revenue generated by the operator from the exploitation of the Metro wireless network. This payment forms part of the consideration payable by the operator in exchange for the right to use Council property and therefore does not amount to trading by the Councils.
- 7.7 The contract gives the operator partial exclusivity for the use of street furniture within certain areas for the first two years of the concession period. The Competition Act 1998 contains two key prohibitions which have been considered in the context of this provision:
 - 7.7.1 The Chapter I prohibition against anti-competitive agreements i.e. agreements which damage competition within a UK market.
 - 7.7.2 The Chapter II prohibition, which prohibits the abuse of a dominant market position.
- 7.8 A "market" is the smallest product group and geographical area within which a monopoly could profitably sustain prices at least 5-10% above competitive levels. The relevant market in this case is likely to be wireless communication services in central London. The

projected market share of each of the bidders, if successful, would not exceed 10% (based on an analysis by the technical consultants for the project) and it is not therefore considered that the partial exclusivity being offered to the operator would amount to a restrictive agreement in breach of competition law or the abuse of a dominant market position.

- 7.9 The level of exclusivity in the conditions has been drafted so as not create a conflict with the Council's other contractual and statutory obligations, the exercise by a telecommunications code system operator of its powers under the Electronic Communications Code, (as set out in Schedule 2 to the Telecommunications Act 1984 and amended by the Communications Act 2003) and any requests of the Olympic Delivery Authority for coverage along the Olympic Route Network.
- 7.10 The contract will be sealed by the Head of Legal Services.

8. FINANCE IMPLICATIONS

- 8.1 There are no tax and accounting implications relating to this recommendation.
- 8.2 The cost of consultancy services provided by Regional Network Solutions is £9,000 split equally between the Councils.
- 8.3 The above cost (7.2) will be offset against the income generated.
- 8.4 Cost of the Assurance Officer will be met by O2.
- 8.5 There is a risk that costs may arise from alternative solutions to street furniture e.g. placement on private property.

9. OTHER IMPLICATIONS

9.1 Risk Management Implications

Risks associated with the legal and finance implications of this contract award are noted in the relevant sections of this report.

9.2 Health and Wellbeing Impact Assessment including Health and Safety Implications

Due to the nature of this contract, health and safety in relation to service supply and maintenance of software is not a relevant factor. The Metro Wireless evaluation criteria however required Tenderers to provide Health and Safety working policies and insurances. These were assessed as part of the pre-qualification process.

9.3 **Equalities Implications**

O2's equalities and diversity policies were considered as part of the process to confirm selection of this Operator.

9.4 **Sustainability Implications**

The wattage on this equipment is low. O2 will meet all power costs.

9.5 **Communications Implications**

All communications with regard this tender are required to be approved by the Councils before publication.

9. **RECOMMENDATION(S)**

- 9.1 It is recommended that Cabinet agree to award the service concession contract to O2 to deliver a Metro Wireless network using RBKC public realm assets for the guaranteed fees and net revenue share contained in their form of tender as described in this report.

FOR DECISION

Tot Brill

Executive Director for Transport Environment and Leisure Services

Nicholas Holgate

Town Clerk and Executive Director of Finance

Background papers: None

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