

## **EAST AYRSHIRE COUNCIL**

**CABINET – 3 DECEMBER 2008**

### **SUPPLY OF ELECTRICITY PROCUREMENT PROPOSAL**

**Report by Depute Chief Executive/Executive Director of Corporate Support**

#### **1. PURPOSE OF REPORT**

To seek Cabinet approval for Procurement Scotland to procure a Supply of Electricity Contract on behalf of East Ayrshire Council for purchases commencing 1<sup>st</sup> April 2010 when the current contractual arrangements put in place by Scotland Excel expire.

#### **2. BACKGROUND**

- 2.1 The current contracts procured by Scotland Excel for Electricity is for tranche purchases for consumption between April 2008 and 31<sup>st</sup> March 2010, with the final two tranche (summer 2009 and winter 2009/10) purchases being imminent.
- 2.2 Electricity is to become a 'Category A' commodity in terms of the recommendations in the McClelland Report and will be established on a "national" basis across all public sector organisations and be procured by Procurement Scotland.

#### **3. APPROVAL**

- 3.1 In order to participate in the forthcoming national contract, Public Bodies are required to sign the Procurement Scotland Agency Agreement relating to the Supply of Electricity by not later than mid December 2008 (Appendix A).

#### **4. OPTIONS**

- 4.1 To sign up to full participation in the national contract to be procured by Procurement Scotland.
- 4.2 To procure a joint All-Ayrshire contract.
- 4.3 To procure a local East Ayrshire Council contract.

## **5. ADVANTAGES / DISADVANTGES**

- 5.1 National Contract: Procurement Scotland has been successful in the procurement of stationery, paper & board and computer consumables resulting in financial savings of circa 28%. Procurement Scotland has experienced personnel in the utilities sector and by way of leverage should be capable of delivering the requirement.
- 5.2 All-Ayrshire Contract: Although the three councils regularly collaborate where they have a common interest and requirement not covered by other contracts and between them could develop a procurement team capable of procuring a fully compliant contract, the risk involved in being a minor player at the same time as a national contract is being procured could jeopardise the likelihood of achieving financial savings.
- 5.3 Local East Ayrshire Council Contract: Although the Procurement Team could procure the contract, resources are currently stretched procuring other services and commodities and the risk involved in being a sole player at the same time as a national contract is being procured could jeopardise the likelihood of achieving financial savings.

## **6 PERSONNEL/FINANCIAL IMPLICATIONS**

- 6.1 There are no personnel implications from this proposal.
- 6.2 The financial implications are difficult to quantify given the volatility of the market and the risks and rewards which may accrue from each of the options, all of which are unknown at this time.

## **7 LEGAL/POLICY IMPLICATIONS**

- 7.1 There are no legal or policy implications arising directly from the contents of this report.

## **8 SUSTAINABILITY**

- 8.1 Green energy options are to be included in the national procurement of electricity, although exact details are yet to be established. There are likely to be optional rates dependant upon percentage of green energy required.

## **9 CONCLUSIONS**

- 9.1 The option to participate in the national Supply of Electricity Contract to be procured by Procurement Scotland would be in accordance with the recommendations of the McClelland Review on Public Procurement in Scotland, by utilising a highly experienced utilities procurement resource within Procurement Scotland and would also allow Corporate Procurement to concentrate on other procurement projects.

## **10 RECOMMENDATIONS**

10.1 It is therefore recommended that Cabinet:-

- (i) considers the procurement options available for the supply of electricity;
- (ii) note the advantages / disadvantages associated with each option;
- (iii) agrees to participate in the national contract for the Supply of Electricity, to be procured by Procurement Scotland;
- (iv) otherwise, notes the contents of this report.

Elizabeth Morton  
**Depute Chief Executive/Executive Director of Corporate Support**

19<sup>th</sup> November, 2008

### **LIST OF BACKGROUND PAPERS**

- (1) Procurement Scotland letter of 18<sup>th</sup> August 2008
- (2) Procurement Scotland letter of 3<sup>rd</sup> October 2008
- (3) Procurement Scotland Agency Agreement Q&A
- (4) Procurement Scotland Risk Management Policy and Procedure

Members wishing further information should contact David Mitchell, Head of Legal, Procurement & Regulatory Services on Extension 6061

**PROCUREMENT SCOTLAND**

**AGENCY AGREEMENT**

relating to the supply of

**ELECTRICITY**

between

**(1) EAST AYRSHIRE COUNCIL,**

**-and-**

**(2) THE SCOTTISH MINISTERS**

## **AGENCY AGREEMENT**

**between**

**(1) EAST AYRSHIRE COUNCIL,**

**-and-**

**(2) THE SCOTTISH MINISTERS (THE “AUTHORITY”)**

### **WHEREAS**

- ONE The Authority is to enter into framework agreements with Suppliers of electricity in terms of which electricity is to be supplied to the Authority and to Scottish Public Bodies (as that term is defined in this Agency Agreement) in the period from 1 October 2009 to 30 September 2012;
- TWO The Authority requires the Client’s authorisation to purchase electricity and enter into Supply Arrangements on the Client’s behalf;
- THREE The Client agrees to appoint the Authority as its agent in this regard;
- FOUR The Client acknowledges that the Authority shall not be party to Supply Arrangements between the Client and the Suppliers and, in particular, shall not be responsible for payment of the Suppliers in respect of electricity supplied or the provision of any associated services to the Client;
- FIVE The Authority, acting through Procurement Scotland, the National Procurement Centre of Expertise, shall endeavour to achieve best value for the Client.

### **NOW IT IS HEREBY AGREED that:**

#### **1. Definitions and Interpretation**

- 1.1 In this Agency Agreement unless the context otherwise requires the following terms shall have the meanings given to them below:

“Agency Agreement” means this agency agreement between the Client and the Authority consisting of these clauses and the two Schedules attached;

“Arbitration Notice” has the meaning given to it in clause 13.5;

“Authority” means the Scottish Ministers;

“Authority’s Obligations” means the obligations listed in Schedule 1;

“Category Forum” means the forum of representatives of the Sectoral Centres of Expertise and certain Scottish Public Bodies established by the Authority in relation to the procurement of electricity;

“Client” means **David Mitchell, Head of Legal, Procurement and Regulatory Services, East Ayrshire Council, London Road HQ, Kilmarnock KA3 7BU;**

“Commencement Date” means the last date of signature of this Agency Agreement;

“Contracting Authority” means any contracting authority as defined in regulation 3 of the Public Contracts (Scotland) Regulations 2006 other than the Authority;

“Default” means any breach of the obligations of the Client (including but not limited to fundamental breach or breach of a fundamental term) or any other default, act, omission, negligence or statement of the Client in connection with or in relation to the subject-matter of this Agency Agreement;

“Existing Supply Arrangements” means any contractual arrangements in existence as at the Commencement Date to which the Client is party in terms of which a supplier of electricity supplies electricity to the Client;

“Notice” means any notice given in accordance with Clause 5 and “Notify” shall be construed accordingly;

“Party” means a party to this Agency Agreement;

“Risk Management Strategy” means the Authority’s risk management strategy for the procurement of electricity as that document may be amended from time to time;

“Schedule” means a schedule annexed to, and forming part of, this Agency Agreement;

“Scottish Public Body” means any of the following bodies; Scottish Non-Departmental Public Bodies, offices in the Scottish Administration which are not ministerial offices, cross- border public authorities within the meaning of section 88(5) of the Scotland Act 1998, the Scotland Office, the Scottish Parliamentary Corporate Body, councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994, Scottish joint fire boards or joint fire and rescue boards, Scottish joint police boards, Scottish National Park authorities, bodies registered as social landlords under the Housing (Scotland) Act 2001, Scottish health boards or special health boards, further or higher education institutions being fundable bodies within the meaning of section 6 of the Further and Higher Education (Scotland) Act 2005, any public body established by or under the Scotland Act 1998 or any Act of the Scottish Parliament, any association of or formed by one or more of the foregoing, bodies financed wholly or mainly by one or more of the foregoing, bodies subject to management supervision by one or more of the foregoing and bodies more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by one or more of the foregoing.

“Sectoral Centres of Expertise” means the Central Government Centre of Procurement Expertise, Scotland Excel, Advanced Procurement for Universities and Colleges, National Health Service Scotland National Procurement and any similar or successor bodies operating as centres of public procurement expertise in Scotland;

“Service Level Agreement” means the service level agreement agreed or to be agreed between the Authority and Suppliers;

“Supplier” means any supplier of electricity appointed by the Authority to supply electricity to the Authority and to Scottish Public Bodies;

“Supply Arrangements” means any contractual arrangements between the Client and a Supplier for the supply of or to facilitate the supply of electricity by the Supplier to the Client (but not including Existing Supply Arrangements);

“Supply Information” means the information listed in Schedule 2;

“Supply Period” means the period from 1 October 2009 or, if later, the date falling 6 months from Commencement Date to the Termination Date;

“Termination Date” means 30 September 2012; and

“Working Day” means a day other than a Saturday, Sunday or bank holiday in Scotland within the meaning of the Banking and Financial Dealings Act 1971.

1.2 The interpretation and construction of this Agency Agreement shall be subject to the following provisions:

- (a) Words importing the singular meaning include, where the context so admits, the plural and vice versa;
- (b) Words importing the masculine include the feminine and neuter;
- (c) Reference to a clause is a reference to the whole of that clause unless stated otherwise;
- (d) References to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument or re-enacted;
- (e) References to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assignees or transferees;
- (f) The words “include”, “includes” and “including” are to be construed as if they were immediately followed by the words “without limitation”;
- (g) Headings are included in this Agency Agreement for ease of reference only and shall not affect the interpretation or construction of this Agency Agreement; and
- (h) References to the relationship of agency shall include the relationship of mandate.

## **2. Appointment of Agent**

2.1 Subject to clauses 2.2 and 2.3, the Client appoints the Authority as its agent.

2.2 The Authority shall have authority as agent of the Client to:

- (a) conclude Supply Arrangements on the Client’s behalf (such Supply Arrangements to take effect in the Supply Period);
- (b) commit to advance purchases of electricity on the electricity market on the Client’s behalf (such purchases to take effect in the Supply Period);
- (c) sign any document necessary to give effect to the above; and
- (d) hold itself out as the Client’s agent and otherwise disclose the fact of its agency in respect of the above.

2.3 The Authority shall have no express or implied authority to act as the Client’s agent beyond that provided for in clause 2.2. Neither Party shall be authorised to act in the name of, or on behalf of, or otherwise bind the other Party save as expressly permitted by the terms of this Agency Agreement.

2.4 The Authority shall be paid no remuneration or commission in respect of its agency.

## **3. Period of Agreement**

This Agency Agreement shall commence on the Commencement Date and shall expire on the Termination Date, unless it is otherwise terminated in accordance with the provisions of this Agency Agreement, or otherwise terminated, or extended under clause 9.

## **4. Authority’s Obligations**

The Authority shall use reasonable endeavours to perform the Authority’s Obligations. For the avoidance of doubt, the Authority shall be under no obligation to make payment to or indemnify any Supplier in respect of the supply of electricity or the provision of any associated services to the Client.

## **5. Notices**

5.1 No notice or other communication from one Party to the other shall have any validity under this Agency Agreement unless made in writing by or on behalf of the Party concerned.

5.2 Any notice or other communication which is to be given by either Party to the other shall be given by letter (sent by hand, post or by the recorded or special delivery service), or by facsimile transmission or electronic mail. Such letters shall be addressed to the other Party in the manner referred to in clause 5.3. Provided the relevant communication is not returned as undelivered, and subject to clause 11.2, the Notice or communication shall be deemed to have been given 2 Working Days after the day on which the letter was posted, or 4 hours, in the case of electronic mail or facsimile transmission or sooner where the other Party acknowledges receipt of such letters, facsimile transmission or item of electronic mail (such acknowledgement not to include an acknowledgement given by means of an automated electronic process).

5.3 For the purposes of clause 5.2, the address of each Party shall be:

(a) For the Client:

**East Ayrshire Council**

**London Road HQ**

**Kilmarnock KA3 7BU**

For the attention of: **John Viviani, Asset Performance Manager**

Tel: **(01563) 576504**

Fax: **(01563) 554610**

Email: [john.viviani@east-ayrshire.gov.uk](mailto:john.viviani@east-ayrshire.gov.uk)

(b) For the Authority:

Procurement Scotland

The Scottish Government

Area 3-F North

Victoria Quay

Edinburgh

EH6 6QQ

For the attention of: Robert Leask, Portfolio Manager - Utilities

Tel: 0131 244 7220

Fax: 0131 244 0449

Email: [procurementutilities@scotland.gsi.gov.uk](mailto:procurementutilities@scotland.gsi.gov.uk)

5.4 Either Party may change its address for service by serving a Notice in accordance with this clause.

## **6. Provision of Information to the Authority and to Suppliers**

6.1 The Client shall, within one month of the date of its signature of this Agency Agreement, by Notice give to the Authority the Supply Information. The Client shall give the Supply Information to the Authority in any form reasonably requested by the Authority.

6.2 The Client shall by Notice give to the Authority updated Supply Information where reasonably requested to do so by the Authority or where there is a significant change to any Supply Information Notified to the Authority.

6.3 The Client shall furthermore provide the Authority with all such information as may reasonably be requested regarding the Supply Information, its Existing Supply Arrangements, any Supply Arrangements and/or any dispute with a Supplier.

6.4 Where the Client terminates any Supply Arrangements with effect prior to the Termination Date, or is in dispute with a Supplier and intends to raise court proceedings or other dispute resolution proceedings against the Supplier to enforce its rights under any Supply Arrangements, the Client shall give Notice of that fact to the Authority.

6.5 The Client shall cooperate with any Supplier who supplies or proposes to supply the Client with electricity with regards to verifying or improving the accuracy of the Supply Information. The Client shall give to any such Supplier the Supply Information where the Authority directs the Client by Notice to do so. The Client shall give the Supply Information to a Supplier in any form reasonably requested by the Authority.

## **7. Entire Agreement**

7.1 This Agency Agreement constitutes the entire agreement between the Parties in respect of the matters dealt with therein. This Agency Agreement supersedes all prior negotiations between the Parties and all representations and undertakings made by one Party to the other, whether written or oral.



7.2 In the event of, and only to the extent of, any conflict between the clauses of this Agency Agreement, any document referred to in those clauses and/or the Schedules, the conflict shall be resolved in accordance with the following order of precedence:

- (a) the clauses of this Agency Agreement;
- (b) the Schedules; and
- (c) any other document referred to in the clauses of this Agency Agreement.

## **8. Assignment**

8.1 The Client shall not assign, sub-contract or in any other way dispose of the Agency Agreement or any part of it without the prior written consent of the Authority (such consent not to be unreasonably withheld).

8.2 The Authority may assign, novate or otherwise dispose of its rights and obligations under the Agency Agreement or any part thereof to:

- (a) any Contracting Authority;
- (b) any other body established by the Crown or under statute; or
- (c) any private sector body;

which substantially performs any of the functions that had previously been performed by the Authority

## **9. Amendment**

9.1 Subject to clause 9.2, this Agency Agreement may be amended only by the written agreement of both Parties.

9.2 Without prejudice to the Client's rights under clause 11, the Authority may by Notice to the Client:

- (a) amend the Termination Date (provided that any extension shall be to a date not later than 30 September 2013); and/or
- (b) amend the Supply Information.

## **10. Warranties, Representations and Liability**

10.1 The Client warrants and represents that:

- (a) it has full capacity and authority and all necessary consents to appoint the Authority as its agent to the extent provided for in clause 2.2;
- (b) it has full capacity and authority and all necessary consents to enter into and perform its obligations under the Agency Agreement;
- (c) the Agency Agreement is executed by a duly authorised representative of the Client; and
- (d) it shall use reasonable endeavours to ensure that all information provided to the Authority under clause 6 shall be true, accurate and not misleading.

10.2 The Client shall indemnify the Authority and keep the Authority indemnified fully against all claims, proceedings, actions, damages, costs, expenses and any other liabilities which may arise out of, or in consequence of any breach by the Client of the warranties and representations in clause 10.1.

10.3 Neither Party excludes or limits liability to the other Party for:

- (a) fraud or fraudulent misrepresentation; or
- (b) death or personal injury caused by its negligence.

10.4 Subject to clause 10.3, in no event shall either Party be liable to the other for any:

- (a) loss of profits, business, revenue or goodwill; or
- (b) indirect or consequential loss or damage.

## 11. Termination

11.1 Each Party shall have the right to terminate the Agency Agreement at any time by giving 12 months' Notice to the other Party.

11.2 Any Notice to the Authority under clause 11.1 shall only be deemed to be given where the Authority acknowledges receipt of the letter, facsimile transmission or item of electronic mail containing such Notice (such acknowledgement not to include an acknowledgement given by means of an automated electronic process).

11.3 Without prejudice to the Authority's other rights of termination under this Agency Agreement or otherwise the Authority may terminate the Agency Agreement by Notice to the Client with immediate effect if the Client commits a Default and if:

- (a) the Client has not remedied the Default to the satisfaction of the Authority within 25 Working Days, or such other period as may be specified by the Authority, after issue of a Notice specifying the Default and requesting it to be remedied; or
- (b) the Default is a breach of clause 10.1 or otherwise a material breach of the Agency Agreement.

## 12. Governing Law and Jurisdiction

The Agency Agreement shall be governed by and interpreted in accordance with Scots law and the Parties submit to the jurisdiction of the Scottish courts (subject always to clause 13.3). Each Party irrevocably waives any objection which it might at any time have to the courts of Scotland being nominated as the forum to hear and decide any proceedings and to settle any disputes and agrees not to claim that the courts of Scotland are not a convenient or appropriate forum.

## 13. Dispute Resolution

13.1 The Parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of or in connection with the Agency Agreement within 20 Working Days of either Party Notifying the other of the dispute and such efforts shall involve the escalation of the dispute to **Depute Chief Executive** (or equivalent) for the Client and the Director of Procurement Scotland for the Authority.

13.2 Nothing in this dispute resolution procedure shall prevent the Parties from seeking from any court of competent jurisdiction an interim decree or order restraining the other Party from doing any act or compelling the other Party to do any act.

13.3 The Parties shall not institute court proceedings, save for proceedings of the kind mentioned in clause 13.2, until the procedures set out in clause 13.1 have been completed save that:

- (a) the Authority may at any time before court proceedings are commenced, serve a Notice on the Client requiring the dispute to be referred to and resolved by arbitration in accordance with clause 13.5;
- (b) if the Client intends to commence court proceedings, it shall serve Notice on the Authority of its intentions and the Authority shall have 15 Working Days following receipt of such Notice to serve a reply on the Client requiring the dispute to be referred to and resolved by arbitration in accordance with clause 13.5; and
- (c) the Client may request by Notice to the Authority that any dispute be referred and resolved by arbitration in accordance with clause 13.5, to which the Authority may consent as it sees fit.

13.4 The obligations of the Parties under this Agency Agreement shall not cease, or be suspended or delayed by the reference of a dispute to arbitration and the Parties shall comply fully with the requirements of this Agency Agreement at all times.

13.5 In the event that any arbitration proceedings are commenced pursuant to clause 13.3:

- (a) the arbitration shall be deemed to be an agreement to refer to arbitration within the meaning of the Arbitration (Scotland) Act 1894;
- (b) the Authority shall give a Notice of arbitration to the Client (the "Arbitration Notice") stating:
  - (i) that the dispute is referred to arbitration; and
  - (ii) providing details of the issues to be resolved;
- (c) the tribunal shall consist of a sole arbitrator to be agreed by the Parties;
- (d) if the Parties fail to agree the appointment of the arbitrator within 10 Working Days of the Arbitration Notice being issued by the Authority under clause 13.5(b) or if the person appointed is unable or unwilling to act, the arbitrator shall be nominated by the President of the Law Society of Scotland for the time being on the application of either Party; and
- (e) the arbitration proceedings shall be governed by, and interpreted in accordance with, Scots law.

**IN WITNESS WHEREOF** these presents typewritten on this and the preceding eight pages are executed as follows:

**SIGNED** for and on behalf of **East Ayrshire Council**

**SIGNED** for and on behalf of **the Scottish Ministers**

At.....

At.....

On.....

On.....

Signature.....

Signature.....

Name: **David Mitchell**

Name.....

Position: **Head of Legal, Procurement & Regulatory Services**

Position.....

Address: **London Road HQ, Kilmarnock KA3 7BU**

Address.....

**In the presence of**

**In the presence of**

Signature.....

Signature.....

Name .....

Name.....

Address.....

Address.....

This is Schedule 1 to the Agency Agreement between **East Ayrshire Council** and the Scottish Ministers.

## **SCHEDULE 1 – AUTHORITY’S OBLIGATIONS**

### **1. Supply of Electricity**

- 1.1 Subject to the Client’s compliance with the terms of this Agency Agreement, the Authority shall facilitate the supply to the Client of electricity for the Supply Period in accordance with the Risk Management Strategy.
- 1.2 The Authority shall make the current version of the Risk Management Strategy available to the Client on request.

### **2. Provision of Information**

The Authority shall give Notice to the Client of:

- (a) the names and contact details of the Suppliers (where these are not known to the Client as at the date of the Client’s signature of this Agency Agreement);
- (b) any Supply Arrangements made on the Client’s behalf (and the terms of such Supply Arrangements, where these are not known to the Client as at the date of the Client’s signature of this Agency Agreement);
- (c) any advance purchases of electricity on the electricity market made by the Authority on the Client’s behalf; and
- (d) any document signed on the Client’s behalf.

### **3. Supplier Management**

- 3.1 The Authority shall monitor and review the Suppliers’ compliance with the Service Level Agreement.
- 3.2 The Authority shall make the Service Level Agreement available to the Client on request.

### **4. Consultation with Category Forum**

The Authority shall consult with the Category Forum or, where such forum has been disbanded or is otherwise not active, with the Sectoral Centres of Expertise:

- (a) with regards to the development and revision of the Risk Management Strategy;
- (b) with regards to the development of the Service Level Agreement;
- (c) with regards to the supply of electricity to the Client and to other Scottish Public Bodies; and
- (d) where the Authority proposes to exercise its rights under clause 8.2 or 9.2 of the Agency Agreement.

This is Schedule 2 to the Agency Agreement between **East Ayrshire Council** and the Scottish Ministers.

## **SCHEDULE 2 – SUPPLY INFORMATION**

The Client shall provide details of specific supply points and consumption data for the following:

### **Supply Details**

1. Half Hourly metered sites
2. Non Half Hourly metered sites
3. Domestic Supplies
4. Non Metered