

**CABINET**

**SOLICITOR TO THE COUNCIL**

**15 NOVEMBER 2016**

**REPORT NO. LEG1614**

**KEY DECISION? NO**

**INDEMNITIES FOR SENIOR OFFICERS IN RESPECT OF SIGNING CONTRACT CERTIFICATES UNDER THE LOCAL GOVERNMENT (CONTRACTS) ACT 1997**

**SUMMARY**

This Report seeks Cabinet approval to provide for an indemnity from the Council in relation to the Chief Executive, the S151 Officer, or the Monitoring Officer in circumstances where the Officer signs a certificate under the Local Government (Contracts) Act 1997 following authorisation by Council, Cabinet, or a relevant Council Committee.

Authority to for the Chief Financial Officer to sign such a certificate in relation the Farnborough International Loan agreement which was approved by Cabinet on 28th July, 2015 as requested by Barclays Bank as the principal funder.

**RECOMMENDATIONS**

Cabinet is recommended to agree to

- (i) Provide for an indemnity where the Officer signs a contract certificate under the Local Government (Contracts) Act 1997 in the circumstances set out in this report
- (ii) Authorise the CFO to provide the certificate in respect of the FIL loan agreement

**1.0 BACKGROUND**

1.1 The Local Government (Contracts) Act 1997 was introduced to clarify the powers of Local Authorities to contract with third parties. It contains express provisions enabling Local Authorities to enter into contracts. It makes provision for some contracts to be certified. Certified contracts are protected from challenge (except judicial or audit review) and the Act also provides powers for Local Authorities to agree terms which will survive a setting aside of the main contract. The certification process ensures that the third party would be compensated where the contract is set aside. A certificate is generally required for contractors entering into private finance or a high risk contract with the Council. In this instance the certificate has

been required by Barclays who are the principal funder under the loan agreement

- 1.2 There are two types of contract that may require certification:-a contract for services (whether or not together with assets or goods) entered into for the purpose of discharging any of the functions of the council , or a contract entered into with a financier, or their insurers, where the financier has, in connection with the contract, made a loan to another party. These contracts must last at least five years. The Officers who can sign such a certificate are the Chief Officer with a statutory responsibility for finance (the Section 151 Officer) or any other statutory or non-statutory Chief Officer or Deputy Chief Officer. At the Council, the Strategic Directors are Chief Officers, and the Section 151 Officer and the Monitoring Officer who are Statutory Officers, would be treated as Deputy Chief Officers for these purposes. Any Officer signing a contracts certificate under the Act is potentially exposed to personal liability if the information certified turns out to be incorrect because they are signing them in their personal capacity. Officers called upon to sign such certificates in the case of their employment may be unwilling to do so without some certainty that their personal position is protected in doing so given the value of these contracts.

## **2.0 INDEMNITIES IN GENERAL**

- 2.1 The general position regarding indemnities is that Officers of the Local Authority are protected by Section 265 of the Public Health Act 1875 (as amended) which provides a form of statutory indemnity. Whilst this is a wide indemnity, it is not totally comprehensive. The indemnity provides immunity from liabilities, together with an indemnity for costs. However, in the case where a Council enters into a contract which it subsequently transpires is ultra-vires, then the activities of the Officer who certified the contract would not be within the scope of the indemnity because of the personal nature of the certificate. In normal areas of litigation actions would be brought against the Council as a corporate body and not against the Officer concerned. It is possible, however, to address this issue by issuing a contractual indemnity. The Local Authorities (Indemnities for Members and Officers) Order 2004 has clarified the position in relation to giving indemnities in these circumstances. They are permitted in relation to matters which have been authorised by the authority or where the Member or Officer is acting further to their powers or duties.
- 2.2 The Council has wide discretion as to terms and conditions upon which an Officer is appointed. This discretion enables an individual officer's contract of employment to include such a specific indemnity whilst they are acting in the course of their duties. There have been a number of high profile cases where contracts have been entered into in good faith by Officers on behalf of Authorities, and without negligence on behalf of the Officers, but they have been subsequently challenged in legal proceedings and have been overturned as ultra-vires. Such an indemnity would protect Officers from personal liability should such circumstances arise.
- 2.3 It is considered that such an indemnity, if properly drafted and issued with authority, would protect Officers even in cases where proceedings are subsequently challenged successfully.

2.4 In considering the question of whether to offer a contractual indemnity, the Council must clearly address itself to the reasonableness of doing so. If the Council wishes to enter into major contracts involving substantial expenditure or into joint funding arrangements to promote economic growth which will last for more than five years, then it is likely that as part of that process the Council will be dependent upon an Officer signing a certificate to enable it to enter into the contract. Officers run the risk of personal liability upon the issue of a certificate, and given this situation it is reasonable to afford the Officer concerned a contractual indemnity for his or her protection where the Council has itself resolved after proper consideration to enter into a particular contract and requires the Officer to give a certificate.

### **3.0 PROPOSED SPECIFIC INDEMNITY**

3.1 In order to avoid the need to consider this issue afresh each time a certificate is agreed, it is proposed that a general variation is made to the contract of Chief and Deputy Chief Officers as defined above to provide for an indemnity where a certificate is signed in respect of a major contract which has been duly authorised by the Council.

3.2 It would also be appropriate to indemnify the Officer in respect of the reasonable cost of being separately advised on the legal implications of signing a certificate.

3.3 The proposed indemnity would only apply to contracts for which Members had agreed a certificate can be given. Authorisation is also sought for the Chief Financial Officer to give a certificate for the FIL agreement as requested by Barclays.

### **4.0 FINANCIAL AND LEGAL IMPLICATIONS**

4.1 The number of certificates issued under this legislation is always likely to be relatively low. The Council has never been called upon to issue one in the past but, we will be required to give one in connection with the FIL project. Any Officer who had received proper legal and financial advice in their personal capacity is unlikely to be prepared to sign such a certificate on behalf of the Authority without indemnity. Proper legal and financial advice, both to the individual Officer concerned and the Authority, should ensure that the likelihood of any indemnity ever being called upon is minimised, but since the effect of the legislation is to potentially prevent claims which would otherwise be made against the Authority, were costs to arise under an indemnity, these are likely simply to replace liabilities that the Council would otherwise be facing under a normal contractual position. In other words, the giving of an indemnity under these circumstances is unlikely to expose the Council to additional legal and financial risk assuming proper processes are followed.

### **5.0 EQUALITY & HUMAN RESOURCES IMPLICATIONS**

5.1 There are not considered to be any specific equality implications arising out of this Report. It is considered that with the provisions and safeguards set

out above, it would be reasonable to extend an indemnity to certain Officers as specified and vary their contracts of employment accordingly.

## **6.0 RISK MANAGEMENT IMPLICATIONS**

6.1 These are dealt with in Section 4 above.

## **7.0 CONCLUSIONS**

7.1 Cabinet is advised that the issues raised in this report will facilitate arrangements for the Council to enter into the FIL loan agreement and for any future major contracts.

**Ann Greaves**  
**Solicitor to the Council**

**7<sup>th</sup> November 2016**