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Award

## **Agreement further to Section 106 Town and Country Planning Act 1990 (as amended) relating to construction of a 2FE Primary School on a development at Wretchwick Way, Bicester, Oxfordshire**

Oxfordshire County Council

F15: Voluntary ex ante transparency notice

Notice identifier: 2022/S 000-006682

Procurement identifier (OCID): ocds-h6vhtk-0320b4

Published 11 March 2022, 11:20am

### **Section I: Contracting authority/entity**

#### **I.1) Name and addresses**

Oxfordshire County Council

County Hall

Oxford

OX1 1ND

#### **Contact**

Ms Amy Keylock

#### **Email**

[Amy.Keylock@Oxfordshire.gov.uk](mailto:Amy.Keylock@Oxfordshire.gov.uk)

#### **Country**

United Kingdom

**NUTS code**

UKJ14 - Oxfordshire

**Internet address(es)**

Main address

<http://www.oxfordshire.gov.uk>

Buyer's address

<http://www.oxfordshire.gov.uk>

**I.4) Type of the contracting authority**

Regional or local authority

**I.5) Main activity**

General public services

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**Section II: Object**

**II.1) Scope of the procurement**

**II.1.1) Title**

Agreement further to Section 106 Town and Country Planning Act 1990 (as amended) relating to construction of a 2FE Primary School on a development at Wretchwick Way, Bicester, Oxfordshire

Reference number

DN601800

**II.1.2) Main CPV code**

- 45214200 - Construction work for school buildings

**II.1.3) Type of contract**

## Works

### **II.1.4) Short description**

The proposed agreement will be a planning obligation pursuant to Section 106 of the Town and Country Planning Act 1990 relating to proposed development at Wretchwick Way, Bicester (“the Development”) The agreement will contain a series of commitments made by the developer (the “Developer”), named as the contractor/concessionaire in section V.2.3), conditional on implementation of the Development (entirely at the discretion of the Developer) and progress of the Development, for delivery of mitigating measures including the design and construction of a primary school. The Developer also has the choice of providing land to Oxfordshire County Council plus funding so that the County Council may design and construct the primary schools instead.

### **II.1.6) Information about lots**

This contract is divided into lots: No

### **II.1.7) Total value of the procurement (excluding VAT)**

Value excluding VAT: £11,166,876

## **II.2) Description**

### **II.2.2) Additional CPV code(s)**

- 45214200 - Construction work for school buildings

### **II.2.3) Place of performance**

NUTS codes

- UKJ14 - Oxfordshire

### **II.2.4) Description of the procurement**

The proposed agreement will be a planning obligation pursuant to Section 106 of the Town and Country Planning Act 1990 relating to proposed development at Wretchwick Way, Bicester (“the Development”) The agreement will contain a series of commitments made by the developer (the “Developer”), named as the contractor/concessionaire in section V.2.3), conditional on implementation of the Development (entirely at the discretion of the Developer) and progress of the Development, for delivery of mitigating measures including the design and construction of a primary school. The Developer also has the choice of providing land to Oxfordshire County Council plus funding so that the County Council may design and construct the primary school instead.

Further information:

- It is understood that the contract award is taking place under EU directive 2014/24/EU. Although it is noted that the relevant UK legislation is the Public Contracts Regulations 2015 as the procedure was not commenced prior to 31st December 2020 (end of the transition period) so it is not governed by the EU directive 2014/24/EU but just by the Public Contracts Regulations 2015 (which of course transposed directive 2014/24/EU into UK Law) as amended by the Public Procurement (Amendments)(EU Exit) Regulations 2020.
- The contract (Section 106 Agreement) has been awarded jointly to: Redrow Homes Ltd and Wates Developments Ltd.
- Start and end date of the contract: not known as it is conditional on the grant of planning permission by Cherwell District Council and the commencement of development by the Developer. Oxfordshire County Council intends to conclude the proposed agreement as soon as practicable after the operation of a standstill period of at least 10 days from the day after the date of publication of this notice.

**II.2.11) Information about options**

Options: No

**II.2.13) Information about European Union Funds**

The procurement is related to a project and/or programme financed by European Union funds: No

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## Section IV. Procedure

### IV.1) Description

#### IV.1.1) Type of procedure

Award of a contract without prior publication of a call for competition in the cases listed below

- The procurement falls outside the scope of application of the regulations

Explanation:

There is proposed an agreement (“the Section 106 agreement”) in which the Developer is afforded the choice of providing:

a. land for a primary school and funding for its construction which does not amount to a public works contract because there is no contract with the Developer for works to be undertaken;

b. the Developer undertaking the construction of a new primary schools (2 FE) and then passing the new primary school, as built, to the County Council which will not constitute public works contracts for the following reasons:

It is considered that the agreement where option b is adopted for the new primary school to be built by the Developer, will not constitute public works contracts for the following reasons:

1. The Section 106 agreement is required to be entered into so as to render the Development acceptable in planning terms. The core rationale for this requirement is that the provision of the school is necessary to enable the grant of planning permission and they are considered to be in compliance with Regulations 122 Community Infrastructure Levy Regulations 2010. Thus, the essential objective of the Section 106 Agreement is for a planning purpose in accordance with the statutory planning regime. It was endorsed in *Faraday Development Ltd v West Berkshire Council and St Modwen Developments Ltd* (“the Faraday Case) following the principle established in *Helmut Muller GmbH v Bundesanstalt fur Immobilienaufgaben-Helmut Muller*) that an agreement was not a public works contract where the contracting authority’s primary objective was of a planning nature under the statutory regime.

2. An essential ingredient of a public works contract is that it is for pecuniary interest – see Regulation 2 of the Public Contract Regulations 2015. The Advocate General’s opinion in *European Commission v Kingdom of Spain* seeks to provide a definitive statement of the meaning of “pecuniary interest” concluding that it implies that the contracting authority

needs to use its own funds either directly or indirectly. No direct financing will be provided by the contracting authority in respect of the Section 106 agreement. Indirect financing occurs when the contracting authority suffers economic detriment as a result of the method of funding the works. No economic detriment will be sustained by the contracting authority in consequence of entering into the section 106 agreement. The primary school works will be delivered in kind rather than through the provision of funding to the contracting authority.

3. Under the Section 106 Agreement there will be no liability for the primary school to be delivered unless the Development is implemented and it is entirely at the discretion of the Developer as to whether the Development is implemented. There is no obligation on the Developer in the S106 agreement to implement the Development. Thus the Section 106 agreement corresponds to the Section 106 agreement considered in the case of R (Midlands Co-operative Society Ltd) v Birmingham City Council (1) Tesco Stores Ltd (2) as approved in the Faraday case (paragraph 52) on the basis that the agreement considered in the Midlands Co-operative Society case contained no obligation contingent or otherwise for the carrying out of development.

Notes:

- a. The estimated aggregate value of the works further to the Section 106 agreement which the Developer is to undertake is £11,166,876.
- b. The County Council will not contribute any money towards the building of the primary school
- c. In the Section 106 Agreement the Developer will agree to undertake a transparent and impartial procurement process for the primary school works.

#### **IV.1.8) Information about the Government Procurement Agreement (GPA)**

The procurement is covered by the Government Procurement Agreement: No

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## **Section V. Award of contract/concession**

A contract/lot is awarded: Yes

### **V.2) Award of contract/concession**

#### **V.2.1) Date of conclusion of the contract**

9 March 2022

#### **V.2.2) Information about tenders**

The contract has been awarded to a group of economic operators: No

#### **V.2.3) Name and address of the contractor/concessionaire**

Redrow Homes

Redrow House, St Davids Park

Flintshire

CH5 3RX

Country

United Kingdom

NUTS code

- UKJ14 - Oxfordshire

National registration number

01990710

The contractor/concessionaire is an SME

No

#### **V.2.4) Information on value of contract/lot/concession (excluding VAT)**

Total value of the contract/lot/concession: £11,166,876

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## **Section V. Award of contract/concession**

A contract/lot is awarded: Yes

### **V.2) Award of contract/concession**

#### **V.2.1) Date of conclusion of the contract**

9 March 2022

#### **V.2.2) Information about tenders**

The contract has been awarded to a group of economic operators: No

#### **V.2.3) Name and address of the contractor/concessionaire**

Wates Developments Limited

Wates House, Wates House

Leatherhead

KT22 7SW

Country

United Kingdom

NUTS code

- UKJ2 - Surrey, East and West Sussex

National registration number

00441484

The contractor/concessionaire is an SME

No

#### **V.2.4) Information on value of contract/lot/concession (excluding VAT)**

Total value of the contract/lot/concession: £11,166,876

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## **Section VI. Complementary information**

### **VI.4) Procedures for review**

#### **VI.4.1) Review body**

High Court of England and Wales

Royal Courts of Justice

London

WC1A 2LL

Country

United Kingdom