APPENDIX 1

ISLE OF WIGHT COUNCIL – PROCUREMENT ISSUE

TERMS OF REFERENCE

I was instructed by the Chief Executive of the Isle of Wight Council to review the Isle of Wight Council's procurement of consultancy in relation to Undercliff Drive, Ventnor.

In particular, my terms of reference were to review / examine the following issues:

1. the way in which consultancy services were commissioned in respect of the scheme, including whether their procurement contravened European law, UK law or the Council's internal procedures and the risk of the Council being challenged on the issue by European or UK Courts, aggrieved contractors or the Council's stakeholders;
2. whether the current situation with regard to the procurement safe in legal terms and if not, what action needs to be taken, including removing any risks of challenge whilst if possible enabling the scheme to continue to timetable;
3. whether the Council's current procedures and practices are sufficiently robust to prevent similar failures;
4. the learning and development opportunities that stem from the review, including actions required to prevent such failures in future; and
5. what (if any) potential action should be taken in respect of officers or members of the Council who were involved in the procurement.

EXECUTIVE SUMMARY

The Council acted either in ignorance or disregard of procurement rules and regulations and the Council's Constitution. The Council is, therefore, unable to demonstrate value for money in using public resources. The governance arrangements exposed by the failure to comply with statutory requirements fell short of the standards the public has a right to expect. Procurement regulations were not complied with and, in my opinion, the appointment of HPR was unlawful. The Council failed to secure its duty to achieve best value and the failure to enter into a lawful and fair contractual relationship with HPR has exposed the Council to unnecessary risk.

AMBIT OF THE REVIEW

For the purposes of this review, I have been supplied with information by the Isle of Wight Council that I have considered and taken into account. This includes a range of correspondence, minutes of meetings, as well as reports and other information.

BACKGROUND AND ADVICE

Due to the value and nature of the Project, the procurement of consultancy in relation to Undercliff Drive, Ventnor, was covered by the Public Services Contracts Regulations 1993. This means that the project had to be advertised in the Official Journal and the rules and procedures set out in the Regulations had to be complied with by the Council. The various EU procurement regulations also laid down certain general principles which the courts use in interpreting the regulations, in particular equality of treatment of bidders and transparency.

I have had the benefit of considering the advice from Addleshaw Goddard, solicitors, on the appointment of HPR and particularly the obligations arising from compliance with EU procurement law and the advice both on derogation from the law and public procurement and the enforcement of public procurement law. That advice is appended to this report. It is sound, robust and comprehensive. I do not disagree with it, and I cannot add to it.

OTHER LEGAL OBLIGATIONS

The framework for decision-making by the Council is governed by the regulations and principles set out in the EU procurement regime. This is also embodied in UK law. The Council's Constitution, required by the Local Government Act 2000, includes the Contract Procedure Rules / Contract Standing Orders. In additional, other obligations can be found in general UK law relating to, amongst other things, the operation of Council decision-making, contract standing orders and the like.

Constitutional requirements

All principle local authorities are required to have a Constitution and the Isle of Wight is no exception. It has a Constitution and that Constitution contains certain procedure rules and requirements, including Contract Standing Orders. This is in accordance with Section 135 Local Government Act 1972. The Constitution also lays out principles for decision-making, including (not surprisingly) that decisions should be taken on the basis of due consideration and professional advice of officers, presumptions in favour of openness, accountability and transparency with options being considered and explained and reasons given. The Council has to follow its own Constitution or maybe challenged for an illegal act for failing to follow its own rules. The rules also exist to avoid the Council (including members and officers) being exposed to unnecessary risks. In addition, the Constitution ensures the Council achieves its duty of best value, ie using public resources for the best possible use. Failure to follow its own rules can at least suggest a perception, if not reality, of failure to deliver some or all of these duties, obligations or requirements.

I have been supplied with a variety of minutes of various meetings at which the issue of Undercliff Drive was discussed, specifically the minutes of the Executive Committee on 5th April 2001, 12th April 2001, a report to the Executive Committee on 2nd October 2001, the minutes of the Executive Committee on 2nd October 2001, a report to the Executive Committee on 5th May 2004 and the minutes from that meeting.

I have been unable to find a specific minute (which I would expect to be from the Executive rather than Full Council) authorising the entering into a contract with HPR. I note that the current constitution does contain a specific delegation to the Strategic Director of Economic Development and Regeneration that in an emergency s/he may take such action as is necessary to protect life or preserve property, etc (paragraph 6.3). This is fairly standard and to be expected. However, given that the contract, as is now clear, should have followed the proper EU procedures, the decision to award the contract should have gone through the proper decision-making process of the Council. Therefore, I raise the question as to whether or not the proper governance arrangements were followed. Had they been followed, it could

be argued that the production of a report requiring authority would have triggered the need to seek appropriate legal advice and would have, therefore, driven the issue of EU procurement rules compliance. Therefore, as well as having appropriate governance arrangements, including rules and procedures, an obligation (and, where necessary, policing and enforcement) of requirements making officers take matters before Members can be beneficial in that it forces them to address issues that they may otherwise either prefer to avoid, or that do not cross their mind.

Section 135 Local Government Act 1972

Section 135 of the Local Government Act 1972 requires that an authority shall make standing orders in respect of contracts.

Section 135(4) states that a person entering into a contract with a local authority is not bound to enquire whether the standing orders have been complied with and non-compliance does not invalidate the contract.

Therefore, non-compliance with contract standing orders does not impact or effect the contractual position between the local authority and HPR.

Procurement rules of Isle of Wight Council

I have been provided with the contract standing orders in place at the time when this contract was let, on or around April 2001. I have been supplied with no information to suggest that there was compliance with these. It is clear that whilst they set out a regime of what must be done for various contracts of varying values, the requirements of the EU procurement regime, when it applies, must be given primacy. This is self-evident. Given that the requirements of the EU procurement regime were not followed, by definition the contract standing orders and, therefore, the Council's constitution were not also followed.

By virtue of Section 135(4), this does not prejudice the contractual relationship between HPR and the Isle of Wight Council. That does not, however, detract from the breach by the Council.

I should add that I sought a copy of the contract in question, but have been advised that there does not appear to be one. It is self-evident that that is a serious omission and concern and a matter that should never have been allowed to arise. Regardless of failure to follow due procedure, a proper contract should have been put in place to protect the interests of both parties and from the public authority's point of view, the public resources being deployed through the contractual arrangements.

The Statutory Officers

Mention must also be made of the statutory responsibilities of the Chief Financial Officer and Monitoring Officer.

The Chief Financial Officer has a duty to make a report where the local authority:

a. has made or is about to make a decision that involves or would involve the authority in incurring expenditure that is unlawful; or
b. has taken or is about to take a course of action which, if pursued to its conclusion, would be unlawful or likely to cause a deficiency on the part of the authority; or
c. is about to enter an item of account the entry of which is unlawful.

The Monitoring Officer must also issue a report where any proposal, decision or omission by the authority has given rise to or is likely to or would give rise to:

a. contravention of any enactment or rule of law or any code of practice made or approved by or under any enactment; or
b. any maladministration or injustice as mentioned in the Local Government Act 1974.

I will not run through the process of making a report but there are different arrangements where the functions are Executive / non-Executive and there are obligations to consult.

It is important to be aware of these statutory obligations because in the circumstances laid out in the legal advice from Addleshaw Goddard, which I concur with, their advice is clear and it is difficult to see how a different position can be taken, other than that the authority has acted unlawfully and, financial expenditure incurred may well have been unlawful / unjustified.

REMEDIES

Failure to follow the EU procurement rules creates a risk of disputes which can lead to project delays. Ultimately, there is a risk of legal action from aggrieved bidders or by the European Commission. It is fair to say that there have only been a handful of cases although they appear to be increasing.

As already stated, Section 135(4) means that although the Council failed to comply with its contract standing orders in awarding this contract, the contractor is not prejudiced by that failure as the contract is not invalidated as a result. The failure, therefore, to comply with the contract standing orders is simply a matter of the local authority's failure to comply with its own statutory duties, and is very much part of the same chain of events as the failure to comply with the EU procurement procedures.

Mention must also be made of the Audit Commission, although I think it is unlikely that they will wish to take statutory action. They could issue an advisory notice under Section 19A Audit Commission Act 1998. However, as the accounts for the period in question will no doubt have been signed off and closed, I believe this is unlikely. Nevertheless, they clearly have a role and an interest in this matter, and the possibility of them either pursuing a matter on behalf of an elector and/or conducting an investigation and/or issuing a Public Interest Report and/or referring to the matter in the Annual Management Letter should not be ignored. Managing the relationship with the Audit Commission in relation to this particular matter will be important and they will need to have confidence that lessons have been learned and positive action has been taken. For that reason, they should be brought "on board" with whatever action follows.

WHO MAY SUE?

The most significant breach relates to EU procurement rules. The duty to comply with the EU rules is owed to service providers. This means a person / organisation who sought, or who seeks to be or who would have wished to have been, the person / organisation to whom a contract is awarded. This would cover bidders, potential bidders or bidders who have been rejected at some point in the process.

It is unclear whether the UK courts will also allow challenges by persons not explicitly mentioned in the regulations but who have a sufficient interest in the matter, for example public bodies interested in the framework arrangements.

In relation to other matters, under domestic law I suppose it is conceivable that somebody could attempt to judicially review the Isle of Wight Council but I think the time limits are difficult (although it could be argued that this matter has only just come into the public domain) and I am not sure what the remedy would be as the decision is not at issue. More likely is an attempt to either judicially review the Monitoring Officer / Chief Financial Officer for failing to issue a statutory report and/or action by the Audit Commission. These matters are, therefore, covered in my answer to Question 3.

TIME LIMITS

Generally, actions must be brought promptly and in any event in relation to alleged breaches of EU Procurement rules within three months from when the grounds for bringing the proceedings first arose. The court may extend this time limit if there is good reason to do so, for example ignorance of the facts giving rise to a possible claim.

The principal remedies are:

- to set aside a decision or action which is in breach of the regulations;
- suspension of the award procedure or the implementation of decisions;
- damages. There must be a sufficient causal link between the faults and the loss suffered. This usually means that the aggrieved firm needs to show it would have won the contract.

In relation to the other matters, time limits for judicial review on the substantive issues has passed, but potentially judicial review against the statutory officers for failing to discharge their duties may lie. Because the accounts are, the Audit Commission's statutory powers may be limited, but their ability to make reference in the Annual Management Letter should not be overlooked.

QUESTIONS

My terms of reference were to review / examine the following issues, which I looked at issue by issue:

1. *the way in which consultancy services were commissioned in respect of the scheme, including whether their procurement contravened European law, UK law or the Council's internal procedures and the risk of the Council being challenged on the issue by European or UK Courts, aggrieved contractors or the Council's stakeholders.*

   I concur with the view of Addleshaw Goodard that the way in which the consultancy services were commissioned was in contravention of EU law. The EU procurement regime is embodied in UK law. Therefore, such actions were also a breach of UK law. I also consider that the Council's contract procedure rules were breached. I can find no evidence to suggest that the decision-making process was in accordance with the Council's constitution. A breach of this is also a breach of UK law.

   The risk of challenge by an aggrieved contractor through either the European or UK courts does exist. However, because time limits have now expired I believe the risk is low, albeit that the awareness or knowledge of the facts giving rise to a possible claim may not yet be considered to be in the public domain and therefore the point may be arguable. Probably of more concern, is an attempted challenge from a third party claiming interest to the matter and/or pursuit via the Monitoring Officer / Chief

Financial Officer's statutory obligations and/or the Audit Commission's various powers including (but not limited to) to issue an Advisory Notice.

2. *Is the current situation with regard to the procurement safe in legal terms and if not, what action needs to be taken, including removing any risks of challenge whilst if possible enabling the scheme to continue to timetable?*

I believe discussions should commence as a matter of urgency, with appropriate external legal and external professional advice (officers with previous involvement should not be involved in the future procurement) involving the Audit Commission in a full, frank and transparent basis to put this matter onto a lawful and proper platform. Possible actions could be:

a. to at least ratify the current position by Members and approve future action to remedy any deficiencies. This could be undertaken as part of a joint Monitoring Officer / Chief Financial Officer report under their statutory powers or otherwise (this might be a topic to discuss with the Audit Commission);
b. a properly documented and valid decision-making process for the next steps is absolutely vital;
c. I concur with the view of Addleshaw Goddard that the Council should, subject to further comprehensive professional and legal advice, enter into a framework agreement as that seems the most appropriate / suitable approach fully tendered in accordance with the law.

3. *Whether the Council's current procedures and practices are sufficiently robust to prevent similar failures?*

I have had the benefit of considering the report presented to the Policy Commission for Economy, Tourism, Regeneration and Transport on 8th December 2006 on Contract Awarding, Completion and Management. Attached to this was the report of the QP Group on a procurement compliance assessment. The content of this report seem very sensible and many of the concerns / issues raised by this particular procurement are addressed within this report.

However, this report only goes so far.

At the time when this procurement was entered into, there were in place rules, requirements and procedures, most specifically the EU procurement procedure rules. However, they were not followed.

Replacing one set of rules with another set of rules and/or recognising the requirements only goes so far.

Therefore, whilst I entirely endorse the report, I would stress very heavily the requirement not only to revamp and review procurement procedures and rules, but to determine who is to be trained, who is to procure, how those rules and requirements are to be policed and who is to enforce them. Procurement frequently touches upon many departments within a local authority. It is frequently not seen as a legal function (although compliance with procurement law is fundamental to any procurement's success). I note that the Council is to establish a procurement unit as a proactive authority-wide service provider to ensure compliance. Clearly they will need to work closely with the Council's lawyers. There will also need to be a clear understanding that procurement is a corporate activity. Whatever the needs of the

service may or may not be, adherence to standards, requirements, procedures, the law, etc cannot be sacrificed.

Therefore, whilst I would fully endorse the report of QP Group and indeed the covering report, I believe that there needs to be a far stronger consideration of who has the right to make procurement decisions and who is in overall control of procurement. In this particular case, and I am surmising from the information before me, it would appear that those responsible for undertaking work in relation to this very serious incident, decided that this was the appropriate course to be taken and pursued it. Whilst I am not recommending radical restructuring of the Isle of Wight Council, there is a question to be asked about whether or not these new arrangements would prevent that situation occurring again?

If officers still have the authority to undertake procurements such as this, how will the central procurement team know what they are or are not doing? For Members to be confident that this will not happen again, Members will need to know that those responsible for policing and enforcing (and enforcement is important) the rules, the procedures, the law, etc, have both the status and knowledge to say no, whatever the officer / Directorate's urgency / status. This is about leadership, embedding and culture – not just rules (or new rules).

4. *The learning and development opportunities that stem from the review, including actions required to prevent such failures in future.*

I think there is a range of learning points from this.

a. Compliance with the law is not a nuisance but a necessity.
b. Urgency is not an excuse for illegality.
c. Effective governance, ie having matters such as this put through the decision-making process with reports containing legal implications paragraphs et al, might well have cured the deficiency in 2001.
d. It is not just a matter of producing rules and requirements, the rules were there (the EU procurement rules) they were not complied with. There needs to be enforcement, policing and, I am afraid to say, sanctions for those who do not comply particularly where the consequences are serious.
e. There are clearly some cultural issues as evidence by, for example, people asking whether the particular officer has found a way around the law. It is about delivering objectives and compliance with the law. The distinction I always draw is the difference between tax avoidance and tax evasion. One is quite legitimate and provides valuable income for a whole profession (accountants), the other is unlawful.

5. *What (if any) potential action should be taken in respect of officers or members of the Council who were involved in the procurement.*

From the information I have seen, no members were directly involved in the procurement decisions which I have criticised in this report. Therefore, there is no action that could or should be taken in relation to members.

In relation to officers, it would appear that the award of the contract to HPR took place in or around April 2001.

The picture painted is one of failure to follow straightforward due process and a lack of "corporateness" on the part of, what I suspect, what was certain key individuals in

an environment and culture that allowed this to happen. It is difficult at this stage to allocate individual responsibility given the problems, both due to the passage of time and the fact that any action would clearly need to be evidence based.

The job of the local authority officer is to give advice to elected members, to the Council at large, to its Executive, committees and sub-committees and to other officers as required. It is also to carry out the work of the Council under the direction and control of the authority, its Executive, its committees and sub-committees and any other person to whom authority has been properly delegated. Above all, senior officers occupy a position of trust.

I have taken the view, given the information I have been asked to assess, which is obviously, by definition, at quite a high level, that I would only consider chief officers and statutory officers in terms of their role in this matter. Therefore, I can offer no judgement as to either the performance or culpability of officers at a lower level. That, I feel, is a matter more appropriately considered and addressed by the Isle of Wight Council and the senior managers in accordance with their appropriate employment procedures.

Officers called on to provide information, to advise or to help formulate advice owe a duty to discharge those responsibilities with reasonable care. They own this duty to the Council as a whole. Failure to discharge this duty by, for example, withholding or misrepresenting material information is misconduct. It would be misconduct for an officer to remain silent or otherwise inactive if a failure to report or otherwise disclose information might prejudice the authority in whose interests s/he is required to act.

The key date is the letting of the contract in or around April 2001. The issues that arose are set out in the legal advice from Addleshaw Goddard and relate to issues of legality as well as overall project management / leadership. The current Monitoring Officer and, therefore, the person whom any focus would be upon for legality, took up the post with the Isle of Wight Council on the 9th September 2002 after this particular contract was entered into. The current Strategic Director took up his post on 4th August 2003, also after the current contract was entered into.

Neither of these two officers were the responsible officer at the time when the contract was entered into, nor were they responsible for decisions made, which I now regard as incorrect, flawed and/or illegal.

Therefore, in relation to the letting of the contract in or around 2001, there are, in my view, no grounds for disciplinary action against these two officers. The incidents complaints of, the flawed judgements made in the procurement, whether they were made on the legal side (or through lack of intervention on the legal side) or on the "client" side for failing to involve legal adequately and/or to follow the due rules and processes, were made by individuals who are no longer employed by the Isle of Wight Council.

I also must, however, make comment about events during intervening years, particularly after the time when the advice from Addleshaw Goddard was received (Appendix 1), which was 25th January 2005. Since that date, although legal advice has been received that suggests, clearly and in my view correctly, that the contract was unlawful, there has been no retendering as advised by Addleshaw Goddard. There has been, to the best of my knowledge no statutory report from either the Monitoring Officer or Chief Financial Officer either in relation to the illegality in 2001 and ongoing illegal position since, and/or the Council's use of resources in terms of the contractual situation in place since 2001 (with all the deficiencies that are well rehearsed in the legal advice from Addleshaw Goodard).

I am not in a position to indicate whether or not disciplinary action should flow as a result of the failure to issue statutory reports and/or retender the contract in 2005. I do, however, feel that I must raise it as an issue and concern. It is then, I believe, a matter for the Isle of Wight Council to undertake whatever processes, if they believe they are appropriate, are necessary. Those processes, by law, will have to follow certain specified routes and I do not feel it appropriate to go any further for the purposes of this report. I acknowledge that the Isle of Wight Council may consider the issue and quite properly decide that the processes are not appropriate, not necessary, not required or will serve no purpose. Those making that assessment will, I am sure, have the benefit of considerably greater detailed knowledge and understanding of the facts and issues.

Nevertheless, the question about what was (or, more accurately, what was not) done following the receipt of such categorical legal advice in 2005 is a matter that I do believe the Isle of Wight Council needs to consider.

Therefore, in relation to the letting of the contract, I have come to the conclusion that not only is there no officer against whom any potential action should be taken, but there is no serving officer against whom action could be taken. It may be that members of the Council and the public at large on the Island consider that former employees of the Council should be called to account for their involvement in the matter, but that is simply not possible. Any disciplinary action could only be taken against current employees of the Council. The timeframe of events in relation to this unfortunate circumstance is such that the two principle officers or posts against whom potential liability might attach are currently occupied by postholders who were not in post at the time when the fundamental flaws or errors were made.

This leaves open the question of whether any action could be taken against serving officers in relation to the issues raised by the situation in 2005. That can only be addressed by further investigation by the Isle of Wight Council under the appropriate formal procedures.

CONCLUSION

I would like to thank particularly Bob Streets, the Chief Internal Auditor, at the Isle of Wight Council for his courtesy and promptness in giving me the information that I sought and additional information when requested.

I have badged this report as confidential. It is a matter for the Chief Executive to decide how and whether he makes it public, that is entirely his decision and a matter that I am happy to leave with him.

I am more than happy to discuss any particular part or aspect of this report with either Council officers or Members. If there is any further information that I have not taken into account in producing this report that the Isle of Wight Council would wish me to review, I am happy to review this report in the light of that supplementary information.

Mark R Heath
Solicitor to the Council and Monitoring Officer
Southampton City Council
9th February 2007

LEGAL ADVICE FROM ADDLESHAW GODDARD

Thank you for your instructions to advise the Isle of Wight District Council in connection with the award of a contract to High-Point Rendel Limited ("HPR") for the provision of engineering services to the Isle of Wight District Council ("IOW") in or around April 2001 ("the Contract"). My advice set out below concerns principally the application of the law relating to public procurement to the contract between IOW and HPR. I have not considered whether there has been any breach of local government law, misrepresentation, fraud or breach of the Council's internal procedures in the course of the award of the contract. In addition, I do not advise on any tax aspect of the contract.

1. Introduction

The law on public procurement applies whenever IOW seeks offers in relation to a contract for engineering services, other than a contract excluded by the general or threshold exclusions in the Public Service Contract Regulations 1993 ("the Regulations"). Whenever IOW proposes to enter into a services contract governed by the law on public procurement, IOW must comply with the Regulations and the overriding principles of equal treatment, non-discrimination, proportionality, respect for the individual's rights and the duty of transparency. Failure to comply with the Regulations and the law of public procurement may lead to the suspension of the procurement process, the setting aside of the Contract and the award of damages to affect third parties.

2. Exclusions

The Contract does not fall within the scope of any of the general exclusions to the application of the Regulations.

The Contract does not fall within the scope of the threshold exclusion to the application of the Regulations if at the time IOW formed the intention to seek offers in relation to the provision of engineering services the estimated value of the contract (net of VAT) for the services exceeded £144,456. The estimated value of the Contract is the value of the consideration that IOW expects to give under the contract. The Regulations provide that where IOW has a single requirement for services and a number of public service contracts are to be entered into to fulfil IOW's requirement, the estimated value of the contract for the purposes of the threshold exclusion is the aggregate value of the consideration that IOW expects to give under each of the contracts.

I assume for the purpose of this advice that the comment in Nick Gallin's undated Report to Directors Group on the Provision of Professional Engineering Services ("Gallin") that the estimated value of the Contract exceeded £144,456 (net of VAT) - the threshold at the relevant time - is correct and that the Contract did not fall within the threshold exclusion in the Regulations.

3. Obligations

IOW must (amongst other obligations):

(a) use the correct procedure for the procurement of the contract;

(b) publicise its intention to seek offers in relation to the public services contract by placing a contract notice in the Official journal of the EU;

(c) only treat a service provider as ineligible to tender for a contract or to be selected to negotiate a contract on the specific grounds set out in the Regulations;

(d) determine which service providers may tender for the contract by reference to the contractor's economic and financial standing, and ability and technical capacity;

(e) conduct the procurement process with regard to the overriding principles;

(f) if requested, debrief unsuccessful service providers; and

(g) publish a contract award notice

where the Regulations apply to the procurement of the Contract. The Contract was awarded, I understand, to HPR without regard to any of the obligations set out above. At first sight, this is a clear an unambiguous breach of the Regulations and law of public procurement and a breach of the duty to service providers (i.e. a person who seeks, sought or would have wished to be the person to whom a public service contract is awarded) to comply with the EC public procurement directives and the UK regulations made under the directives, as interpreted in accordance with the relevant EC and UK case law. I deal with the consequences of such a breach below.

4. **Derogation From The Law On Public Procurement**

It is suggested in Gallin that the European Parliament procedures (sic) on public procurement are not followed because of

- the specialist nature of the project
- the need to progress matters swiftly
- the need to employ a consultant who has an expert knowledge of coastal and landslide engineering, and an intimate knowledge gained in undertaking studies of the Undercliff area over the last 10 years.

None of the criteria listed in Gallin entitled IOW to ignore its obligations to award the contract in accordance with the law on public procurement. In practice, if IOW proposes to procure works, services or supplies that are not within the scope of the general or turnover exclusions from the regulations it is unlikely that IOW will be able to avoid the need to follow the procedures in the current UK public procurement regulations and directives or the procedures in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the Public Contracts Directive") which is to be implemented into UK law before 31 January 2006.

Neither the specialist nature of the project or the need to employ a consultant who has an expert knowledge of coastal and landslide engineering, and an intimate knowledge gained in undertaking studies of the Undercliff area over the last 10 years have any effect on IOW's obligation to procure the Contract in accordance with the law of public procurement. These factors may, and should properly, be considered by IOW in the course of a procurement process, but they do not enable IOW to fail to comply with the law on public procurement.

The Regulations and the Public Contracts Directive both make provision for the use of the negotiated procurement procedure in an emergency. The Regulations provide that IOW may use the negotiated procedure when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by and not

attributable to IOW, the mandatory time limits in the procurement procedures cannot be followed. Can IOW use this provision in the Regulations and if so, how must IOW conduct the procurement of the Contract?

The right to use the negotiated procedure in an emergency must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying this derogation lies on IOW (Commission v. Italian Republic). The need to obtain advice on the stability of the ground after the catastrophic failure of the carriageway on 2 April was undoubtedly urgent. However, HPR undertook a cliff risk assessment and reported to the Environment and Tourism Select Committee on the effects of the prolonged Autumn/Winter rainfall and severe frost on the Island's coastline on 19 January 2001, approximately 10 weeks before the catastrophic failure. HPR, as Gallin states, had been involved in undertaking studies of the Undercliff area over the last 10 years. In view of the strict interpretation of the derogation, IOW may not be able to successfully argue first that the reasons of extreme urgency applied to the procurement of the original study and report or that when the reasons of extreme urgency arose, they were brought about by events unforeseeable to IOW.

In addition, it appears that HPR were asked to provide services to IOW immediately after the catastrophic failure of the carriageway at Undercliff and also on at least one later date. HPR presented a draft report to the Executive of IOW on 2 October 2001. I do not know when this report was commissioned, when the work was undertaken and if it formed part of the original instructions to HPR. IOW may find it difficult to discharge the burden of proving that the exceptional circumstances justifying the derogation were still present 6 months after the catastrophic event, particularly if the instructions to HPR and their report concerned less immediate dangers and more long term remedial works.

Even if IOW could rely on the derogation, how should IOW have conducted the procurement process? Events of extreme urgency entitle IOW to use the negotiated procedure, giving IOW flexibility and a short timescale for procurement; they do not entitle IOW to ignore the law of public procurement altogether. The derogation from the Regulations in the case of extreme urgency entitles IOW:

- to forgo publicising its intention to seek offers in relation to the contract by the publication of a contract notice; and
- to ignore the stipulation that a minimum of 3 contractors must be invited to negotiate the contract.

IOW must still use the correct criteria to exclude persons with whom it will negotiate and make the selection of the person with whom it is to negotiate in accordance with the criteria laid down in the Regulations. In addition, IOW must publish a contract award notice to the Official Journal of the European Union no later than 48 days after the award of a contract. If IOW was entitled to use the extreme urgency derogation, at the least it failed to publish a contract award notice it failed to comply with the Regulations that apply when the derogation is granted when it awarded the Contract to HPR. The and by so doing breached public procurement law and the Regulations.

5. The Enforcement of Public Procurement Law

IOW owes a duty to service providers to comply with the EC public procurement directives and the UK regulations made under the directives, as interpreted in accordance with the relevant EC and UK case law. A service provider and in certain circumstances a person from a country that is a signatory to the Government

Procurement Agreement or a person who seeks, sought or would have wished to be the person to whom the Contract is awarded and in each case who, in consequence of the breach, suffers or risks suffering loss or damage may enforce IOW's obligations to comply with public procurements law.

Proceedings to enforce IOW's obligations must be brought promptly and in any event within three months from the date when the grounds for bringing the proceeding first arose unless a court considers that the there is good reason for extending the period in which proceedings may be brought. A challenge may be made as soon as there has been a breach of IOW's obligations which may cause a service provider loss. Acting promptly may require proceedings to be brought within the three-month period. A right to start proceedings may and usually will arise before the process for the award of the contract has been completed.

A service provider must start proceedings as soon as it is aware of all the facts that they need to know in order to start proceedings. A service provider may not wait to see whether they are successful before looking for grounds on which to challenge the process under which they have failed. In addition, a service provider may not delay commencing proceedings because such proceedings may impair his relationship with the contracting authority and may jeopardise his prospects of securing a public contract.

Lack of legal advice is not a good reason for failing to bring proceedings against IOW where a service provider is appraised of all the material facts of which it needs to be aware before bringing proceedings. It may be difficult to decide when grounds for bringing proceedings in respect of an anticipated breach first arise. Such grounds arise when there is a real risk of a breach of IOW's obligations taking place, for example, when IOW asked to meet with HPR to discuss a prospective services contract.

A service provider must inform IOW of the breach or apprehended breach of the duty owed to the service provider and of the service provider's intention to bring proceedings in the High Court before doing so. As the Contract has been entered into, the High Court cannot order any remedy other than an award of damages in respect of IOW's breach of its obligations.

It is very doubtful whether proceedings could now be brought by a service provider against IOW for breach of the Regulations because of the passage of time since an initial breach of the Regulations may have occurred. IOW should, as a matter of prudence check that there are no continuing breaches of public procurement law that present a present risk of challenge, that any decision or action of IOW for which there is doubtful authority is ratified and that in the event that a matter comes to the attention of the District Auditor, IOW can provide evidence of a properly documented valid decision making process.

6. **Are HPR Disqualified From Involvement In Future Procurements?**

IOW's duty to respect the principle of equal treatment of tenderers is of the essence of the directives on public procurement. IOW must guarantee that there is no discrimination among tenderers. If a party that carries out preliminary work can also win the main contract, there is a risk that it may orientate the preparatory work in a way that would be favourable to it. In the view of Advocate General Mr. Philippe Leger in *Fabricom SA v The Belgian Government*, it is practically impossible to envisage a system that would make it possible to guarantee that information and experience gained by HPR in the preparatory phase will not be used by HPR when it submits a tender for the main contract.

The principle of equal treatment requires that HPR must know in advance what they must or must not do if they wish to obtain a public contract. HPR must be made aware of the consequence if involvement in the preparatory work for a public tender is going to disqualify them from tendering for the public contract, so that it can be free to decide whether to be involved in the preparatory work or the main contract.

Although the matter is not settled finally by the European Court of Justice, it is suggested that the best means of resolving this dilemma is not for HPR to be prevented from taking part in further procurements when it has been involved in the preparatory work, but to require it to show that it does not benefit from an unjustified advantage of a nature to distort the normal conditions of competition for the award of the contract in question. This matter can be resolved at prequalification questionnaire stage.

IOW should also enter into a framework contract with a supplier chosen after a competition held in accordance with public procurement law under which IOW can immediately call for services of the type rendered by HPR in April 2001 in events of extreme urgency. The Public Contracts Directive makes provision for such framework contracts. Although the Directive has yet to be implemented in the UK through regulations, we know of the new procedures in the Public Contracts Directive are being used already. The Office of Government Commerce which is currently conducting consultation into the form the new regulations should take, has no objection to the new framework procedure in the Public Contracts Directive being used prior to the promulgation the Public Contracts Regulations.

7. **Summary**

IOW very likely breached public procurement law in awarding the contract for the provision of engineering services to HPR immediately after 1 April 2001, and may have done so before and after this date.

It is unlikely that the award will be successfully challenged now, due to the passage of time from the probable date of the breach.

HPR may be involved in future procurements where it has carried out preparatory work for the main contract, provided that its involvement cannot distort competition for the main contract.

IOW should enter into a framework agreement after a call for competition for the provision of engineering services that can be delivered to IOW at short notice.

I hope that this advice is beneficial to IOW and I apologise for the delay in providing it to you. I shall, of course be more than happy to discuss the content of this email with you.

25th January 2005

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