

Notes of an informal briefing of the Chairman and Spokesperson of the Cabinet Scrutiny Committee held on Wednesday, 15 July 2009.

Present: Mrs T Dean (Chairman) and Mr R F Manning.

Officers: Mr P Gilroy, Chief Executive, Ms T Oliver, Director of Strategic Development and Public Access, Mr M Banks, Barrister, Contracts and Procurement Team

Also Present: Mr P Sass, Head of Democratic Services and Local Leadership and Mrs A Taylor, Research Officer to the Cabinet Scrutiny Committee.

Apologies: Mr L Christie

Introduction

The Chairman and Spokespeople of the Committee invited the Chief Executive, the Director of Strategic Development and Public Access and the Barrister, Contracts and Procurement Team to this informal briefing to discuss the process behind the decision taken to extend the Kent TV Contract.

Discussion

Mrs Dean explained that in the Minutes of Cabinet Scrutiny Committee of Jan 26th 2009 Mr Chard had stated that no decision had yet been taken about the Kent TV contract. In June 2009, following a meeting of the KentTV Board, Mr Chittenden reported to Mrs Dean that the decision to extend the contract until March 2010 had been taken by the Chief Executive, and that as far as she was aware no member notification had appeared in between those two dates. She asked for the process to be outlined.

Ms Oliver confirmed that she had sought advice from Mr Banks during March about how to tackle the ending of the contract in the absence of a Cabinet decision. A meeting was held with the Chief Executive, the Monitoring Officer, the Director of Strategic Development and Public Access, the Barrister (Contracts and Procurement Team), Head of Democratic Services and Local Leadership, Democratic Services Manager (Executive) to confirm the way forward and a discussion was held with the Chief Executive in April 2009 at which point a decision was made to extend the contract. There was no written note of this meeting. A new contract, which apart from the date was identical to the original, was drawn up dated 18.06.09, but had not been signed by the Chief Executive until 15.07.09 (i.e. the date of the current meeting). The cost to the authority of extending the contract was £350k, which was within the 2009/10 approved Budget.

Mr Sass confirmed that this decision did not fall within the category of a 'key decision'. Mrs Dean queried whether it might have come under the category of a key decision "which affected a significant number of people in more than one division."

In response to questions, Mr Banks explained that the Kent TV contract did not contain a specific provision for extension and, therefore, in order to effect the desired outcome of the contract expiring in March 2010, instead of August 2009, a new contract was needed on the same terms. Because this was a new contract, the procurement rules in the document "Spending the Council's Money" normally required a competitive process to be

undertaken for a contract of this value. However, Mr Banks explained that provided the Chief Executive agreed that “special circumstances” existed, it was possible to avoid a competitive tendering process.

Ms Oliver had provided Mr Gilroy at their April meeting with a briefing setting out the “special circumstances”, as supplied by Mr Banks on March 23rd 2009 Banks and added to by Ms Oliver. They were:

- (i) it was only a two year contract and it is only a seven month revision and the contract will be exposed to a competitive re-tendering exercise within 31 months of the original contract being entered into,*
- (ii) it is believed that the incumbent will provide the additional services at the existing contract rates and consequently the cost of the additional services is not expected to exceed 20% of the original contract sum,*
- (iii) while it was always intended to review the success of the two year pilot before deciding to continue the project, the importance of waiting until the pilot is well advanced before completing the review which will inform the decision whether to continue the service, and the importance of maintaining continuity if this ground-breaking new service is to continue, were not fully appreciated at the time the original contract was let,*
- (iv) it has only now become apparent that it would be beneficial to amalgamate the Kent TV contract with the What's On contract and the latter runs for seven months beyond the Kent TV contract until 31 March, 2010, and*
- (v) the only practical solution to avoid major inconvenience is to negotiate a seven month revision with the incumbent.*
- (vi) Kent TV employs 11 local Kent residents and supports the Kent creative industry by commissioning content from local production companies*
- (vii) Kent TV is also offering support to local businesses and voluntary organisations during difficult economic times by raising awareness of their services and promoting Kent*

Concerns about the perception of the Chief Executive taking this decision were raised by Mrs Dean and Mr Manning, i.e. that Mr Gilroy was the Chairman of the Kent TV Board as well as Chief Executive of the Council.

In response, Mr Banks stated that he did not believe that the Chief Executive had any conflict of interest that precluded him from signing the contract. Mr Manning asked Mr Banks whether he had considered public perception of the issue when giving his advice. Mr Banks replied that he had not. Later Mrs Dean and Mr Manning returned to this point with Mr Banks who responded that public perception had not been his concern.

Mrs Dean asked whether Mr Gilroy had taken any advice on his having a potential conflict of interest, or whether the issue of a potential conflict of interest had been raised with him at any time by any officer of the County Council. Mr Gilroy said that he had not asked for advice, and the issue of conflict of interest had not been broached with him. He said that a Cabinet decision should have been taken in Spring to resolve the issue of what the County Council intended to do at the expiry of the contract. In the absence of such a decision he had been obliged to take action to ensure a smooth ending of the contract. He did not consider that the decision involved a large amount of money or for a long period of time. He did not consider his position as Chair of KentTV Board constituted a conflict of interest.

Mrs Dean asked whether, had Mr Gilroy chosen not to make the decision himself, the process would have been to refer the matter up for a decision by the Leader of the Council or the Cabinet member responsible. Mr Banks confirmed that this was the case.

Ms Oliver explained that, had the contract not been extended beyond August 2009, the competitive tendering process would have had to commence at least 6 months before the contract expiry date. The effect of the contract being extended meant that the tender documentation would be more robust, because there would have been more intelligence available from the pilot phase to inform the re-tendering exercise. Mr Manning asked whether provision should have been made for the contract evaluation review to commence in March and this was confirmed. Ms Oliver also said that the redundancy of 11 people had to be considered.

Mrs Dean asked when the results of the review would be available and Mrs Oliver said it was intended to submit a report to the September meeting of the Cabinet, detailing the outcome of the review, which would then be followed by a competitive tendering exercise, with a further report to the Cabinet Member in December 2009 to award a new contract.

There was a brief discussion between Mrs Dean and Mr Manning following the informal briefing, where the following questions were discussed

- Whether special circumstances really existed to justify avoiding the competition rules by authorising the contract extension.
- Whilst the officers stated that the procedures were correct, whether proper consideration was given to the perception and sensitivity of the contract, and Mr Gilroy's position as Chairman of the KentTV Board, in deciding that the Chief Executive should take the decisions both that special circumstances existed, and that the contract should be extended. In particular, whether the Chief Executive had a conflict of interest.
- Concern was expressed about the lack of information provided to non-executive members between January and June 09 about what was happening with the Kent TV contract, particularly the views of the Cabinet Members as to the proposed extension.

Supplementary Guidance from the Barrister (Contracts and Procurement Team)

Advice was requested on whether there was a potential conflict of interest between the role of Chairman of the Board of Governors of Kent TV and the role of Managing Director of the Strategic Development Unit which includes Kent TV.

In my opinion there is no conflict of interest between the two roles.

Kent TV is a unit within KCC. It is not a company, nor does it have any other separate legal status. Following a competitive tendering exercise KCC appointed Ten Alps plc to provide TV and website services to KCC.

The Kent TV contract, between KCC and Ten Alps plc, includes the Kent TV Board of Governors – Terms of Reference:

"A Board of Governors will be appointed by KCC with a chair and a deputy. The chair will be a KCC Officer, but the membership will not be limited to KCC employees. The main function of the Board is to oversee the editorial and strategic remit of the Channel.

Appointments will be made on a non-political basis and the board will consist of people with an interest or level of expertise in Kent and/or the media. Initially, members of the Board will be appointed for a two year period. Appointment and removal to the Board will be entirely at the discretion of KCC.

The Board will be independent and will, essentially, represent the interests of everyone in the county.

It will be supportive of the Channel and its management, rather than being merely a regulator. Although KCC is ultimately responsible for all operational and strategic aspects of the Channel, the Board will exercise editorial control, in conjunction with the KCC Project Director.

Specifically, it will be responsible for:

- a) Creating and developing the Editorial Specification;
- b) Monitoring the Channel's performance against the objectives, criteria and standards set out in this Agreement;
- c) Ensuring that the Site and the Channel deliver good value to the people of Kent;
- d) Ensuring that the Site and the Channel are fair and impartial;
- e) Arbitrating on complaints from Visitors, in the last resort, if the complainant is not satisfied with the response by the Service Provider.

The Board will have an advisory role on the appointment of the senior staff on the Channel, KCC having the ultimate right of veto, in accordance with Clause 9.

The Board will not have a direct control of the day to day running of the Channel but will be expected to offer advice on all aspects of the Channel, particularly in relation to matters of policy and strategy. Unless otherwise indicated by KCC, the Service Provider shall implement all decisions and directions of the Board in relation to the Channel.

The Board will meet at least quarterly and additionally as may be determined by the Chair. The Board will have the ability to call emergency meetings to discuss specific issues. The Director of Programmes will be required to attend at meetings of the Board, unless otherwise advised.

The Board may if it desires meet at KCC's premises and receive administrative and secretarial assistance from KCC. The public will be able to contact the Board via the secretary.

Minutes of the meetings of the Board will be published."

Importantly the main function of the Board is to oversee the editorial and strategic remit of the Channel. Conversely, a Director of Programmes is appointed by, and employed by, Ten Alps plc as overall manager and editor of the Channel. Ten Alps plc is operating under a tight remit and is required to provide the services in accordance with a specification and a detailed budget. Further checks and balances are provided by the appointment of the Director of the Strategic Development Unit as the Kent TV Project Director responsible for liaising with the Director of Programmes. The Kent TV contract, clause 8.2 provides:

"The KCC Project Director and the Director of Programmes shall meet regularly (and not less than once a month) to review the operation of the Site and the Channel and the conduct of the Budget and to discuss future plans, programmes and strategies for the Site and the Channel. In particular the Parties shall assess the extent to which the Site and the Channel are meeting the requirements of the Specifications. In addition, the Director of Programmes shall attend the meetings of the Board".

For the purposes of this advice I have also considered KCC's Officers' Code of Conduct, which forms Appendix 6, Part 2 of the Constitution. It provides that an officer involved in the tendering process and dealing with contractors must be clear about the separation of client and contractor roles and that senior officers who have both a client and contractor responsibility must be aware of the need for accountability and openness. Consequently an officer involved in the tendering process is not prohibited from dealing with contractors but must be clear about the separation of client and contractor roles. That is self evident for an officer of your seniority and experience. In any event, while as Managing Director of the Strategic Development Unit you have a client role, as Chairman of the Board of Governors of Kent TV you do not have a role as contractor. Ten Alps plc is the contractor and provides the services, holds the budget and controls expenditure; the Board of Governors do not.

For completeness I would also mention that the Local Government Act, 1972, s.117, requires an officer to declare any pecuniary interest he has in contracts to be let. You have no pecuniary interest in Ten Alps plc or the Kent TV contract.

Michael Banks
Barrister
Contracts & Procurement Team