

11 March 2015 – Full Council

Question Three from Mr Dixon to the Leader of the Council, Mrs Brown

Public question to the leader of the council

As leader of Arun District Council, you said in a public statement relating to the Cabinet Office mystery shopper investigation, published on the council's web site on 8th April 2014 that: *"The Cabinet Office has conceded that the information given to Mr Dixon was untrue"*.

I was concerned that the council might have wilfully misrepresented the Cabinet Office in order to deceive the public – which would amount to a serious abuse of the public's trust relating to a major public procurement project. So I challenged Richard Heaton, Permanent Secretary and First Parliamentary Counsel to the Cabinet Office, to clarify the Cabinet Office position.

On 10th February 2015, the Permanent Secretary responded saying: *"In particular, it is clear to me that we did not provide information to you that was untrue."* I have attached Mr Heaton's letter for information.

Who should the public believe – you or the Permanent Secretary?

Leader of the Council:

A bundle of papers have been circulated to Members, officers and the public. These papers will also be shown on the overhead screen.

The dates and times of each of these communications are key to this public question. All these communications were given to Mr Dixon on 7.11.2014 in response to his Freedom of Information Request.

The key parts of the communications have been marked with grey highlighting. In view of the number of communications I suggest at this stage you just read the dates and highlighted text. These communications as redacted, will also be put on the Public Question Time File held by Democratic Services



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[REDACTED]
Arun District Council
Arun Civic Centre
Maltravers Road
Littlehampton
BN17 5LF

3 February 2014

Dear [REDACTED],

Re: Cabinet Office Mystery Shopper Referral MS560 – Arun District Council Reference 2006/S 173-183906

We have received an anonymous referral under the Cabinet Office's Mystery Shopper Scheme concerning the award in 2006 of a contract for over £100m relating to a building development in Littlehampton. In the annex which follows I have set out details of the Cabinet Office's role in public procurement and of our Mystery Shopper Scheme.

In this case we have been given feedback concerning the fact that the Council was recently advised that the project is now valued at £25-40m. Our mystery shopper contends that this is a substantial deviation from the winning bid and that it constitutes a breach in the EU Directives.

It would be helpful to have your comments on the feedback we received, especially on the point concerning the apparent difference between the advertised value of the contract and its new estimated value, by Monday 17 February 2014. If the issues raised are complex we welcome the opportunity to discuss them, usually over the telephone. We will then develop recommendations.

We normally publish the results of these investigations on line and we will discuss the wording of our report with you before doing so.

Yours sincerely

[original signed]

Olaf Dudley
Procurement Policy Advisor

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Annex: Cabinet Office procurement policy and the Mystery Shopper Scheme.

Leader of the Council:

The Process of such discussion forms a right of response, and is a material part of the process. The Cabinet Office did not follow this part of the process and responded to the mystery shopper without giving the Council the opportunity to respond first.

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Cabinet Office procurement policy and the Mystery Shopper Scheme

The Cabinet Office is responsible for UK procurement policy and providing advice and information to public authorities on procurement issues. We are responsible for the negotiation of the EU Public Procurement Directives and their transposition into law in England, Wales and Northern Ireland through the Public Contracts Regulations. We are also responsible for co-ordinating responses to UK procurement infraction cases. These are complaints brought by the European Commission where it is believed that a contracting authority may not have met their legal obligations under the EU rules.

In addition we are responsible for ensuring that public procurement is based on the principle of obtaining best value for money. We publish documents, such as policy action notes and guidance documents, on our website which set out the UK approaches to public procurement. We therefore take a close interest in public procurement issues across the full range of contracting authorities, which are those bodies, including in local government, to which the public procurement regime applies. The mystery shopper scheme was launched by the Prime Minister and Minister for the Cabinet Office in February 2011. This was part of a series of announcements about the reform of public procurement and measures to open it up to greater participation by small and medium sized enterprises. The Prime Minister and Minister for the Cabinet Office were supported in making those announcements by Baroness Eaton who was then chair of the Local Government Group. On 9 March 2012 further announcements were made by the Minister for the Cabinet Office, including the extension of the mystery shopper scheme to supply chain issues.

The Government is committed to the simplification and streamlining of public procurement. It is also keen to open up public supply markets to a wide range of suppliers including SMEs and social enterprises. It is also committed to adopt procurement approaches that will support growth, in particular by signalling future demand before procurement exercises start and by removing barriers to new entrants to markets

The mystery shopper scheme allows suppliers and other individuals to raise concerns about public procurements. They may do this on an anonymous basis if they wish. It is an informal scheme and it does not advocate for the supplier who raised the concern. Any intervention we make is with a view to improving procurement practice and seeking clarification of actions taken in particular procurements. If a supplier is contemplating or undertaking formal action to dispute a procurement decision, for example through the courts or by means of a referral to the European Commission, we do not investigate. As part of our commitment to transparency results of cases and any recommendations we may make are published on the Cabinet Office website.

You can find more details of the scope and remit of the mystery shopper scheme at <http://www.cabinetoffice.gov.uk/resource-library/mystery-shopper-scope-and-remit> and details of published cases at <http://www.cabinetoffice.gov.uk/resource-library/mystery-shopper-results> .

From: Wendy Ashenden-Bax

Sent: 13 February 2014 19:57

To: 'olaf.dudley@cabinet-office.gsi.gov.uk'

Cc: Nigel Lynn; Nigel Croad; Alan Peach; [REDACTED] Karl Roberts; [REDACTED]

Subject: Draft Cabinet Office

Dear Mr Dudley,

Thank you for your letter of 3rd February 2014 addressed to this Council's Procurement Officer.

With reference to our telephone conversation on 5th February 2014, I note that the scheme the Cabinet Office is enquiring about is the Bognor Regis Town Centre re-generation project, not a project in Littlehampton.

Following an OJEU procurement this Council entered into a Development Agreement with St Modwen on the 11.12.07 for the regeneration of two sites in the town centre of Bognor Regis with a build value of £105m. The OJEC notice was published on 11.11.2005, ref OJ/S S217 11/11/2005 213992-2005-EN. The description of the contract in the OJEC notice was "The sites have potential for a range of uses including leisure, retail, offices, community and health facilities". Due to the recession and the Health Trust and WSCC no longer needing a substantial part of the accommodation that it was intended would be provided for their use, and the fact that alternative pre-lets have not yet been secured, the scheme has not progressed to planning applications being submitted.

On 11.01.12 the Council considered the matter and decided to explore what would need to change to make the scheme viable. The following is the Resolution of Council at Minute 556 Page 380 Resolution (3) the Council write to St Modwen indicating the Council's willingness to enter negotiations surrounding an extended and revised development agreement based on the emerging proposals on the understanding that the Council and St Modwen both recognise that a new OJEU procedure would need to be undertaken if the outcomes would be beyond the boundaries of the existing procurement process. Members considered this matter again on 6.11.13 Minute 363 on Page 281. I attach copies of both the above minutes for your information. As you will see from the attached minutes, the Council and St Modwen have kept all members and the public informed of the reasons this project has not advanced and the work that is being undertaken to identify the options available for the future.

The current position is that the Development Agreement was extended to 31st December 2014 for the scheme as originally tendered and the work regarding the negotiations and evaluation of options is still ongoing. One of those options is a new OJEU process but that is only one of the options.

[REDACTED]

The Council is not in a position at the moment to make a firm decision on the options under consideration, but when it is, the matter will be considered again by the Council's Members.

The project as set out in the Development Agreement is estimated to create 500 new jobs in Bognor Regis. Average unemployment in Bognor Regis between July 2011 and June 2012 was 5.8% (reported in Hansard 19.10.12) whereas the average for the south-east was 2.5% and nationally 3.8%. If the Cabinet Office is able to introduce the Council to any funding or assistance that would help to provide much needed re-generation for Bognor Regis that would be very much appreciated.

Yours sincerely

Wendy Ashenden-Bax
Head of Legal and Administration – Monitoring Officer

From: Dudley, Olaf - Cabinet Office [Restricted] [mailto:Olaf.Dudley@cabinet-office.gsi.gov.uk]
Sent: 14 February 2014 17:11
To: Wendy Ashenden-Bax
Cc: Mystery Shopper - Cabinet Office [Restricted]
Subject: [UNCLASSIFIED] RE: Draft Cabinet Office

Dear Ms Ashenden-Bax,

Many thanks for your response.

I hope to be able to review this next week and will be in touch in due course.

Best wishes

Olaf Dudley



Olaf Dudley

Procurement Policy Advisor, Procurement Policy Team

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Leader of the Council:

The Cabinet Office did not contact the Council again until 1.4.2014.

Leader of the Council:

This was the next communication received from the Cabinet Office on this matter after the acknowledgement of 14.2.2014.

From: Dudley, Olaf - Cabinet Office [mailto:Olaf.Dudley@cabinet-office.gsi.gov.uk]

Sent: 01 April 2014 10:12

To: Wendy Ashenden-Bax

Cc: Mystery Shopper - Cabinet Office

Subject: MS 560 - Arun District Council - Mystery Shopper referral

Dear Ms Ashenden-Bax,

With apologies for the delay, thank you for your e-mail of 13 February regarding the Bognor Regis town centre re-generation project.

We note the Council has extended the development agreement until 31 December 2014 and that a number of options, including but not limited to a new OJEU process, are being investigated.

Clearly development agreement contracts are case-specific and usually complex. However, the winning bidder was chosen as a result of a procurement process that ended more than 6 years ago, in a very different economic and financial environment, and for different requirements and intended outcomes. In the interest of achieving best value for money we therefore recommend that the Council should use this opportunity to re-visit the market by initiating a new OJEU process.

Can we ask that you update us when a decision has been made.

Yours sincerely,

Olaf Dudley



Olaf Dudley

Procurement Policy Advisor, Procurement Policy Team

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From: Wendy Ashenden-Bax
Sent: 01 April 2014 11:13
To: 'Dudley, Olaf - Cabinet Office'
Subject: RE: MS 560 - Arun District Council - Mystery Shopper referral

Dear Mr Olaf,

Thank you for your email of 1.4.14. I confirm that I will make all officers and members who are dealing with this matter aware of the Cabinet Office recommendation that a new OLEU process be initiated. The Council is currently contractually bound to the terms of the Development Agreement until 31 December 2014, so the Cabinet Office recommendation cannot be instigated without further work. The work referred to in my email to you of 13.2.14 is still ongoing.

As requested I will update you when a decision has been made by the Council.

Kind regards

Wendy Ashenden-Bax
Head of Legal and Administration – Monitoring Officer

Leader of the Council:

The purpose of making officers and Members aware of this communication was to enable the Council to consider and give its response to the Cabinet Office.

From: Wendy Ashenden-Bax
Sent: 04 April 2014 11:02
To: 'olaf.dudley@cabinet-office.gsi.gov.uk'
Subject: Arun Regeneration Disaster

Dear Mr Dudley,

Further to our telephone conversation this morning I am very disappointed to hear that the Cabinet Office released the information in your email to me of 1.4.14 to the Mystery Shopper before I had been given sufficient opportunity to respond to you with the Council's collective comments on this matter to take into account the contractual arrangement the Council is still in and the related commercial confidentiality and also to make it very clear that this Council has not breached the OJEU regulations.

I ask that you read the email below and the contents of the hyperlink which have occurred as a direct result of the premature release of the Cabinet Office Response which has been to the serious detriment of this Council, the Council's joint venture partner St Modwen and the Leader of this Council. I anticipate that the information on the hyperlink will be changing as time goes on, so I attach a snap shot that I made yesterday evening.

As discussed, I will telephone you again to discuss a way forward when I have spoken with the Council's Chief Executive and the Leader of this Council.

Kind regards

Wendy Ashenden-Bax
Head of Legal and Administration – Monitoring Officer

From: Gillianannabrown@aol.com [mailto:Gillianannabrown@aol.com]

Sent: 04 April 2014 16:40

To: joe.taylor@cabinet-office.gsi.gov.uk; Wendy Ashenden-Bax; Nigel Lynn; gibbn@parliament.uk;

Subject: Arun regeneration disaster

Dear Mr Taylor

I refer to your conversation with Nick Gibb MP this afternoon.

I cannot understand why Mr Dudley, a procurement policy advisor from the cabinet office, has released information to Mr Dixon, under the Mystery shopper scheme before my Council has been given the opportunity to respond with the Council's collective comments on this matter to take into account the contractual arrangement the Council is still in and the related commercial confidentiality. We would also have made it very clear that we have not breached the OJEU regulations.

As a direct result of this premature release of the Cabinet Office response it has had a serious detrimental effect on the reputation of my Council, myself as Leader and of our joint venture partner St Modwen. We now have some extremely damaging and untrue allegations being made, on web sites and also passed on to the press, suggesting that we have breached the terms of the OJEU on tendering regulations. The reputation of my Council is extremely important to me and this one sided release from your office has seriously undermined it.

I make the following request on behalf of Arun District Council.
That the Cabinet Office immediately:

Retract its Response in its entirety and inform Mr Dixon and the Bognor Regis Civic Society that it has done this.

Inform Mr Dixon and the Bognor Regis Civic Society that the Cabinet Office has not investigated Arun District Council and the Cabinet Office does not have any evidence that Arun District Council has breached the OJEU tendering regulations.

Inform Mr Dixon and the Bognor Regis Civic Society that the Resolutions of Arun District Council in minute 556 on 11.1.12 and Minute 363 on 6.11.13 were for the extension of the period during which a planning application is to be submitted and negotiations for any necessary minor modifications to the Development Agreement on the understanding that the Council and St Modwen both recognise that a new OJEU procedure would need to be undertaken if the outcomes would be beyond the boundaries of the existing procurement process.

I look forward to an urgent response to this request in order to try and restore our maligned reputation caused entirely by the Cabinet Office release.

Regards
Gillian Brown,
Leader, Arun District Council

From: Rowbury, Sam - Cabinet Office [<mailto:Sam.Rowbury@cabinet-office.gsi.gov.uk>]
Sent: 07 April 2014 17:18
To: Nigel Lynn
Cc: [REDACTED]; Francis, Andrew - Cabinet Office; Taylor, Joe - Cabinet Office; Dudley, Olaf - Cabinet Office
Subject: Mystery Shopper re: Bognor Regis Town Centre development agreement

Nigel

We discussed Gillian Brown's email to John Taylor of 4 April concerning the Bognor Regis Town Centre development agreement.

The Cabinet Office Mystery Shopper scheme provides an informal route for concerns to be raised about public procurement issues. We accept these referrals on an anonymous basis and our aim is to discuss issues with contracting authorities and where necessary make recommendations based on good procurement policy and practice, which we routinely share with the mystery shopper as well as the authority. In line with the Government's commitment to transparency, results of referrals are published on line.

In this case we did not investigate the original contract award and there is no suggestion from the work we have done that its award was not made in accordance with the Public Contracts Regulations or the EU Directives on public procurement. The e-mail circulated from Bognor Regis Civic Society is therefore not correct in this respect and we are writing to Bognor Regis Civic Society accordingly.

Where contracts have been entered into several years ago and under which work has not yet commenced, we recommend that authorities **consider** if they continue to represent best value for money and that a new procurement is initiated if they do not.

A summary of the results of the referral was sent to Arun District Council for approval. Though this summary is due for publication in due course, we stress that it has not been made public by us at this stage.

- You asked that we respond to you rather than Gillian Brown as she was not in the office today but I would be grateful if you could update her. Can I also ask that your press office liaises with ours in the event that you wish to refer to Cabinet Office in any statement/briefing (please speak to Andrew Francis – 0207 276 0400, Andrew.Francis@cabinet-office.gsi.gov.uk)

Best wishes

Sam Rowbury
| Cabinet Office

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Leader of the Council:

In this response the Cabinet Office quoted its general advice to all authorities which is to **consider** best value first, and then if best value will not be achieved, initiate a new procurement. The Council had made clear to the Cabinet Office that a new procurement was not the only option available to the Council and the Council was considering **all** its options.

This email also confirms the Council's understanding that the Cabinet Office email of 1.4.2015 at 11:13 was sent to Arun District Council for approval. However, the Cabinet Office sent the information contained in that email to the mystery shopper before Arun District Council was given a reasonable opportunity to respond.

No breach of OJEU regulations

The Cabinet Office has confirmed it has not recommended that Arun District Council should initiate a new OJEU tendering process for the Regis Centre redevelopment, despite claims made by Bognor Regis Civic Society.

The Cabinet Office Mystery Shopper scheme provides an informal route for concerns to be raised about public procurement issues. The Cabinet Office accept these referrals on an anonymous basis with the aim to discuss issues with contracting authorities and where necessary make recommendations based on good procurement policy and practice.

The Cabinet Office has confirmed that it did not investigate the original contract award and that there is no suggestion from the work it has done that its award was not made in accordance with the Public Contracts Regulations or the EU Directives on public procurement. The department therefore confirmed that the e-mail circulated from Bognor Regis Civic Society is not correct in this respect.

Councillor Mrs Gillian Brown, Leader of Arun District Council, said: "The Cabinet Office has conceded that the information given to Mr Dixon was untrue - Arun District Council has not breached the terms of the OJEU on tendering regulations. Nor has it been investigated for doing so.

"Therefore I would like to make it clear that while the Council has extended the developer agreement with St Modwen, no other decisions have been made so Arun District Council has not breached any regulations and any allegations made along these lines are completely without substance .

"We are pushing for a full apology and are very disappointed with the Cabinet Office for putting information out into the public arena which was completely untrue."

Published at 17:24 on 08/04/2014

Screenshot from Arun District Council's website taken 20.40 hrs on 9.4.2014

Leader of the Council:

The fourth paragraph relates to the second area of highlighting shown on the email from Sam Rowberry of the Cabinet Office on 7.4.2014 at 17:18. And needs to be read as a whole.

From: Dale, Joanna - Cabinet Office [mailto:Joanna.Dale@cabinet-office.gsi.gov.uk]
Sent: 28 July 2014 15:02
To: Wendy Ashenden-Bax
Cc: Mather-Derrick, Belinda - Cabinet Office
Subject: RE: Release of e-mail from 1 April 2014 - MS 560
Importance: High

Dear Ms Ashenden-Bax,

Many thanks for your swift response. Please be assured that we are not instructing you to terminate your current contract which we note has been extended to 31 December 2014. What we have advised as good practice is that where contracts have been entered into several years ago and under which work has not yet commenced, we recommend that authorities **consider** if they continue to represent best value for money and that a new procurement is initiated if they do not. Our recommendations are on the basis of achieving best value for money and are non-binding. In this context we would hope that you'd consider whether the end of December would mark an appropriate juncture to have put in place a new VFM arrangement, rather than extending this existing contract further.

In terms of publication we try to keep all entries brief, factual and to the point. We believe we have covered off Mr Rowbury's salient points in our current drafting and are not proposing to make any further amendments.

I hope that the above serves to clarify our position and I should be grateful if you could confirm you are content with the proposed form of words and advise if you would like us to include that optional last line proposed by Mr Dudley.

Kind regards

Jo Dale.



customer service

Jo Dale
Mystery Shopper SME Team
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From: Dale, Joanna - Cabinet Office [mailto:Joanna.Dale@cabinet-office.gsi.gov.uk]
Sent: 30 July 2014 09:43
To: Wendy Ashenden-Bax
Cc: [REDACTED]; Gillian Anna Brown; Nigel Lynn; [REDACTED];
Rowbury, Sam - Cabinet Office
Subject: RE: RE: Release of e-mail from 1 April 2014 - MS 560- Revised wording for publication
Importance: High

Dear Ms Ashenden-Bax,

I can confirm that we are happy with the amended wording that you have proposed. As such, when we publish the results of your case this will be the wording used:

Issue:

A mystery shopper raised concerns about a development contract for over £100m awarded in 2006; the development had not yet gone ahead and had recently been valued at £25-40m, which the mystery shopper contended was a substantial deviation from the winning bid, constituting a breach in the EU Directives.

Response:

We discussed the mystery shopper's concerns with Arun District Council who told us that the existing development agreement as tendered had been amended to require the submission of a valid planning application by 31 December 2014 and that the Council are exploring a number of options, including but not limited to a new OJEU process. The minutes of the Council record that both the Council and St Modwen both recognise that a new OJEU procedure would need to be undertaken if the outcomes of those other options would be beyond the boundaries of the existing procurement process. Where contracts have been entered into several years ago and under which construction work has not yet commenced, the Cabinet Office recommend that authorities consider if they continue to represent best value for money and that a new procurement is initiated if they do not. The Cabinet Office recommendation is non-binding and the Cabinet Office are not instructing the Council to terminate its current contract. The Council confirmed that they would make all officers and members dealing with the matter aware of the Cabinet Office recommendation and agreed to update the Cabinet Office when a decision had been reached by the Council. The investigation found no evidence of any breach in the EU Directives and the recommendation was made on the basis of achieving best value for money.

Thank you for your assistance in this matter, as requested, I have also copied this response to Nick Gibb MP. We will let you know when we have published the above.

Kind regards

Jo Dale.



customer service

Jo Dale
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Leader of the Council:

On 10.9.2014 the Council considered a further report in this matter and resolved by Minute 229 to jointly surrender the Development Agreement with immediate effect with no compensation to be paid by either the Council or St Modwen.

The Council has given you a full response to your Freedom of Information request that was responded to under the Environmental Information Regulations, and I have given a detailed answer to your public question. It is your decision what facts you take into account and what and who you believe.

The Council does not intend to respond to further questions or communications relating to this matter.