

Divisions Affected - Countywide

CABINET 26 April 2022

Highway Works Bond for Development with Public Bodies

Report by Corporate Director for Environment and Place

RECOMMENDATION

1. **The Cabinet is RECOMMENDED to** delegate powers to negotiate and put in place alternative solutions to a conventional Section 278 Agreement Bond with Public Bodies to the Corporate Director for Environment and Place in consultation with the Director of Finance.

Executive Summary

2. This report addresses the situation where a standard bond or security deposit cannot or should not be given because of the status of a Public Body or the project being undertaken by that Public Body.
3. Securing a financial bond or security deposit through the 'Section 278 Agreement Standard Conditions' is standard practice and covers the potential financial risk to Oxfordshire County Council if highway work needs to be completed or rectified should a developer default in any way.
4. Recently, it has become apparent when working with public bodies, that securing a bond or security deposit is not always appropriate or possible. Applying the standard bond or security deposit to public bodies means that there is a cost to the public purse.
5. Therefore, flexibility is sought through delegated powers to negotiate and put in place alternative arrangements and vary the standard conditions without requiring referral to Cabinet. This will provide process agility and save time.
6. The delegated powers and alternative options are described in paragraphs 13 - 16.

Background

7. The standard conditions associated with the Highways Act 1980 S278 Agreements were adopted most recently by Cabinet in 2016. Any departure from the standard conditions currently requires Cabinet approval.
8. The term “Public Body” is used to describe Government Departments and their Arm’s Length Bodies and Councils of all tiers within the Local Government umbrella. Such bodies include Network Rail, National Highways, the Environment Agency, the Department for Education, Oxford City Council, Cherwell District Council, West Oxfordshire District Council, South Oxfordshire District Council, Vale of White Horse District Council and the Town and Parish Councils.
9. A recent example requiring a departure from the standard conditions were Network Rail who are now treated like a Government Department, since the Framework Agreement between Department for Transport and Network Rail was signed in 2019. This agreement includes a duty on Network Rail to adhere to the guidelines in ‘Managing Public Money’, requiring the Department for Transport to give written approval to enter a bond. In their view a waste of public money as it occurred between two public bodies such as Network Rail and Oxfordshire County Council.
10. Oxfordshire County Council Legal Services investigated this stance, and it does hold legal weight. Legal Services also determined that the situation with regards to adhering to ‘Managing Public Money’ is now the same for Environment Agency schemes as for Network Rail.
11. Similar situations also arise with other public organisations, e.g. Oxford City Council, District Councils, Town and Parish Councils, where consideration is given to whether a bond from such a Public Body is appropriate if it is merely exercising its public functions.
12. The instances of this ‘bond’ situation occurring could reasonably be expected to increase and flexibility is now required to put in place alternative arrangements or withdraw the need for a bond at all, when dealing with a public body. Hence, delegated powers are sought to allow for this process agility and saving time in seeking Cabinet approval for every instance of departure from this standard condition.

Details of the Proposal

Proposed Delegated Powers

13. The procedure recommended for approval is that the officers identify at the earliest possible stage of any development if a public body is the sponsor and where a bond or security deposit as per the ‘Section 278 Agreement Standard Conditions may not be appropriate.

14. The Corporate Director for Environment and Place through delegated powers and where applicable the Director of Finance would be authorised to sign off bond alternatives below £5,000,000. Where the value is £5,000,000 or more then alternatives would still require Cabinet approval.
15. So that the risk to Oxfordshire County Council is reduced, alternative options to the standard bond or security deposit will be considered and these include:
 - a. If Oxfordshire County Council are making a financial contribution to the Project, it may be agreed with the public body that a sum equivalent to the bond sum is withheld until work is completed and the defects period expires. Essentially, this is a retention and has been done on some School and Rail Projects and conforms to the basic principle of the Standard Conditions.
 - b. Other local government bodies such as Oxford City Council and District Councils in Oxfordshire have in the past on occasion provided a self-Bond. That is the Council enters a Bond with the County Council where it acts as the surety and the County Council can call on the Bond where there has been a default.
 - c. It may be possible for the main contractor to enter into the agreement on the public bodies behalf and provide a bond.
 - d. For some District council developments where the organisation is carrying out their statutory duty then they should not be expected to provide any kind of bond, for example any highway works associated with provision of new Council Housing unless the impact of the works on the highway network would be substantial and/or the value of the works is significant.
16. The Corporate Director would be authorised through these delegated powers to grant permission for a development to proceed without a bond or alternative where the developer is a public body.

Corporate Policies and Priorities

17. This will support Oxfordshire County Council with working collaboratively with Government Departments and their Arm's Length Bodies on major infrastructure schemes which benefit the public. It will help Oxfordshire County Council to work more flexibly with local District and Parish Council partners on mutually beneficial schemes. Where this approach is appropriate, it will also help to save time and expense for both parties, and ultimately the tax payer.

Financial Implications

18. The 'no-bond' options will introduce a potential financial risk to Oxfordshire County Council. The risk would be that Oxfordshire County Council were required to complete substantial portions of the associated highway work but then were not successful with a pursuit of compensation for this from the Public Body involved. However, it is extremely unlikely that the Public Body

themselves would suddenly cease to exist in any form in the way that a private developer might. There is also an inherent duty for the Public Body to work with Oxfordshire County Council to complete the work out of Public Interest.

19. There are no financial implications to the other options as they would all mitigate the financial risk to Oxfordshire County Council of the public body defaulting on the work.
20. The officer time in following through the process outlined above (as opposed to processing a standard bond) can either be charged to the Public Body by agreement or will be funded through the team's base revenue budget.

Comments checked by:

Kathy Wilcox (Head of Financial Strategy) and Rob Finlayson (Finance Business Partner)

Legal Implications

21. Bonds for highway works are standard throughout the construction industry. They are an invaluable tool which enables the highway authority to obtain quick redress where there has been a significant default by the developer, either in failing to complete works or carrying them out badly.
22. On occasions in the past Oxfordshire County Council has threatened to call in a bond and the developer has then carried out the necessary remedial works immediately. A bond is an additional legal mechanism which enables the Council to resolve a substantial problem without the need engage in the lengthy process of commencing legal proceedings for breach of contract.
23. The alternative solutions to a bond identified in the report are welcome and have been adopted in the past where the circumstances justified such an approach. Oxfordshire County Council must accept that the Government guidance "Managing Public Money" is in practice a barrier to national public bodies or Government Departments providing a bond and seeking alternatives if possible is therefore the right approach.

Comments checked by:

David Mytton (Solicitor) david.mytton@oxfordshire.gov.uk

Staff Implications

24. This would not require any additional resources and would be considered as business as usual.

Equality & Inclusion Implications

25. No implications in respect of equalities or inclusion have been identified in respect of the proposal.

Sustainability Implications

26. No implications in respect of sustainability have been identified in respect of the proposal.

Risk Management

27. Oxfordshire County Council would still be covered under any alternative arrangements against any potential financial risk because of needing to either finish or re-instate any partly completed and abandoned schemes, or to rectify any defects if the developer fails to rectify these in good time.
28. Where no bond is required then there would be a potential financial risk to Oxfordshire County Council. However, this option would only be considered appropriate for a Public Body who would be able to cover the financial risk even if Oxfordshire County Council needed to resort to legal measures of enforcement.

Bill Cotton
Corporate Director for Environment and Place

Annex:	None
Background papers:	None
Other Documents:	None

Contact Officer:	Julian Richardson, Senior Engineer julian.richardson@oxfordshire.gov.uk
------------------	--

April 2022