

**BIRMINGHAM CITY COUNCIL**

**RESOURCES O&S COMMITTEE – PUBLIC MEETING**

**1530 hours on Monday 8 February 2021 (On-line Meeting)**

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**Present:**

Councillor Sir Albert Bore (Chair)

Councillors: David Barrie, Meirion Jenkins, Yvonne Mosquito and Paul Tilsley

**Also Present:**

Councillor Ian Ward, Leader of the Council

Councillor Tristan Chatfield, Cabinet Member, Finance and Resources

Councillor Robert Alden

Richard Brown, Consultant – Interim Project Director for Birmingham Smithfield

Suzanne Dodd, City Solicitor

Alison Jarrett, Assistant Director, Development and Commercial

Richard Tibbatts, Head of Contract Management

Jayne Bowles, Scrutiny Officer

Emma Williamson, Head of Scrutiny

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**1. NOTICE OF RECORDING/WEBCAST**

The Chairman advised the meeting to note that this meeting will be webcast for live and subsequent broadcast via the Council's Internet site ([www.civico.net/birmingham](http://www.civico.net/birmingham)) and that members of the press/public may record and take photographs except where there are confidential or exempt items.

**2. APOLOGIES**

None.

**3. DECLARATIONS OF INTERESTS**

None.

#### **4. REQUEST FOR CALL-IN: PROVISION OF LEGAL ADVICE FOR THE BIRMINGHAM SMITHFIELD DEVELOPMENT – INCREASE IN CALL OFF CONTRACT VALUE**

(See documents 1, 2 and 3)

Councillors Robert Alden and Meirion Jenkins were asked to state their reasons for the Request for Call-In.

Councillor Jenkins made reference to the fact that the original contract had been placed in 2016 and had already been extended twice, in December 2018 and November 2019. He set out three issues which should be addressed before agreeing this extension:

- Has enough been done to satisfy ourselves that this will be the last extension to that contract?
- Given the value of the increases as against the original, has enough been done to renegotiate the charges to get best value?
- Has enough been done to see if we can use our in-house legal team? Given the changing nature of the contract, that should be revisited, and given the amounts involved it may have been cheaper to employ someone to do this.

Councillor Alden confirmed the criteria upon which the call-in had been requested, as set out in the call-in request form, and highlighted the following points:

- The Executive has failed to act on comments made by the Resources O&S Committee on different occasions on Single Contract Negotiations and contract extensions;
- There seems to be a failure to take into account changes in the economic climate since the original contract in 2016. There have clearly been delays and changes, including the impact of the Commonwealth Games;
- There is a lack of clarity regarding the procurement process with no explanation of why this has had to come back twice before for extensions;
- There are no details about how our obligations under the Public Contracts Regulations 2015 (sections 72 and 73) are being met in particular with reference to the provision that any modifications that increase the costs by 50% or over must be retendered;
- There are similar provisions set out in the Constitution (Part D section 3.7) including that the value of an extension must not exceed £0.5m, and the requirement for a business case and options appraisal.

The Leader, the Cabinet Member for Finance and Resources, Assistant Director Development and Commercial and City Solicitor responded as follows:

- Since the original procurement, there were further complexities which had not been foreseen, in relation to the Enterprise Zone and LEP negotiations, which were more complex than originally envisaged;
- During this period, the Council was also approached by the Organising Committee of the Commonwealth Games to use the site during the games, so further legal advice was needed;
- Going out to procurement again would have led to further delays and could have resulted in more expense;

- There wasn't the capacity in the in-house legal team and where there is a very focussed area of work it is not unusual to use outside expert advice, as there would be an on-going cost to the Council to employ that expertise;
- The day rates have not increased since the original negotiations and there is a cap in place to complete the work;

In considering the request for call-in, the following were the main points discussed:

- The Chair asked committee members to decide whether there was a need to go into private session to consider the exempt appendix and it was agreed that there was sufficient information in the public report to vote on the call-in;
- It was noted that the report contains a comment that early contract management was not as tight as it might have been, which underpins some of the concerns raised;
- It was confirmed that there have been a few officers engaging with the legal company whereas best practice is to have one legal officer doing that and if that had been the case, this report would have been brought for decision earlier;
- The increase in value would not have been any different;
- The Chair undertook to discuss future work with the Resources O&S Committee on procurement and contract management, as this issue of timeliness had been raised before;
- The main issue related to compliance with national regulations with regards to contract extensions and the fact that the change meant the cost exceeded 50% of the cost of the original contract;
- Further clarification was sought from the City Solicitor who advised that the regulations permit changes to contracts but set out the parameters of that, one of which is that the change should not result in an increase in cost above 50%;
- If that does happen, the contract should be retendered and that is the case here. Therefore, the Council is open to challenge from other law firms;
- There are ways to mitigate that risk, such as issuing a VEAT notice;
- The risk was acknowledged but has to be balanced against the other risk related to delay and of the Council being unable to deliver against the project as a whole;
- It was accepted that the issuing of a VEAT notice would mitigate the risks and would therefore be an acceptable way forward.

The Chair then moved to a vote of the members and the Committee resolved to call-in the decision for re-consideration by Cabinet by a vote of three members to two, the relevant criteria being:

*5 - the Executive appears to have overlooked some relevant consideration in arriving at its decision.*

The legal advice is that the Council is not in compliance with national regulations. However, the Council has to view the risk of challenge as against the potential delay if re-tendering were to be undertaken.

The Executive, as represented by the Leader and Councillor Chatfield, acknowledged that risk but were of the view that the failure to extend was a greater risk.

The Committee asked that a VEAT notice be issued to mitigate the risks of the decision, which result from the fact that the contract extension includes an increase in cost of over 50%, in contravention of national regulations.

**RESOLVED:-**

That the decision be referred back to Cabinet for re-consideration.

**5. OTHER URGENT BUSINESS**

The Chair proposed, and it was agreed, that at the next meeting on 11 February, the Committee should consider Chapter 6 of the Financial Plan which sets out the revenue and capital costs of the Commonwealth Games, and in particular the position with regard to unsecured partner contributions.

**6. DATE AND TIME OF NEXT MEETING**

Noted.

**7. REQUEST(S) FOR CALL IN/COUNCILLOR CALL FOR ACTION/PETITIONS RECEIVED (IF ANY)**

None.

**8. AUTHORITY TO CHAIRMAN AND OFFICERS**

**RESOLVED:**

That in an urgent situation between meetings, the Chairman jointly with the relevant Chief Officer has authority to act on behalf of the Committee.

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The meeting ended at 1723 hours.