

Birmingham City Council

Report to the Leader and the Cabinet Member for Finance and Resources

Date: 27 January 2021



Subject: PROVISION OF LEGAL ADVICE FOR THE BIRMINGHAM SMITHFIELD DEVELOPMENT INCREASE IN CALL OFF CONTRACT VALUE

Report of: Ian MacLeod
Acting Director - Inclusive Growth

Relevant Cabinet Member: Councillor Ian Ward - Leader of the Council
Councillor Tristan Chatfield - Finance and Resources

Relevant O & S Chair(s): Councillor Sir Albert Bore - Resources

Report author: Marlene Slater, Project Delivery Manager
Telephone No: 0754 8712 816
Email Address: marlene.slater@birmingham.gov.uk

Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, add Forward Plan Reference:		
Is the decision eligible for call-in?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential: The accompanying Exempt Appendix A contains confidential market information which could impact on the ongoing legal process if published. Schedule 12A of the Local Government Act 1972 as amended- paragraph 3 – information relating to the financial or business affairs of any particular person (including the authority holding that information).		

1 Executive Summary

- 1.1 This report provides details to seek approval to increase again the value of the legal adviser services contract to support the Birmingham Smithfield Development project.
- 1.2 The increase in the value of the contract is to ensure the efficient and effective support for the procurement of a Development/Investment Partner for the Birmingham Smithfield Development and the achievement of the Council's project objectives.
- 1.3 Due to the additional complexities of procuring the development partner for the project, further legal advice and enhanced due diligence is needed to finalise the Joint Venture Agreement and Associated Contracts to protect the City Council's interests, maximise value for money and reduce the level of risk exposure to the Council.
- 1.4 This proposed increase in sum is detailed in Exempt Appendix A.

2 Recommendations

That the Leader and the Cabinet Member for Finance and Resources:

- 2.1 Approve the increase in value of the call off contract for the provision of legal advice to support the ongoing and completion stages of the Smithfield development project as detailed in Exempt Appendix A.
- 2.2 Authorise the City Solicitor to execute and complete all necessary legal documents to give effect to above

3 Background

- 3.1 On 20 September 2016, Cabinet approved the Birmingham Smithfield Masterplan which sets out the vision to create a new destination in the heart of the city centre including new cultural and leisure attractions, vibrant retail markets and spaces for new and existing small businesses, as well as a residential neighbourhood with a high-quality public realm and integrated public transport links to the wider city centre
- 3.2 Cabinet gave approval to commission a legal adviser to support the procurement of a Development/Investment Partner(s) to deliver the Birmingham Smithfield Development on 18 October 2016.
- 3.3 On 23 November 2016, the Strategic Director of Economy in conjunction with the Assistant Director of Procurement, the Strategic Director of Finance and Legal and the Acting City Solicitor gave approval to award a call-off contract for the provision of legal advisor services to support the procurement of Development/Investment Partner for the Birmingham Smithfield Development project to Bevan Brittan LLP for a period of 4 years commencing in December

2016 following a further competition exercise using the Crown Commercial Services Legal Services Framework Agreement.

- 3.4 The services were to be called off from the contract for the provision of legal advice in the development of proposed delivery strategy, business case, service contracts and partnership agreement(s) where the Council's Legal Services did not have the expertise or the capacity to provide such advice.
- 3.5 On 12th December 2018 the Corporate Director, Economy in conjunction with the Director of Commissioning & Procurement, Corporate Director of Finance and Governance and the City Solicitor approved to extend the value of the contract for the provision of legal advice for the Smithfield project.
- 3.6 In November 2019 the Corporate Director, Economy in conjunction with the Director of Commissioning & Procurement, Corporate Director of Finance and Governance and the City Solicitor approved a further extension to the value of the contract for the provision of legal advice for the Smithfield project.
- 3.7 Additional Services Required.

Further legal advice and enhanced due diligence is needed to deal efficiently and effectively with the complexities of the procurement to protect the Council's interests, maximise value for money and reduce the level of risk exposure for the process to the entering of the contract with the Development Partner. The additional complexities identified throughout the process were unforeseen, due to the scale and scope of the development and in terms of timing, allowing for changes to the activity on the Markets site for the hosting of the Commonwealth Games (bringing forward activity rather than adding to it). As a result, finalising the Joint Venture Agreement (JVA) and associated contracts is taking longer than anticipated. These additional services include:

- 3.7.1 Dealing with Land Registry enquiries, reviewing title deeds and preparing land registry applications.
- 3.7.2 Reviewing the final Financial Plan, Viability and Funding Strategy, Section 123 Statement, Temporary Use Strategy and Tax Report.
- 3.7.3 Provision of Procurement, State Aid, Markets and Employment Advice.
- 3.7.4 Negotiating and finalising the Joint Venture Agreement (JVA), Building Licence & Deed of Easement and Covenant, Site Assembly Agreement, form of Phase Development Agreement, and related ancillary documents. Construction documents namely - JCT design & build contract, JCT design & build sub-contract, Construction Management Agreement, Trade Contract, Parent Company Guarantee, and a Performance Bond to formally appoint the Development/Investment Partner for Birmingham Smithfield.
- 3.7.5 Preparing the Legal Report on the JVA.
- 3.7.6 Provision of advice in the preparation of the Smithfield Development Contract Award Cabinet Report.

- 3.8 The additional services outlined above are within the scope and nature of the existing call-off contract for the provision of legal advice for Birmingham Smithfield Development. The cost of the additional services is based on the tendered rate that provides a discounted fee against the maximum fee rates on the Crown Commercial Services Legal Services Framework Agreement.
- 3.9 Management of the contract in the earlier stages was not as tightly monitored as best practice would recommend. In-house legal advisors were not engaged to oversee the scope and a number of different officers were involved in instruction. The management of the contract now and going forward addresses these potential weaknesses by allocating an in-house legal advisor, increasing the dialogue and continuing to maintain a close working relationship with Bevans.
- 3.10 The accountability for the contract will be with the Interim Smithfield Project Director who will manage the contract operationally and will engage with Legal Services to ensure the required professional services are delivered in an efficient and timely manner to meet the requirements of the project.

4 Options considered and Recommended Proposal

- 4.1 Option 1 – To Do Nothing. To do nothing would result in no additional external legal advice to that which has already been given as there is not the expertise or the capacity internally. It would result in a significant delay to the project, and a high risk of legal challenge from Bidders, and the partnership agreement and associated contracts not delivering the Council's requirements, providing protection to its interests and achieving best value. Therefore, this option was discounted.
- 4.2 Option 2 – To Use Council's Legal Services. The City Council's Legal Services do not currently have the required capacity and expertise to support the delivery of the procurement of the Birmingham Smithfield Development project. Therefore, this option was discounted.
- 4.3 Option 3 – Undertaking a Procurement Process for the additional legal advice required – This is not appropriate as the services required are in the scope of the existing call-off contract; conducting a procurement exercise would cause significant delays to the project and the potential change in supplier is highly likely to result in disproportionate technical difficulties and the provision of legal advice and formation of partnership contract and associated contracts that are incompatible with existing arrangements.
- 4.4 Option 4 – Extend the current contract – This is the preferred option as the project is more complex and is taking longer to finalise than original envisaged. The recommended supplier has provided a satisfactory level of service to date and this would ensure the continuity of the high-quality legal advice that is vital for the successful delivery of this complex project. It would also eliminate the inherent unacceptable risk of inconsistent legal advice and significant delays to the project if the service were to be competitively procured resulting in a change to the

supplier. The fees will be paid in accordance with the original call-off contract that was competitively procured through the Crown Commercial Services Legal Services Framework Agreement and provided a discount on maximum fees. This is the recommended proposal.

5 Consultation

- 5.1 The Acting City Solicitor has been consulted and agrees with the contents of the report.

6 Risk Management

- 6.1 Not extending the legal service contract would result in a high risk of further project delay, or the partnership agreement and associated contracts not delivering to the Council's requirements, providing protection to its interests and achieving best value as the Council would not have a legal advisor in place.

7 Compliance Issues:

7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?

- 7.1.1 Details were provided in the Cabinet Report of 18 October 2016 and the same continues to apply.
- 7.1.2 Birmingham Business Charter for Social Responsibility (BBC4SR)
- 7.1.3 The recommended supplier is a certified signatory to the BBC4SR. The commitments within the action plan will be increased in proportion to the additional value to the contract and will be monitored and managed during the contract period.

7.2 Legal Implications

- 7.2.1 The City Council has a duty to efficiently manage its assets and has the power to hold and dispose of land under Sections 120 and 123 of the Local Government Act 1972 and also an obligation to obtain the best price reasonably obtainable.
- 7.2.2 Under Section 1 of the Localism Act 2011, the Council has the power to enter into the arrangements set out in this report, which are within the remit and limits of the general power of competence Section 2 and 4 of the Localism Act 2011.
- 7.2.3 Section 111 of the Local Government Act 1972 contains the Council's ancillary financial and expenditure powers in relation to the discharge of its functions.

7.3 Financial Implications

- 7.3.1 The value of the variation to the scope work will be met from the overall approved budget for the project funded by Greater Birmingham Solihull Enterprise Zone (GBSLEP) Enterprise Zone revenue expenditure. A change request has been approved by Capital Board and discussed with the LEP. It will be submitted to include additional spend required to take the project to

FBC stage. The work to date informs the SOBC stage, the OBC stage and is preparation for FBC and full contract stage.

7.3.2 The expenditure in relation to the Legal Advisor will be managed by the Interim Project Director in consultation with the Interim Head of Law (Property, Planning and Regeneration) and the Acting Director – Inclusive Growth.

7.3.3 Invoices will be submitted monthly for work completed.

7.4 Procurement Implications

7.4.1 This report concerns procurement and the implications are detailed throughout the report.

7.5 Public Sector Equality Duty

7.5.1 The requirements of Standing Order 9 in respect of the Council's Equality Policy and the Equality Act 2010 have been specifically included in the contract documentation.

8 Appendices

8.1 **Appendix A** – Exempt Information.

9 Background Documents

9.1 Report based upon confidential information contained in the Officer's file(s).

- Birmingham Smithfield Development Cabinet Report 18 October 2016