



# Provision of Legal Advice for the Birmingham Smithfield Development – Increase In Call Off Contract Value

## Call In by the Resources O&S Committee

### 1 Request for “Call-In”

- 1.1 On 27 January 2021, the Leader and the Cabinet Member for Finance and Resources took a decision to:
- 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.
  - Authorised the City Solicitor to execute and complete all necessary legal documents to give effect to above.
- 1.2 A request for Call-In was made to the Resources Overview and Scrutiny (O&S) Committee by Councillors Robert Alden and Meirion Jenkins on 29 January 2021.
- 1.3 The Resources O&S Committee considered the request for call-in at a meeting on 8<sup>th</sup> February 2021. At the meeting the Committee heard from Councillor Ian Ward, Leader of the Council, Councillor Tristan Chatfield, Cabinet Member, Finance & Resources, Alison Jarrett, AD, Development & Commercial and Suzanne Dodd, City Solicitor.

### 2 Request for Call-In

- 2.1 Councillor Robert Alden stated the following call-in criteria applied:
- 3 - the decision appears to be inconsistent with recommendations previously made by an Overview and Scrutiny body (and accepted by the full Council or the Executive);*
- 5 – the Executive appears to have overlooked some relevant consideration in arriving at its decision;*
- 8 – there is a substantial lack of clarity, material inaccuracy or insufficient information provided in the report to allow the Overview and Scrutiny Committee to hold the Executive to account and/or add value to the work of the Council;*
- 9 – the decision appears to give rise to significant legal, financial or propriety issues;*



*10 – the notification of the decision does not appear to have been in accordance with council procedures*

2.2 Cllr Jenkins set out three issues to be addressed before the extension is agreed:

- 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.

2.3 Cllr Alden added further submissions against each of the call-in criteria:

- 3 – 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;
- 5 – 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.
- 8 – 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.
- 9 – 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.
- 10 – 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.

2.4 The Leader responded that what has happened since the original procurement was that there were further complexities not foreseen, in relation to the Enterprise Zone and LEP negotiations, which were more complex than originally envisaged. Also during this period, the Council was approached by the Organising Committee of the Commonwealth Games to use the site during the games, so further legal advice was needed.

2.5 Members' discussion focused on two aspects. Firstly, it was noted that the report contains a comment (3.9) 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. That is not the case now. 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.



- 2.6 However, 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 sought from the City Solicitor. She advised that the regulations permit changes to contracts but set out the parameters of that. One of those parameters is that the change should not result in an increase in cost above 50% - if it does, the contract should be retendered. That is the case here and therefore the Council is open to challenge from other law firms. There are ways to mitigate that risk, such as by issuing a VEAT notice.
- 2.7 The Leader further advised the Committee (as reported by Cllr Bore) that he acknowledged the risk but balanced that against the other risk related to delay and of the council being unable to deliver against the project as a whole. Cllr Chatfield also accepted that a VEAT would mitigate the risks and would therefore be an acceptable way forward.

### 3 The Committee Resolution

- 3.1 The Committee resolved to call-in the decision for reconsideration by Cabinet by a vote of 3 members to 2. The relevant criteria is:
- 5 – the Executive appears to have overlooked some relevant consideration in arriving at its decision*
- 3.2 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 Cllr Chatfield, acknowledged that risk but were of the view that the failure to extend was a greater risk.
- 3.3 The Committee asks that a VEAT notice is 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.

**Councillor Sir Albert Bore, Chair, Resources Overview and Scrutiny Committee**