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Appendix 1 is confidential/exempt under Access to Information Procedure Rule 10.4.3, 'Information relating to the financial or business affairs of any particular person (including the authority holding that information). It contains information which if disclosed to the public would, or would be likely to prejudice the commercial interest of the Council.

**Report of : The Director of City Development**

**To : Executive Board**

**Date: 4 July 2007**

**Subject: Design & Cost Report**

**Scheme Title PROPOSED ARENA DEVELOPMENT**

**Capital Scheme Number 12589 / ARE / 000**

**Electoral Wards Affected:**  
  
**CITY WIDE**

**Specific Implications For:**

Equality and Diversity	<input type="checkbox"/>
Community Cohesion	<input type="checkbox"/>
Narrowing the Gap	<input type="checkbox"/>

Eligible for Call In

Not Eligible for Call In  
(Details contained in the report)

**Executive Summary:**

The report informs Members of the Executive Board of the split procurement process using the Competitive Dialogue procedure that is being pursued to select both a preferred operating and developer partner. Under this arrangement, in the first instance an operator is selected by the Council and the operator inputs into the final arena specification to be provided to interested developers and joins with the Council to select the preferred developer.

Executive Board are advised as to the progress made with the procurement of the proposed operating partner. The report also details the proposed evaluation criteria and weightings to be used in the selection of the developer for the arena and, proposes that the Director of City Development be authorised to approve both the long listing and short listing of potential operators and developers, with Executive Board ultimately approving the selection of the preferred and reserve operator and developer for the arena.

The report seeks Executive Board's approval to procure specialist legal advisors to provide legal advice to the Council across a wide range of issues during the procurement process, through to contract award/financial close for the selection of both the preferred operator and developer.

## **1.0 PURPOSE OF THIS REPORT**

1.1 The purpose of this report is to:-

- i) Note the progress made in the operator procurement process for the proposed arena development.
- ii) Authorise the Director of City Development to approve both the long listing and short listing of potential operators and developers during the Competitive Dialogue procurement process.
- iii) Seek Executive Board's approval to the evaluation criteria to be used by the City Council and its partners for the selection of the preferred developer for the proposed arena.
- iv) Authorise an injection of funds into the capital programme and the incurring of expenditure for the appointment of consultants to provide legal advice to the Council throughout the procurement process to contract award/financial close for the proposed operator and developer, as detailed in the recommendation contained in Appendix 1 which is confidential/exempt under Access to Information Procedure Rule 10.4.3.

## **2.0 BACKGROUND INFORMATION**

2.1 The City Council's Executive Board at its meeting on 13 December 2006 agreed to support the findings and recommendations contained in PMP's report on the proposed funding and procurement of a multi purpose arena and associated facilities and, approved a two stream procurement process to select a preferred operator and developer/site for the proposed new arena. The Executive Board requested that before the procurement process for the developer/site (the developer) for the arena commenced, the proposed evaluation criteria to be used for the selection of the preferred developer should be presented to Executive Board for approval.

2.2 At its December 2006 meeting, Executive Board also acknowledged the requirement for up to circa £20m as the level of public sector investment that may be needed to facilitate the development of the proposed multi purpose arena in the city.

## **3.0 CURRENT POSITION**

### **(i) The Procurement Approach**

3.1 Executive Board has previously endorsed a split procurement approach, based on an overlapping, two streamed competitive process in order to maximise the quality and value of the proposed arena development.

3.2 In the first instance, the Council will endeavour to select an operating partner, to be followed by the selection of a development partner, who will also bring forward a site and associated enabling development. During the operator selection process, interested parties will be expected to develop an indicative (commercially sustainable) programme of events and services proposed for the new facility. Once selected, the preferred operating partner would work alongside the City Council to

finalise the arena specification based on their proposals and, will contribute to the selection of a preferred developer.

3.3 The final arena specification has yet to be determined, but based on research undertaken to date is likely to reflect the following:-

- Circa 12,500 seats.
- An entertainment focused layout to accommodate the national and international concert circuit.
- Flexibility in building construction, facilities, seating arrangements and rigging to accommodate a range of event types that will support the proposed operator's business plan.
- An event programme that will seek to maximise visitors to the city, that will ensure operational profitably, a sustainable and resilient business plan and, will provide a significant socio-economic benefit to the city.
- An architectural approach that will promote a high quality design which will contribute to the life of the city.
- A sustainable transport, design and operating solution.

3.4 As Executive Board was advised at its December 2006 meeting, the Council has not sought to specify the inclusion of conference and exhibition facilities, but rather invites operators/developers to consider the merits of including such facilities with regard to the interests of the overall financial viability of the proposed development.

3.5 The City Council will conduct the procurement process in such a way as to ensure:-

- Value for money and affordable proposals are received from interested parties.
- Probity and accountability in the procurement process is achieved.
- Compliance with the requirements of the Public Services Regulation 2006, which require the process to be carried out with transparency, fairness and without discrimination between bidders.

3.6 It is intended that competitions for the selection of the preferred operator and developer will be managed on the terms of the OJEU Competitive Dialogue procedure, rather than the Negotiated Procedure. Members of the Executive Board should note that whilst the Negotiated Procedure would identify a potential partner and then, thereafter, allow for an extended period of discussion with only one party, the opportunity afforded by the Competitive Dialogue procedure to retain a competitive tension for a longer period throughout the procurement process is considered to outweigh the potential disadvantage of the competitive Dialogue approach whereby, if at any point during the procurement process, the project brief is revised, then previously excluded parties would need to be invited to rejoin the procurement process. In addition, Members should note that since the introduction of the Competitive Dialogue process under the 2006 Regulations, the European Union Commission now expect the use of this procedure in preference to the Negotiated Procedure and, failure to do so is likely to attract a challenge from the Commission.

3.7 Members of Executive Board should note that whilst Executive Board will determine the selection of the preferred and reserve operating partner and developer for the arena, it is proposed that the Director of City Development be authorised under the Council's scheme of delegation to approve both the long listing and short listing of parties during the Competitive Dialogue procurement process.

### **(ii) Operator Selection**

3.8 In order to maximise long-term commercial sustainability, the proposed arena will require an experienced and expert operator, capable of delivering a full and varied events programme.

3.9 The OJEU Notice for the procurement of the preferred operator has been published. Interested parties accessing the Council's Tender website will be able to obtain a marketing brief and, a pre-qualification questionnaire (PQQ) which will need to be completed and returned to the City Council by 4 July 2007. At the pre-qualification stage, the primary purpose is to identify and qualify all organisations that can demonstrate the financial and technical capabilities/track record required to take part in the tender process.

3.10 The primary criteria for the evaluation of the operator PQQ will be financial (60%) and technical (40%) evaluation, with the proposed qualification threshold for financial and technical evaluation of the PQQ being 50%, below which bidders will not continue through the evaluation process. Members of Executive Board should note that the weighting (60%) in favour of financial criteria reflects the importance of the proposed operator having the required financial status to assume responsibility for such a major venue.

3.11 Thereafter, through the Invitation to Participate in Dialogue and Invitation to Continue Dialogue stages of the operator procurement process, bidders will be requested to provide increasingly detailed levels of information to the Council and assessment of their responses will be based on the following (but not limited to) broad areas.

- Financial/Commercial proposals 50%
- Operational 25%
- Deliverability 25%.

### **(iii) Developer Selection**

3.12 A developer will be required to deliver the risk capital, co-ordinate site assembly and lead on the development of the arena. The selected developer will need to understand the aims of the project, be capable of delivering the required level of investment, co-ordinate the delivery of the site and any required enabling development and, in particular, have sufficient capacity to manage the financial risk of a development that is likely to cost in excess of £40m.

3.13 The City Council has published a 'Prior Information Notice' advising potential interested parties that it is the Council's intention to publish an OJEU Notice in mid July 2007. Interested parties will be required to complete a PQQ (similar in nature to that prepared for the preferred operator) and, the assessment procedure at this stage will be to pre-qualify a shortlist of potential developers with the capability to bring forward major mixed use schemes and, who can demonstrate that they are able to deliver such a scheme of this scale, nature and complexity.

3.14 It is proposed that the PQQ evaluation criteria (not exhaustive) for developers should include:-

- **Status of the Potential Supplier** Status in law.
- **Financial Capability** Company balance sheet information, details of financial capability to support the development of a major scheme etc.
- **Compliance with EU/UK procurement legislation**
- **Resources:** Key personnel, number of personnel, design capability, construction capability and key resources etc.
- **Business Capability:** Need to demonstrate capability and experience of working on large scale developments, partnerships with the public sector, working with third party stakeholders etc.
- **Track Record:** Details of previous relevant experience particularly of working in partnership with public bodies, scheme values, references etc.
- **Corporate Policies** Reference to H & S, environmental, equal opportunities and training policies etc.

3.15 In terms of assessing the development submissions through the Invitation to Participate in Dialogue and Invitation to Continue Dialogue stages of the procurement process, it is proposed that the following (not exhaustive) criteria, with appropriate weightings are used for selection:-

**1. Financial and Economic Impact – 60%.**

- Level of public sector contribution required.
- Compliance with the public sector 'grant' requirements.
- Robustness of financial proposal and ability to manage and control the financial risk of a development of the scale, nature and complexity proposed.
- Level of direct investment (includes extent of construction and related works).
- Level of ancillary development i.e. investment 'unlocked' as a result of the arena development.
- Direct operational impact i.e. number of new jobs created, training places offered etc.
- Indirect operational impact i.e. additional visitors to Leeds, secondary spending etc.

- Contribution towards vitality/city experience.
- Interface with and contribution to the public domain.
- Contribution to unlocking further development

## **2. Technical Capability – 20%**

- Compliance with operator's requirements.
- Location and environment i.e. accessibility to public transport, city centre, car parking etc.
- Design and quality i.e. compliance with specification, design quality, functionality, whole life cycle costs etc.
- Environmental sustainability of arena solution

## **3. Deliverability –20%**

- Land ownership i.e. site assembly, acquisition and availability.
- Town planning.
- Site development capacity i.e. ability of the site to accommodate the arena and any required enabling development.
- Buildability i.e. complexity of the site from a construction perspective.
- Dependence on enabling development.
- Transport and access.
- Timing and programme i.e. overall timescale for delivery, when site would be available to allow development to commence etc.
- Response to contractual documentation ie comments on proposed contract with the proposed operator and the Council and its partners with regard to the proposed public sector investment etc.

### **(iii) Legal Advice**

- 3.16 Executive Board at its meeting in December 2006 authorised budget provision for the retention of PMP Consultants to project manage the implementation of the detailed delivery plan and, to participate in and advise the Council throughout the procurement process to the point at which both a preferred operator and developer has been identified.
- 3.17 The service commissioned from PMP Consultants does not include the provision of specialist legal advice across a range of issues both during the procurement process (using the Competitive Dialogue procedure), through to contract award/financial close, with the potential for further legal advice being required post financial close.
- 3.18 The nature of the legal advice required is highly specialised. Projects of this nature are intensive in terms of resources and time and, whilst the Council's Legal and

Democratic Services would wish to contribute to the project, they are not in a position to lead on the provision of legal advice during the process. To do so would create the risk of delay to completion of the project. In addition, there will be an expectation from the market that external legal advisors will be appointed, and to do so would reinforce the credibility of the project and, the Council's commitment to it. A combination of in-house and external services could lead to inconsistencies and delays creating additional risks for the project, and the prospect of future unforeseen liabilities. Consequently, the Chief legal Services Officer is of the view that a combination of in-house and external resources would not be appropriate for this particular project and, that there is a need to appoint external lawyers to provide a comprehensive service.

- 3.19 The legal advice to be provided to the Council may be summarised as advice relating to commercial development, the Competitive Dialogue procedure, public procurement process, state aid issues, property, title checks, construction related matters, local government and tax issues generally associated with the project and to prepare all project agreements and ancillary documentation required to achieve legal and financial closure.

#### **4.0 PROGRAMME**

- 4.1 An indicative procurement programme has been prepared which endeavours to keep the stages of the procurement process to a minimum. The programme assumes that the preferred operator will be selected prior to the receipt of final tenders from the proposed developer.

Key stage	Operator	Developer
PIN notice published	N/A	30/05/2007
OJEU notice published	30/05/2007	16/07/2007
Issue Marketing Brief	01/06/2007	01/06/2007
Issue pre-qualification questionnaire	01/06/2007	16/07/2007
Market awareness open day	11/06/2007	11/06/2007
Return of pre-qualification questionnaire	04/07/2007	21/08/2007
'Longlisting' of bidders and issue of descriptive documents	20/07/2007	01/10/2007
ITPD phase ends	20/09/2007	04/02/2008
Selection of shortlisted parties for ITCD phase	12/10/2007	03/03/2008
Receipt of ITCD responses from shortlisted parties	23/11/2007	14/04/2008
Shortlist parties from ITCD phase	28/12/2007	18/06/2008
Formally conclude Dialogue and Issue Final tender documents	04/01/2008	18/06/2008
Submission of final tenders	11/02/2008	01/07/2008
Selection of preferred partners	25/04/2008	11/09/2008

#### **5.0 COMPLIANCE WITH COUNCIL POLICIES**

- 5.1 The Vision for Leeds 2004 to 2020 identifies a major project to improve the cultural life of the city, including developing a new, large scale international cultural facility such as an arena.

#### **6.0 LEGAL AND RESOURCE IMPLICATIONS**

- 6.1 Existing budget provision in Capital Scheme No. 12589/ARE will meet the cost of the City Council employing PMP Consultants to project manage the implementation of the delivery plan for the proposed arena.
- 6.2 At this time it has only been possible to estimate the cost to the Council procuring the legal advice detailed in paragraphs 3.16 to 3.19 inclusive above, details of which are contained in Appendix 1, which is confidential/exempt under Access to Information

Procedure Rule 10.4.3, as it contains information which it disclosed to the public would, or would be likely to prejudice the commercial interests of the Council. Appendix 1 contains the Council's estimate of the fee that the proposed legal advisors will seek for providing the legal advice required by the Council and, if disclosed, would prejudice the Council's position during the competitive procurement process for such legal advisors. By keeping the information confidential at this time, it increases the Council's chance of securing a competitive and, hence value for money tender for the commission.

## **7.0 RISK ASSESSMENT**

- 7.1 There is a risk that the budget provision proposed for the appointment of specialist consultants to provide legal advice during the procurement process may be insufficient. The risk cannot be completely mitigated and, whilst it is the intention to appoint such consultants on the basis of a fixed fee, if ultimately it proves to be the case, then a review of the proposed scope of works for the consultants would need to be undertaken to bring the costs back within budget.
- 7.2 There is a risk that there are only a limited number of operators with the required experience to run a venue of the size proposed. If these operators fail to express an interest in the proposed Leeds Arena, then the Council would need to consider establishing a Special Purpose Vehicle to operate the new facility.
- 7.3 There is a risk that the City Council will incur consultancy fees in the employment of PMP Consultants and associated legal advisors without successfully procuring the appointment of a preferred operator and developer for the arena. Whilst the risk cannot be completely mitigated, the Council will endeavour to structure the appointment of such consultants with appropriate break points in their commissions should the project fail to proceed, so that payments would only be made for work undertaken to the point any commission is terminated.
- 7.4 There is a risk that some elements of the advice work that will be procured from the appointed legal advisors may not ultimately be eligible for treatment as capital expenditure within the Council's accounts. The specific risk relates in the main to work associated with the procuring and appointment of an operator, these costs may not be really attributable to the development costs of the arena. Dependent upon the eventual split of legal advisor costs between the developer and operator procurement elements, the Director of Resources will determine which, if any, of these costs need to be charged to and funded from revenue.

## **8.0 RECOMMENDATIONS**

- 8.1 Executive Board is requested to:-
  - (i) Note the progress made to date in the operator procurement process.
  - (ii) Authorise the Director of City Development under the Council's scheme of delegation to approve both the long list and shortlist of potential operators and developers during the Competitive Dialogue procurement process.
  - (iii) Approve the tender evaluation criteria to be used in the procurement process for the appointment of the preferred developer for the proposed arena.
  - (iv) Authorise an injection of funds as detailed in Appendix 1 which is confidential/exempt under Access to Information Procedure Rule 10.4.3 into existing Capital Scheme No. 12589/ARE/000 and the incurring of expenditure for the appointment of consultants to provide specialist legal advice to the Council on



the operator and developer procurement processes through to contract award/financial close.