

Agenda Item No:

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Report of : Asset Management and Regeneration

Report to : Director of City Development

Date: 30 January 2015

Subject: Proposed Waiver of Contract Procedure Rules 9.1 and 9.2 to Invite Interserve Construction Ltd to Tender for a Package of Enabling Works on the Kirkgate Market Project Without the Need for Inviting a Competitive Tender for the Proposed Works.

Are specific electoral Wards affected?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, name(s) of Ward(s):	City & Hunslet	
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, Access to Information Procedure Rule number:		
Appendix number:		

Summary of main issues

1. The report seeks approval to Waive Contract Procedure Rules 9.1 and 9.2 to authorise Interserve Construction Ltd (Interserve) to undertake a package of enabling works on the Kirkgate Market project without inviting a competitive tender for the proposed works.
2. The report details the background to the Market's project, the procurement of Interserve as the preferred contractor for the proposed improvement and refurbishment works (the proposed works), outlines the proposed enabling works, the reasons for inviting Interserve to undertake the enabling works without inviting competitive tenders for the works and, summarises the consequences if the proposed action to Waive Contract Procedure Rules 9.1 and 9.2 for Interserve to progress the proposed works is not approved.

Recommendation

3. The Director of City Development is recommended to approve the Waiver of Contract Procedure Rules 9.1 and 9.2 to authorise Interserve Construction Ltd to undertake a package of enabling works on the Kirkgate Market project without inviting a competitive tender for the proposed works.

1 Purpose of this report

- 1.1 The purpose of this report is to seek approval to Waive Contract Procedure Rules 9.1 and 9.2 to authorise Interserve Construction Ltd to undertake a package of enabling works on the Kirkgate Market project without inviting a competitive tender for the proposed works.

2 Background information

- 2.1 In July 2011, the Council's Executive Board approved the vision and objectives for Kirkgate Market and, in February 2012 it approved recommendations to undertake a feasibility study to improve and refurbish the Market.
- 2.2 In April 2014, the Council authorised a £12.3m investment in Kirkgate indoor and outdoor market and these works are currently programmed to commence on site in April 2015 in line with the necessary planning and listed building consents and, subject to timely vacant possession of the required areas of the Market being secured. The Executive Board at its April 2014 meeting also authorised the Director of City Development in consultation with the Executive Member for Transport and Economy to take the decisions that facilitate the works to improve and refurbish Kirkgate Market.
- 2.3 In accordance with the Council's Contract Procedure Rules, the Chief Economic Development Officer approved the selection of a competitive, two stage develop and construct procurement approach via the YorBuild Framework for the procurement of a contractor for the proposed works and, subsequently in October 2014, the Director of City Development approved the appointment of Interserve as the preferred contractor to undertake the proposed works.
- 2.4 Interserve is currently developing their second stage tender submission which is due to be submitted to the Council in mid February 2015. Subject to the receipt of an acceptable second stage tender, the development programme assumes a contract award on 1 April 2015, with the main contract works to start on site scheduled for mid-April 2015.
- 2.5 In anticipation of the proposed start on site, businesses occupying stalls in the 1976 and 1875 market halls affected by the phase 1 works were served a Section 25 Notice (Landlord and Tenant Act 1954) to quit their business premises on 31 January 2015. From 1 February 2015, a large section of the indoor market will, therefore, stand empty in anticipation of the contractor's start on site.

3 Main issues

Reasons for Contract Procedure Rules Waiver

- 3.1 Subsequent to the selection of Interserve as the preferred contractor for the proposed works, in order to adhere to the strategic development programme which envisages works to the Market being complete by late summer 2016, the Kirkgate Market project team in discussion with Interserve has determined that a package of enabling works costing in the region of £200,000 should be undertaken by the preferred contractor prior to the main contract works starting on site. Subject to approval, the proposed package of enabling works would commence in early February 2015, to be complete by mid April 2015 and comprises:
- ❖ Detailed, pre-refurbishment/demolition asbestos surveys in the area covered by the proposed phase 1 works.
 - ❖ Underground drainage surveys.
 - ❖ Structural surveys.
 - ❖ Establishment of contractor site accommodation.

- ❖ Erection of hoardings around the proposed phase 1 area of work, the contract set down area, the access road running alongside the indoor market/outdoor market and around the contractor's site accommodation.
- ❖ Submission of applications to utility companies for diversion works.
- ❖ The construction of outfall drainage in the south east corner of the site adjacent to the exit from the NCP car park.
- ❖ Demolition of 4 no. outdoor market stalls to create a contractor drop off / holding area.
- ❖ Service (electricity and water) diversions where required.

3.2 The Director of City Development should note that the package of enabling works detailed in paragraph 3.1 above will be covered by the terms and conditions of contract to be concluded with Interserve as procured from the YorBuild Framework, but that in order to adhere to the strategic development programme, it is proposed that the works be brought forward in time prior to reaching financial close for the main works contract. It should also be noted that several of the proposed works detailed above cannot commence until the Local Planning Authority has approved the implementation of a programme of archaeological and architectural recording consistent with the proposed development.

3.3 To ensure that the works to improve and refurbish Kirkgate Market are delivered efficiently, on programme and within budget, the Kirkgate Market project team supported by the Kirkgate Market Project Board are of the view that Interserve as the selected preferred contractor for the proposed works who has developed a detailed knowledge and understanding of the works be appointed to undertake the required enabling works.

3.4 Given the need for an early start in order to maintain the development programme, the need to minimise the Council's risk exposure by passing the design and construction risk responsibility to Interserve and, the need to minimise the risk of vacant parts of the Market being occupied by unauthorized users, it is not considered practical to let this contract to another company via a mini competition from the YorBuild Framework nor, for the Council to let such contracts directly itself on an individual basis, as such an approach would maintain the risk exposure with the Council and would potentially have significant implications on programme and cost.

Consequence if the Proposed Action is Not Approved

3.5 If the proposed action is not approved, there is a high risk that the development programme will not be maintained and that financial close and contract award will not be achieved in April 2015 and that works on site will not be complete in late summer 2016 as currently programmed.

3.6 The alternative would be to procure a contractor from the YorBuild Framework by competitive tender to undertake the enabling works. The Director of City Development should note that assuming contractor interest in the enabling works package, that allowing time for the preparation of tender documentation and the tender process itself which is estimated would take around 6 weeks to conclude, then the earliest a contractor could be appointed to undertake the works would be late March 2015. In addition, given that the contractor undertaking the enabling works will be responsible for the design of any service and utility diversion works, the intrusive asbestos survey works and ultimately the removal of any such asbestos, then the contractor would need to provide warranties to the Council both for the design work for the diversions and the asbestos survey, with such warranties ultimately having to be passed to the contractor undertaking the Market

improvement and refurbishment works. Such an arrangement has the potential to increase and not reduce the Council's risk exposure on the project.

Advertising

- 3.7 No specific advertising will be undertaken. The Director of City Development should note that Interserve was selected as the preferred contractor for the works via a competitive procurement process from the YorBuild Framework.

4 Corporate Considerations

4.1 Consultation and Engagement

- 4.1.1 The Kirkgate Market Project Board has been consulted on the proposed package of enabling works and is supportive of the recommendation contained in the report.
- 4.1.2 The Council's Procurement Governance and Regulation Manager has been consulted and advised as to the need to approve a Waiver of Contract Procedure Rules 9.1 and 9.2 in this instance.
- 4.1.3 The Executive Member for Transport and the Economy has been consulted and is supportive of the recommendation contained in the report.

4.2 Equality and Diversity / Cohesion and Integration

- 4.2.1 The Kirkgate Market refurbishment scheme will ensure it continues to promote sustainable and inclusive economic growth by maximising employment opportunities for local residents. The establishment of a permanent, fully functional and viable fresh produce offer in Kirkgate Market is integral to its remaining a vital source of affordable and in some cases culturally niche produce for the citizens of Leeds.

4.3 Council Policies and City Priorities

- 4.3.1 The continued improvement of Kirkgate Market is consistent with the Best Council Plan 2013 – 17 in terms of promoting sustainable and inclusive economic growth by maximising employment opportunities for local residents.
- 4.3.2 Securing the future of Kirkgate Market is a key element of being the Best City
- ‘Best City ... for business, making sure jobs are created and that local people can access those jobs, making sure new developments create skills and opportunities through apprenticeships’.
- ‘Best City ... for communities, encouraging community spirit and local activity’.

4.4 Resources and Value for Money

- 4.4.1 The cost of the proposed enabling works has been estimated by Interserve to be in the region of £200,000 inclusive of the contractor's preliminaries and fees. If the Director of City Development is minded to authorise the Waiver of CPR 9.1 and 9.2 to allow Interserve to undertake the proposed enabling works, then the company will submit a fixed price for the works. The cost of the proposed enabling works will only be established upon receipt of a price for the work from the preferred contractor.
- 4.4.2 The Council's retained cost consultant for the project has advised that the budget cost estimate provided by Interserve for the proposed enabling works appear

reasonable for the nature of the proposed works. The cost consultant will comment on the company's price for the works in terms of value for money to the Council.

- 4.4.3 The cost of the proposed enabling works will be met from existing budget provision authorised by the Council's Executive Board at its meeting in April 2014.

4.5 Legal Implications, Access to Information and Call In

- 4.5.1 This is a significant operational decision and is not subject to Call In. The report does not contain any exempt or confidential information.
- 4.5.2 Legal advice has been sought from the Council's Procurement Unit who confirmed that these works are included in the approval to appoint Interserve to undertake the proposed works as part of the second stage tender referred to in paragraph 3.2 above. Whilst the second stage tender is being developed, leading to the proposed award of a contract to Interserve starting on 1 April 2015, it could be argued that giving this work directly to Interserve in this way could leave the Council open to a potential claim from other contractors to whom this contract could be of interest that it has not been wholly transparent
- 4.5.3 It is, however, considered that the risk of a challenge on the basis that the Council is allocating these works to Interserve without a procurement exercise is significantly mitigated. It is the case that these works would always have to be carried out, albeit when the main contract is awarded. As such, the Council can reasonably argue if challenged that it had always intended to carry out these works, the main contract allows for these works and that the Council is merely choosing to allocate the work now in order to ensure that the works are delivered efficiently, on programme and within budget.
- 4.5.4 Although there is no overriding legal obstacle preventing the Waiver of CPR 9.1 and 9.2, the above comments should be noted. In making a final decision, the Director of City Development should be satisfied that the course of action proposed represents best value for money to the City Council.
- 4.5.5 If the Director of City Development was to approve a Waiver of CPR 9.1 and 9.2, it is envisaged that the Council would place either a direct order with the preferred contractor to undertake the works, issue a letter of comfort to the contractor or enter into a Pre Contract Service Agreement for the works. The precise mechanism has yet to be determined and will be discussed in detail with officers from the Council's Procurement Unit.

4.6 Risk Management

- 4.6.1 There is a risk that the City Council and Interserve may fail to agree a second stage tender and hence reach financial close for the main works contract. This risk cannot be completely mitigated, however, the Council has established a strategy to identify cost savings should this prove necessary to ensure that the scheme is budget-compliant and can proceed. The strategy could involve a combination of omitting/deferring work that would not undermine the core aspects of the project, identify alternative sources of funding and examining the potential for additional funding supported by prudential borrowing.
- 4.6.2 The Director of City Development should note that the level of any savings that may be required will only be known in mid-February 2015, when the guaranteed Maximum Price has been issued by the contractor to the Council and reviewed , some three weeks after a potential order for the proposed package of enabling

works has been placed with the preferred contractor. However, unless the scheme were to be postponed indefinitely or cancelled, the works to be carried out under the enabling works package would still be required and any delay may incur additional costs.

- 4.6.3 At the date of report preparation, it is understood that one Counter-Notice (Section 26 Notice) has been served on the City Council by a displaced tenant. The location of the unit occupied by the trader serving the Counter Notice is such that access to the unit for both the trader and customers can be maintained. The Market's team has advised that the unit in question will not be surrounded by the proposed hoarding which forms part of the proposed enabling works and, that the trader will be able to trade without obstruction, with little impact on the planned hoarding layout.

5 Recommendation

- 5.1 The Director of City Development is recommended to approve the Waiver of Contract Procedure Rules 9.1 and 9.2 to authorise Interserve Construction Ltd to undertake a package of enabling works on the Kirkgate market project without inviting a competitive tender for the proposed works.

6 Background documents¹

- 6.1 None

¹ The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.