

Appendix 1 to this Report is Exempt/Confidential under Access to Information Procedure Rules 10.4 (3)

Report of : City Development

Meeting: To The Director of City Development

Date of meeting: 18 August 2011

SUBJECT: LEEDS ARENA PROJECT, ADDITIONAL FEE PAYMENT TO COBBETTS LLP

WARD:

This Report is for:-

Discussion Only

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Information Only

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Advice/consideration
prior to taking a

decision or
reporting to a Committee

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Decision to be taken by:-

Full Council

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Corporate Governance and Audit Committee

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Executive Board

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Standards Committee

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An Area Committee

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Member Management Committee

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A Regulatory Committee

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A Director using delegated authority

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The information contained in Appendix 1 details the proposed expenditure to be incurred to meet the cost of the additional legal advice required on the arena project.

It is considered that the public interest in maintaining the content of Appendix 1 as Exempt/Confidential outweighs the public interest in disclosing the information in the Appendix, as disclosure could prejudice the development of the arena and the fee relates to the financial/business affairs of a particular company which, if revealed, would place the company at a commercial disadvantage when competing for other consultancy commissions.

EXECUTIVE SUMMARY

The report proposes expenditure to be incurred to meet the cost of additional legal input on the Leeds Arena project. The report summarises the additional work already undertaken by the retained legal advisors on the project prior to contract award to

BAM Construction, the residual legal issues to be addressed and, sets out the reasons why a Waiver of Contract Procedure Rules authorising the additional work was not obtained at the appropriate time in accordance with Contract Procurement Rules 31.4.

1.0 INTRODUCTION

- 1.1 The purpose of this report is to advise the Director of City Development of the reasons why a Waiver of Contract Procedure Rules was not obtained at the time the additional legal advice / input from Cobbetts LLP was sought on the Leeds Arena project. It also seeks approval to authorise the payment of additional fees to the company for the additional legal work and time the company has committed to the project pre-execution of the building contract with BAM Construction for the construction of the Leeds Arena and, also for the additional work the company continues to perform both on construction issues associated with the project and also in respect to the Agreement for Lease / Lease with SMG the operator for the arena.
- 1.2 Appendix 1 of this report is confidential as it details the fee provisionally agreed with the company for work undertaken to date and the proposed expenditure to be incurred to conclude the residual legal issues outstanding on the arena project. In line with Access to Information Procedure Rules 10.4 (3) it is considered that the public interest in maintaining the content of Appendix 1 as Exempt / Confidential outweighs the public interest in disclosing the information contained in the Appendix, as disclosure could prejudice the development of the arena and the fee relates to the financial/business affairs of a particular company.

2.0 BACKGROUND

- 2.1 In July 2007, the City Council sought a competitive fee proposal from external legal advisors to provide legal advice and support on the arena project. The legal advice provided to the Council under this commission may be summarised as advice relating to public procurement processes, the Competitive Dialogue Procedure, commercial development and state aid issues, as well as property, title checks, planning, local government and tax issues generally associated with the procurement of both the preferred operator and developer for the arena.
- 2.2 Following a competitive tender process and in accordance with EU procurement procedures, Cobbetts LLP were appointed as legal advisors to undertake the provision of legal advice as detailed in paragraph 2.1 above.
- 2.3 Subsequently, Cobbetts were retained to represent the Council in a number of legal transactions, the details of which are contained in Appendix 1, the content of which is Exempt / Confidential under Access to Information Procedure Rules 10.4(3).

3.0 REASONS FOR CONTRACT PROCEDURE RULES WAIVER

- 3.1 Towards the end of 2010, upon receipt of the contractor's proposals for the arena development, it became apparent that the cost of the proposals as presented by BAM Construction exceeded the budget available for the project. In order to achieve a budget compliant scope of works, the contractor had to develop a more efficient and cost effective design solution that would satisfy the Council's brief, SMG's operational requirements, achieve all statutory consent and be within the budget set by the Council.
- 3.2 In order to mitigate the delay to the project programme and to avoid the potential for further significant cost increases arising from raw material price increases, the Council

requested its retained consultants to fully engage with the contractor and commit additional time and resources sufficient to ensure the building contract could be executed in May 2011, with works starting on site shortly thereafter. In these circumstances, all time and effort from Council officers and the Council's advisors was focussed on achieving an acceptable design solution within budget.

- 3.3 Against this background, Cobbetts, as the Council's legal advisor on the project, had to:-
- i) Negotiate with SMG and prepare a Variation Agreement to reflect the changes in the design for the arena that had occurred in order to achieve a budget compliant scope of works.
 - ii) Comment on the implications of changes in the scheme design on third party funding agreements.
 - iii) Respond to general queries and provide advice as required on the Council / SMG Agreement for Lease / Lease.
 - iv) Undertake lengthy contractual negotiations with BAM Construction to reach agreement on the terms and conditions of the building contract, combined with the provision of general construction advice.
- 3.4 The Director of City Development should note whilst an element of the company's earlier appointment allowed for such works to be undertaken, such commission did not foresee that the Value Engineering process would take over six months to complete, thus involving Cobbetts in considerably more meetings, negotiations and drafting of documents than originally envisaged. Equally, in terms of bringing the respective legal agreements to a conclusion, Cobbetts will need to complete the Council / SMG lease upon practical completion of the building works, negotiate and procure Collateral Warranties from the Council's advisors and BAM Construction's consultants and key identified sub-contractors.
- 3.5 Given the circumstances outlined above, Council officers did not secure the required Waiver of Contract Procedure Rules at the appropriate time for approval of Cobbetts additional time and input to the arena project and, as a consequence of such works, the additional fee payable to the company.

4.0 CONSEQUENCES IF THE PROPOSED ACTION IS NOT APPROVED

- 4.1 The Director of City Development should note that Cobbetts has either already undertaken the additional work and committed additional time to the project or has been instructed to progress and complete the works summarised in paragraph 3.4 above.

5.0 ADVERTISING

- 5.1 The Director of City Development should note that the appointment of Cobbetts to provide legal advice on the arena project was undertaken via an OJEU competitive procurement process. In terms of the additional legal input to the arena project that forms the subject of this report, the Council's arena client project team was of the view that no further advertising for additional legal input was required, as the Council's legal advisor was already undertaking the work on behalf of the Council. To have done otherwise would have caused significant delay and extra costs to the arena project.

6.0 LEGAL IMPLICATIONS

- 6.1 The Chief Procurement Officer has been consulted on the additional work and as a consequence, the additional proposed fee payable to Cobbetts and, has advised that a report needs to be presented to the Director of City Development setting out the reasons why a Waiver of Contract Procedure Rules could not be obtained at the appropriate time.
- 6.2 In approving a Waiver without competition, there is a risk of challenge from other potential providers who have not had the chance to bid for this work. This risk is mitigated by the fact that Cobbetts has been working on this scheme since July 2007 and, accordingly, it makes sense that they should provide this additional work bearing in mind the knowledge they have gained of the project over the last four years. To have procured and appointed alternative legal advisors would have meant additional disproportionate costs being incurred and unacceptable delay to the programme by bringing an alternative provider up to speed with the arena project.

7.0 CONSULTATIONS

- 7.1 The Chair of the Arena Project Board has been consulted on the proposal and is supportive of the recommendations contained in the report.

8.0 FINANCIAL IMPLICATIONS

- 8.1 The proposed expenditure to be incurred to meet the cost of the additional legal input to the project is detailed in Appendix 1, which is Exempt / Confidential under Access to Information Procedure Rules 10.4(3).

9.0 RECOMMENDATIONS

- 9.1 The Director of City Development is recommended to:
- i) Note the contents of the report
 - ii) Approve the expenditure required to meet the costs of the additional legal input to the arena project.

Background Papers

None