

Agenda Item No:

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Report of : Acting Chief Asset Management Officer

Report to : THE DIRECTOR OF CITY DEVELOPMENT

Date: 22 January 2013

Subject: PROPOSED RETENTION OF CONSULTANTS TO SUPPORT AND REPRESENT THE CITY COUNCIL IN ITS LEGAL PROCEEDINGS WITH MONTPELLIER ESTATES LTD

Are specific electoral Wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, name(s) of Ward(s):		
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 checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, Access to Information Procedure Rule number:	10.4 (3)	
Appendix number:	1	

Summary of main issues

1. The report details the work undertaken and the costs incurred of retaining the consultants who had previously advised the Council on the Leeds arena project, to support and represent the City Council in its legal proceedings with Montpellier Estates Ltd (MEL)
2. The report details the background to MEL's legal claim against the Council arising from the termination of the procurement process undertaken by the Council to appoint a developer for the Leeds arena. It summarise the additional work requested of and undertaken by the consultants, the fees to be paid to the consultants and, sets out the reasons why a Waiver of Contact Procedure Rules authorising the additional work was not obtained at the appropriate time in accordance with Contact Procedure Rules 31.5

Recommendations

The Director of City Development is requested to:

- i) Note the content of the report
 - ii) Approve the retention of the companies and the incurring of fees required to meet the costs of the Council's specialist advisors previously engaged on the Leeds arena project, to support and represent the City Council in its legal proceedings with Montpellier Estates Ltd.
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1 Purpose of this report

- 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 of requesting the additional input from the Council's former specialist advisors in respect of the legal proceedings between the Council and MEL. It seeks retrospective approval to the retention of the advisors and payment of additional fees to the companies for the time they have committed to support and represent the City Council in its legal proceedings with MEL

2 Background information

- 2.1 MEL's legal proceedings against the City Council arise out of the procurement process undertaken by the Council using the Competitive Dialogue Procedure to appoint a developer for the Leeds arena.
- 2.2 The Director of City Development should note that the documentation issued to companies participating in the developer procurement process expressly provided that it was anticipated that the project would be funded through a combination of public and private sector investment, that bidders would be expected to minimise the use of public sector funds, that the competition process would be conducted in such a way as to ensure that value for money and affordable proposals were received, that any costs or expenses incurred by any bidder or other person would not be reimbursed by the Council and that neither the Council nor any of its advisors would be liable in any way to any bidder or other person for any costs, expenses or losses incurred in connection with the procurement process. Bidders were also advised that the City Council reserved the right at any time not to select a developer and to withdraw from the procurement process.
- 2.3 In February 2009, following Executive Board's decision at its meeting on 5 November 2008 to terminate the developer procurement competition without the award of a contract and, as a consequence of this decision to lead on the delivery of the arena itself, MEL submitted a claim against the Council for damages for breach of the Council's statutory duties arising under the Public Contracts Regulations 2006 and/or Directive 2004/18/EC and/or for breach of contract. Specifically, MEL challenged the decision of the Council to abort the tender procedure and proceed with the proposed arena development itself on land at Clay Pit Lane.
- 2.4 Subsequently in May 2010, the City Council received notice from legal representatives acting for MEL that they were considering issuing a further claim against the City Council and/or its agents in relation to the procurement of the development and construction of the Leeds arena. Details of MEL's deceit claim

are summarised in Appendix 1, the contents of which are Exempt/Confidential under Access to Information Procedure Rules 10.4(3).

- 2.5 The Director of City Development should note that MEL's two claims (procurement and deceit claims) were consolidated by Order of the High Court and proceeded to trial, which was held at the High Court, London over an eight (8) week period in October/November 2012.

3 Main issues

- 3.1 The Director of City Development will appreciate from the information summarised above and in Appendix 1, that the City Council had to make extensive preparations for its defence of the allegations raised by MEL.
- 3.2 As part of the preparations for trial, the Director of City Development previously authorised that fees could be paid to DTZ to support the Council in its defence of MEL's procurement and deceit claims.
- 3.3 During preparation for trial, Council officers were approached by representatives of DTZ, IPW Ltd and Arup who had advised the Council on the arena developer procurement process and, who had been requested by the Council to support and represent the Council in its defence of MEL's claims, requesting the payment of fees to cover their time commitments for trial preparation and attendance at the trial itself. Council officers accepted the principle that payments should be made to the companies as such work was not covered by their original commission on the arena project, subject to agreeing their specific inputs and the fee rates to be charged, the details of which are contained in Appendix 1.
- 3.4 In order to rigorously defend MEL's allegations and given their considerable knowledge and experience of the developer procurement process, officers considered it essential that representatives from DTZ, IPW Ltd and Arup were requested to provide specialist supporting information in respect of the procurement competition, be available to respond to requests for the provision of further information from MEL, prepare for and attend as witnesses at the trial and to provide support and advice to the Council's retained legal team. In particular, the consultants were requested to:-
- ❖ Comment on and prepare witness statements on behalf of the City Council for submission to the Court.
 - ❖ Respond to Counsel's enquiries on all aspects of MEL's claims.
 - ❖ Review and comment on the content of trial bundles, MEL's witness statements, evidence and daily trial transcripts.
 - ❖ Input to and review respective opening and closing submissions.
 - ❖ Attend at court, prepare for and appear as witnesses on behalf of the Council.
- 3.5 Given the consultants central role in the original developer procurement process which was terminated by the Council's Executive Board in November 2008 without the award of a contract, Council Officers were of the view that there was no alternative but to request the input of the three companies to support the Council in its defence of MEL's claims and, as a consequence to recompense the consultants

for the time committed by them to advise, represent and support the City Council in its legal proceedings with MEL.

- 3.6 The Director of City Development should note that approval to Waive Contractor Procedure Rules to retain the three companies to support the Council in its defence of MEL's allegations without the need to invite competitive tenders should have been obtained during the early stages of trial preparation. Unfortunately, such approval was not sought at the appropriate time, as Council officers were heavily involved in preparing for trial themselves and then attending the trial itself. As such, retrospective approval is being sought for the retention of the three companies and the payment of fees without the need to competitively tender their appointments.

4 Advertising

- 4.1 In terms of the three companies input and the payment of their fees that forms the subject of this report, the Council's arena project manager was of the view that no advertising for the input required from the companies was either necessary or required, as only specific individuals from the three companies involved in the original developer procurement process (the subject of the legal proceedings) could provide the advice required to support the Council in its defence of MEL's allegations. As such, advertising the service required would serve no purpose in the context of the legal proceedings for which their input was required.

5 Corporate Considerations

5.1 Consultation and Engagement

- 5.1.1 The Council's Financial Performance Group has been advised as to the anticipated cost of progressing the legal action with MEL.
- 5.1.2 The Chief Procurement Officer has been consulted on the retention of the three companies to support and represent the Council in its legal proceedings with MEL and, as a consequence the payment of additional fees to the companies, has advised that a report needs to be presented to the Director of City Development in accordance with Contract Procedure Rules 31.5 setting out the reasons why a Waiver of Contract Procedure Rules could not be obtained at the appropriate time.

5.2 Equality and Diversity / Cohesion and Integration

- 5.2.1 There is no expected impact on the protected equality characteristics and, therefore, it is not applicable for an EIA or screening form to be completed at this time.

5.3 Council Policies and City Priorities

- 5.3.1 To comply with Council policy, the recommendation contained in this report requires a retrospective approval to retain consultants who had previously worked on the arena development project and the payment of fees for their input in supporting the Council in its legal proceedings with MEL.

5.4 Resources and Value for Money

- 5.4.1 The resource implication of the proposed course of action is detailed in Appendix 1 of the report, the content of which is Exempt/Confidential under Access to Information Procedure Rules 10.4 (3)

5.5 Legal Implications, Access to Information and Call In

- 5.5.1 The Chief Procurement Officer has advised that there are no implications from a procurement perspective, as specific individuals from the three companies were the only persons able to support and represent the Council in its legal proceedings with MEL, given their specific and detailed knowledge of the developer procurement process which forms the subject of the legal action between MEL and the City Council
- 5.5.2 The report is not subject to Call In.
- 5.5.3 Appendix I of this report is Exempt/Confidential under Access to Information Procedure Rules 10.4(3), as it details the fees payable by the Council to its specialist advisors in preparing for, responding to requests for information from MEL and attending the trial as witnesses on behalf of the Council. It is considered that the public interest in maintaining the content of Appendix I as Exempt/Confidential outweighs the public interest in disclosing the information in the Appendix, as the fees relate to the financial/business affairs of individual companies, which if revealed would place the companies at a commercial disadvantage when competing for other consultancy commissions.

6 Recommendations

- 6.1 The Director of City Development is recommended to;
- i) Note the content of the report
 - ii) Approve the retention of the companies and the incurring of fees required to meet the costs of the Council's specialist advisors previously engaged on the Leeds arena project to support and represent the City Council in its legal proceedings with Montpellier Estates Ltd.

7 Background documents¹

- 7.1 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.