



**Report of Finance Manager, Resources and Housing  
Report to Chief Officer of Highways and Transportation**

**Date: 06 April 2021**

**Subject: Request for approval to award a contract to Bellavail IMS Ltd through a waiver of Contracts Procedure Rules No 9.1 and 9.2 – High Value Procurements**

Are specific electoral wards affected? If yes, name(s) of ward(s):	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Has consultation been carried out?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Will the decision be open for call-in?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, access to information procedure rule number: Appendix number:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

**Summary**

**1. Main issues**

- The Council in undertaking its statutory functions as both Highway and Traffic Authority upholds a large number of Section 38/S278 schemes under the powers and provisions contained within various enabling Acts i.e. The Highways Act 1980. The promotion of these matters is governed by regulations and directions which require the Council to adopt the highway and any offsite works as agreed with the developer as part of the S38 agreement and in line with statutory obligations.
- Since 1982 the Section 38/S278 team has managed over 1800 Section 38 schemes and successfully completed 1501 of these. A balance of 299 schemes are incomplete (un-adopted) at this time with a small percentage of these in dispute with the developer. A new process for completing the highway adoption on the disputed schemes has been identified with an initial trial involving 19 schemes. It is proposed that due to current staffing and the complexities of dealing with these problematic schemes to engage with Bellavail IMS Ltd a bespoke legal organisation with expertise in handling Section 38 disputes. Bellavail is currently working with over 37 other local authorities across the UK.
- As it is the Council's duty to ensure all highway works are carried out to the required standards and handed over for final approval and subsequent adoption, it is proposed to engage Bellavail IMS Ltd in this process with an initial sample of Section 38 schemes. This will be on a **Proof of Concept** or trial basis in an effort to ensure the process works well and proves to be a successful way of dealing with

these problematic schemes. Where a bond is available and the developer has negated on their duties to the Authority and therefore noncompliant in relation to the Highways 1980 Act, Bellavail IMS Ltd will take action on behalf of Leeds City Council to recover costs to complete unsafe or incomplete works.

- Bellavail IMS Ltd offer a unique **Net Nil Cost** Service to Authorities for their services. The services provided are a combination of technical and legal services to Local Authorities to resolve unadopted highways left outstanding by developers. This cost of this is recovered from the bond or from the Developer and therefore with no direct recourse to the highway authority. The risk is therefore assumed entirely by Bellavail IMS Ltd. Market testing has not identified any other organisation who offers a service whereby there is no charge to the Council.

## 2. Best Council Plan implications (see the [latest version of the Best Council Plan](#))

- Utilising Bellavail IMS Ltd is very much in keeping with Our Best Council Plan, spending money wisely (Financial strategy) as there is a nil cost to Leeds City Council for these services. Furthermore officer's time will be recovered as part of this process and therefore offering further benefit to the Highways and Transportation department.
- Leeds City Council maintain over 2900Km of highway, this opportunity ensures that where un adopted roads are not completed or in poor repair and where the developer may be negligent, then these highways can be made good offering a safe sustainable infrastructure for all road users, (Safer Leeds Strategy and supporting Leeds Transport Strategy) Leeds City Council can ensure that the highway is constructed to the correct standard providing accessible homes to the community and further protecting maintenance budgets. (Financial strategy)

## 3. Resource implications

- As this is a Proof of Concept an exact impact on resources is still to be evaluated. It is expected to be minimal as once the scheme details are handed over then 90% of all activity will be completed by Bellavail IMS Ltd.
- It is expected that no more than two to three working days per case will be required by an officer of Leeds City Council with an additional two days for inspections, this would suggest that a maximum of five Days per open case. This resource and subsequent cost will be recovered from the outstanding bond.

## Recommendations

The Chief Officer (Highways and Transportation) is requested:

- i) to approve the waiver of Contract Procurement Rule No 9.1 and 9.2 – High Value Procurements to allow Leeds City Council to negotiate and enter into a contract directly with Bellavail IMS Ltd for the provision of services as detailed in this Report; and
- ii) to approve the appointment of Bellavail IMS Ltd on the terms agreed in the aforementioned contract to begin this financial year and either terminate or be reviewed and renewed if appropriate on 12.04.2023

- iii) Spend to be a maximum of £120,000 over the contract term (to be wholly recovered from developers through bonds)

## **1. Purpose of this report**

- 1.1 This report is seeking to approve the waiver of Contract Procurement Rule No 9.1 and 9.2 – High Value Procurements to allow Leeds City Council to negotiate and enter into a contract directly with Bellavail IMS Ltd for the provision of services as detailed in this Report.
- 1.2 There are currently Council Tax paying homeowners living on un-adopted roads within Leeds City Council wards. Highways resource is concentrated on the enormous amount of new build within the area. Where a developer has failed to comply with the Highways Act 1980 Act and specifically S38/S278 provisions. It is therefore proposed to engage specialist services to provide resource and expertise to give Leeds City Council the certainty that they can enforce the provisions of the Section 38/278 for the benefit of Council Tax paying homeowners in our service area.

## **2. Background information**

- 2.1 The Council in undertaking its statutory functions as both Highway and Traffic Authority promotes a large number of Section 38 and S278 schemes under the powers and provisions contained within various enabling Acts e.g. The Highways Act 1980. The fulfilment of these matters is governed by regulations and directions which require the Council to ensure all works carried out are compliant with these acts and that highways once completed are fit to be adopted by the Council and registered accordingly.
- 2.2 The key tests for the adoption of a highway include that it must be of sufficient public utility, constructed to agreed standards, maintained for a period of 12 months by the developer, and be used as a highway during that period.
- 2.3 Legislation requires developers to bear the costs of the construction and maintenance of the highway and other appropriate matters. A bond is deposited to cover the cost of bringing the road up to an adoptable standard should a Developer become insolvent or is otherwise unable to meet their obligations.
- 2.4 It is prudent for the Highway Authority not to adopt a highway until a development is completed. This ensures that wear or damage through the use of the road by construction traffic is not rectified at the public expense but at that of the developers.
- 2.5 The time taken for a highway to become legally adopted and maintainable by public expense is dependent upon the developer as is the time it takes for a development to be completed to the stage that the highway is of a standard suitable to adopt. In a number of instances , developers have either unfortunately ceased to trade before bringing the highways in their developments to an adoptable standard or have failed to construct the highway to a standard that is reasonable for the Highway Authority to adopt. This has resulted in concerns being raised by Members and residents that

the highways could remain un-adopted but through no fault of the existing or prospective new residents.

- 2.6 For those existing developments where the value of a bond is insufficient to cover the necessary works or there are particular legal complexities in dealing with a developer, the Highway Authority has limited options. It can enter into lengthy legal procedures with no guarantee of success; it can utilise the bond and add any additional funding necessary from existing highway maintenance funding to complete the necessary works; or it can leave the highway as un-adopted. None of these options is of long-term benefit to the Authority or residents.
- 2.7 The proposed specialist, Bellavail IMS Ltd, has expertise and experience in dealing with outstanding Section 38/278 Agreements that the Highway Authority would have difficulty in completing. This enables them to bring most outstanding agreements to a satisfactory conclusion with the eventual adoption of the highway and all at no public cost. Bellavail IMS Ltd have successfully dealt with over 1000 outstanding agreements in the last 6 years. The council will not incur any costs for this work, all associated fees and additional costs are captured through the bond and all work carried out by Bellavail IMS Ltd is at their own risk. At no point can Bellavail IMS Ltd approach Leeds City Council for any costs incurred for any work performed as part of their undertaking.

### **3. Main issues**

- 3.1 The Council does not currently have resource to address the issue of historic sites, this work will clear down these challenging sites which will free up time to work on current developments. This further protects Leeds city Council maintenance budgets as we are not having to perform earlier than planned maintenance works providing value for money.
- 3.2 Although there is no “spend” with this organisation directly from the council, they are accessing funds that only the council and the developer has access to, and are ring fenced for a limited purpose. For this reason it is proposed that the trial scheme is carried out as a below EU procurement spend threshold waiver while the detailed position on this arrangement in procurement law terms is investigated further.
- 3.3 Bellavail IMS Ltd Fees and Council fees (Officers fees for additional hours worked in helping collate information and manage their part of the process) Actual cost of remedial works to bring the site up to an adoptable standard. These costs are recorded and invoiced accordingly and are taken directly out of the bond. Once all costs are established the developer is informed.
- 3.4 Full Financial Disclosure. Upon completion and adoption on all Bellavail IMS Ltd managed cases the Local Authority client is issued with a financial summary confirming:
- i. value of claim
  - ii. value of monies received (Settlement)
  - iii. value of highway improvement works undertaken
  - iv. Bellavail resource cost
  - v. establishment fees recovered

- 3.5 Once a site is identified as a potential case, a survey of the works required is undertaken and the evidence presented to the developer. The developer then has the opportunity to either use Bellavail IMS Ltd to remedy the situation or use their own contractors to remediate for their own repairs.
- 3.6 There are many benefits for the Authority to consider, nil cost, and low risk.  
Demonstrates pro-activeness to protect residents / council tax payers  
Secures source of finance for highway improvement works if required  
Fulfils the Local Authorities social and legal obligations  
Encourages the developer to enter into Section 38 Agreements early.  
Assists the section 38/S378 team in tidying up historic case load. Minimum resource requirement allowing officers to concentrate on the current caseload which is now in excess of 450 live schemes.

## **4. Corporate Considerations**

### **4.1 Consultation and engagement**

- 4.1.1 This report will have no impact to service users and therefore requires no public consultation.

### **4.2 Equality and diversity / cohesion and integration**

- 4.2.1 Equality and Diversity has been considered but it is not appropriate for this request.

### **4.3 Council policies and the Best Council Plan**

- 4.3.1 This decision is aligned to the Best Council Plan 2020/2025 'Safer Leeds Plan and the Highways Infrastructure and Asset Management Strategy.

#### Climate Emergency

Leeds City Council promotes a right first time policy this reduces our carbon footprint in this sector, repeat site visits and rejection of materials has a negative impact and severely impacts on carbon emissions. If we hold developers to account for poor work then this message will have a positive influence on getting new build highway works completed right first time and reduce our carbon footprint.

### **4.4 Resources, procurement and value for money**

- 4.4.1 The use of Bellavail IMS Ltd as a specialist consultant will have no financial impact on Leeds City Council as they work on a **Net Nil Fee** basis to the Council.
- 4.4.2 Bellavail IMS Ltd provides its clients with complete indemnity against all costs in the unprecedented event our advice or actions are determined to have been improper or unjustifiable. This assurance is further supported by a fully insured professional indemnity policy.
- 4.4.3 The use of Leeds City Council officers to collate or provide additional data and or inspections will be recovered through the process.

4.4.4 It is difficult to establish an exact value for money for this work at this time, however the savings against long term maintenance budgets could be considerable and will be collated and evidenced as part of the trial.

#### **4.5 Legal implications, access to information, and call-in**

4.5.1 The report is not subject to Call In and there are no grounds for treating the contents of this report as confidential with the Council's Access to Information Rules.

4.5.2 This is a trial scheme with spend that is below the threshold of the application of the Public Contracts Regulations 2015 therefore the Public Contracts Regulations 2015 should not apply. Despite this, entering into this arrangement directly with Bellavail IMS Ltd in this way could leave the Council open to a potential claim from other suppliers to whom this contract could be of interest that it has not been wholly transparent. In terms of transparency, it should be noted that case law suggests that the Council should always consider whether contracts of this value could be of interest to contractors in other EU member states and, if it could, the opportunity should be subject to a degree of advertising. It is up to the Council to decide what degree of advertising is appropriate. In particular, consideration should be given to the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographical location of the place of performance

4.5.3 The Chief Officer (Highways and Transportation) has considered paragraphs 4.5.2 and – due to the fact that the requirement is for highly specialised consultants – is of the view that the scope and nature of the services is such that it would not be of interest to providers in other EU member states, and it is considered that the risk of challenge identified at paragraph 4.5.2 above is extremely low.

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 the final decision, the Chief Officer (Highways and Transportation) should be satisfied that the course of action chosen represents best value for money.

#### **4.6 Risk management**

4.6.1 There is minimal risk that this waiver could be challenged in the future, all relevant mitigation has been carried out to reduce any potential risk to the business.

4.6.2 Leeds city Council have full control of this process. Bellavail IMS Ltd must seek approval from the appointed Section 38 officer on each scheme to proceed to the next stage of the process. If at any point the officer determines that there is a risk to Leeds City Council this will be escalated and a decision made as to whether the process continues.

#### **5. Conclusions**

5.1 In conclusion as a proof of concept, capped both financially and in terms of volume of cases to be trialled this offers Leeds City Council a valuable opportunity to not only clear down their historic case load but also reduce risk of claims of

maladministration regarding the Section 278/Section 38 adoption process at a nil cost to the Authority.

## **6. Recommendations**

The Chief Officer (Highways and Transportation) is requested:

- iv) to approve the waiver of Contract Procurement Rule No 9.1 and 9.2 – High Value Procurements to allow Leeds City Council to negotiate and enter into a contract directly with Bellavail IMS Ltd for the provision of services as detailed in this Report; and
- v) approve the appointment of Bellavail IMS Ltd on the terms agreed in the aforementioned contract to begin this financial year 2021 and either terminate or be reviewed and renewed if appropriate on 12.04.2023
- vi) Spend to be a maximum of £120,000 over the contract term (to be wholly recovered from developers through bonds)

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## **7. Background documents**

7.1 None

## Appendix 1

### What is your reason for waiving CPRs?

<p>There is a genuine, unforeseeable emergency meaning there is no time to go through a procurement process e.g. to deal with the consequences of extreme weather.</p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<p>To purchase supplies or services on particularly advantageous terms due to liquidation/administration.</p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<p>Requirement to put a contract in place with a current provider whilst a review of the services is completed.</p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<p>Ran out of time to undertake a new procurement exercise</p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<p>Other</p> <p>As it is the Council's duty to ensure all highway works are carried out to the required standards and handed over for final approval, it is proposed to engage Bellavail IMS Ltd in this process with an initial sample of Section 38 schemes. This will be on a Proof of Concept or trial basis in an effort to ensure the process works well and proves to be a successful way of dealing with these problematic schemes. Where a bond is available and the developer has negated on their duties to the Authority and therefore noncompliant in relation to the Highways 1980 Act, Bellavail IMS Ltd will take action on behalf of Leeds City Council to recover costs to complete unsafe or incomplete works.</p> <p>Bellavail IMS Ltd offer a unique <b>Net Nil Cost</b> Service to Authorities for their services. The services provided are a combination of technical and legal services to Local Authorities to resolve unadopted highways left outstanding by developers. The cost of this is recovered from the bond or from the Developer and therefore with no direct recourse to the highway authority. The risk is therefore assumed entirely by Bellavail IMS Ltd. Market testing has not identified any other organisation who offers a service whereby there is no charge to the Council.</p>	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No