

Approval to waive Contract Procedure Rules 9.1 and 9.2 to directly award a contract to Bermar Building Company Ltd for the continuation, without interruption, of works at Kirkgate Market 1875 Blockshops – Phase 2 Delivery.

Date: 28.04.2023

Report of: Head of Projects and Programmes

Report to: Director City Development

Will the decision be open for call in? Yes No

Does the report contain confidential or exempt information? Yes No

Brief summary

- The purpose of this report is to seek the approval of the Director City Development for a waiver to Contract Procedures Rules 9.1 and 9.2 such that the contractor currently carrying out essential health and safety works at Kirkgate Market Blockshops (phase 1) can be appointed to continue without interruption into the next phase (phase 2) of works without competition and subject to affordability.

Recommendations

The Director City Development is recommended to;

- a) Approve a waiver to Contract Procedure Rules 9.1 and 9.2 to allow the appointment without competition of Bermar Building Company Limited, the contractor currently carrying out phase 1 of works at the Kirkgate Market 1875 Blockshops, in order to continue with the second and final phase of works in line with previous approvals and without interruption.
- b) Subject to satisfactory performance on phase 1 and the submission of an affordable cost for phase 2, approve the appointment of Bermar Building Company Limited to carry out the phase 2 works. Authority to Spend to be requested once a cost for the works is confirmed. The estimated cost for the phase 2 construction works at RIBA stage 4 is £4.692m. If the proposals contained in this report are approved phase 2 will commence in July 2023 with a construction period of approximately 9 months (Key Decision will be brought forward).

What is this report about?

- 1 Bermar Building Co Ltd are currently working on site to deliver Phase 1 of essential health and safety works at the 1875 Kirkgate Market Blockshops. The contract was awarded in January 2022 in the sum of £3,609,781 with works starting in late January 2022 and now due to finish on site in June 2023. There have been some delays in completing the works due to structural issues identified after the contract commenced, Bermar's performance was not identified as a reason for the delays.
- 2 The successful Bermar tender followed a retender issued to contractors from the Constructionline framework. This approach was necessary as a previous procurement exercise via the YORBuild construction framework which closed in May 2021 yielded no submissions. Subsequently approval was obtained in June 2021 to retender the scheme utilising a list of interested contractors from an alternative approved framework, Constructionline. Two tenders were received and Bermar were awarded the contract following evaluation.
- 3 The initial tender exercise to use the YORbuild framework was approved as a Key Decision in February 2021. The key decision noted that, subject to good performance on site for phase 1 and satisfactory price for further phases, then these subsequent phases might be awarded to the contractor who undertook the phase 1 works to provide continuity and avoid interruptions. The administrative decision that changed the procurement route also changed the emphasis to Phase 1 being procured as a standalone scheme, this was clarified to bidders during the tender process by confirming it had not yet been decided how further phases would be procured.
- 4 Current market conditions are proving challenging in terms of lack of interest in tendering, increasing prices of labour, materials, and the inflationary increases being experienced. These conditions are affecting contractor interest in procurements and the prices being received when bids are submitted.
- 5 Given the constraints of the site environment, including; the market continuing to be a working environment, out of hours working, liaison with traders, and the potential for other contracts running concurrently, there is a material risk that if the works are competitively tendered there will again be limited or no interest from contractors in bidding for the works. If this occurs the current relationships between Bermar and the Council and Bermar and the traders could be lost.
- 6 It should be noted that running a competitive procurement process will result in delays to the works of several months due to the processes involved in conducting a procurement exercise, awarding a contract, demobilising Bermar, and mobilising the successful contractor. Additional costs for the Council will also be incurred in terms of loss of revenue income from lettings, compensation payments to traders, and staff resource.
- 7 The Director City Development should note that there is a need to conclude the works as soon as practicable, as these pertain to health and safety issues, which are the principle focus of the works overall.

What impact will this proposal have?

- 8 Kirkgate Market is a significant asset to the city both in a historical context and in supporting Small and Medium sized Enterprises (SMEs), as the market provides an environment to trade in a city centre location. The Council has committed to and continues to make significant

investment in the preservation and improvement of Kirkgate Market following on from the successful completion of the major refurbishment project in 2016.

- 9 The proposed works will extend the longevity of the 1875 blockshops and roof, which is the most historic area of the market. In 2019 a soft strip of several blockshops was undertaken to reveal the historic building fabric and enable the design team to accurately identify and assess the condition of the blockshops. This informed the design for the reinstatement and refurbishment of the blockshops and the remedial work required to the roof areas above to address the problem of rain water ingress.
- 10 A direct appointment to Berman Building Co Ltd will allow works to proceed without interruption or unnecessary costs and delays and will preserve the good relationship between the Council and Market traders.

How does this proposal impact the three pillars of the Best City Ambition?

Health and Wellbeing Inclusive Growth Zero Carbon

- 11 Kirkgate Market contributes to the Council's Best Council Plan vision to achieve a strong economy and sustainable infrastructure and contributes to the Inclusive Growth Strategy by backing innovators and entrepreneurs in business and social enterprise.

What consultation and engagement has taken place?

Wards affected: Little London and Woodhouse

Have ward members been consulted? Yes No

- 12 Members have been consulted on the overall project on the 1875 Blockshops and advised of the proposal to directly appoint the contractor currently on site.
- 13 There have been no issues from Members consultations regarding the proposal to appoint the stage 1 contractor to carry out phase 2 works subject to affordability criteria.

What are the resource implications?

14. The estimated cost for the phase 2 construction works at RIBA stage 4 is £4.692m. The full project budget appears in the table below. The appointment of the current contractor to continue the next phase of this work represents value for money to the council because;

- Berman are already mobilised on site, money will be saved and efficiencies achieved by having the continuity of Berman on site as no de-mobilisation and re-mobilisation costs will be incurred.
- Losses to the market revenue income from rentals continue to be incurred for as long as sections of the market are closed, for phase 2 this stands at £6654 per month. A direct appointment will minimise these losses.

	Budget (£)	Estimates (£)	Actual spend to date (£)	Balance (Budget minus estimates) (£)
	6,325,000			
Design Phase 1, inc surveys		£670,000	598,304	
Design Phase 2, inc surveys		£415,000		
Construction phase 1		3,646,390	2,234,372	
Construction phase 2		4,692,000		
Inflation (12%)		560,000		
Trader Compensation		130,000		
Injection 2022	3,300,000			
Injection via SIB Jan 2023	1,900,000			
Totals	11,525,000	10,113,390	2,832,676	1,411,610

What are the key risks and how are they being managed?

15. Lack of Interest due to Market Conditions – the initial phase 1 tender utilising Yorbuild did not receive any returns from contractors. The market has not changed and there is a high risk this could happen again losing time and resources. A direct appointment negates this risk
16. Challenge Risk – Although the direct award to Bermar Building Company Limited to carry out the phase 2 works is estimated to be below the Public Contract Regulations 2015 (PCRs) works threshold of £5.3m inc VAT, there is a risk of a procurement challenge from other contractors regarding the proposed direct appointment of Bermar. This is due to the aggregated total estimated value of phases 1 and 2 of the contract exceeding the Public Contract Regulations works threshold of £5.3m inc VAT. The position outlined in this report provides strong justification for the direct appointment and the risk of a procurement challenge can be mitigated through a Voluntary Transparency Notice (see paragraph 22 below).
17. Existing Expertise and Relationships – Bermar know the site well and this will promote efficiencies throughout subsequent phases. They know and have existing relationships with the staff at the market and traders, losing this could be to the detriment of the project.
18. Site Continuity – it is imperative that delays are minimised on this scheme due to the impact it has on the traders at the market and works need to be completed as quickly and efficiently as possible. Appointing Bermar to deliver this work would achieve this.
19. The longer the completion of all works is delayed the greater the reputational damage to the Council

20. Using the same contractor reduces the risk of poor co-ordination and removes potential doubts over responsibility for any defects liabilities between the two work phases. Defects liability clearly rests with one contractor.

What are the legal implications?

21. The approvals requested in this report are classed as a Significant Operational Decision, as they are the consequence of previous key decisions to inject funds into the capital scheme. The works can be approved by the Director City Development. The report does not contain any exempt or confidential information under the Access to Information Rules.

22 The value of the direct award to Bermar Building Company Limited for phase 2 works is below the UK services threshold for the application of PCR's for the procurement of public works contracts and therefore it is not subject to the PCR's and can be awarded provided it is in accordance with the Councils CPR's. CPR 9.1 and 9.2 require competition for procurements valued over £100k and the invitation of at least 4 written tenders. A waiver of these CPR's is required to directly award a contract to Bermar Building Company Limited for phase 2 works. It could be argued that the total value of phases 1 and phase 2 works in the aggregate exceeds the PCR's works financial threshold and therefore the direct award is not permitted (see para 16 above). To minimise this risk it is advisable to issue a Voluntary Transparency Notice (VTN) on Find a Tender (FTS) immediately after the decision to award the direct contract has been taken and then wait ten days to see if any procurement challenges are made. If no challenges are made within those 10 days the risk of challenge is significantly reduced. Further, publishing a VTN will also start time running for any other potential claim for breach of the PCR's, which must be brought within 30 days of the date that an aggrieved party knew or ought to have known, that a breach had occurred. However it is important to note that by publishing a VTN the Council is alerting the market to a direct award, and as the contract for Phase 2 is below the PCR's threshold, technically a VTR does not need to be issued, although the Council may voluntarily issue one for the reasons explained in this report.

Options, timescales and measuring success

What other options were considered?

23 Tendering phase two separately was considered but is not the preferred option for the reasons laid out in this report.

How will success be measured?

24 Success will be measured through completion of the works on time, within budget, and in accordance with the scope of works.

What is the timetable and who will be responsible for implementation?

25 Phase 1 works are due to conclude in June 2023. If the proposals contained in this report are approved phase 2 will commence in July 2023 with a construction period of approximately 9 months. All works to the 1875 blockshops would therefore conclude in April 2024.

26 The project will be managed by officers from the Council's Projects and Programmes team.

Appendices

- None.

Background papers

- None.