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Watford Borough Council

Cultural Quarter - Advice

8th December 2020

1 Executive Summary

1.1 We have been asked to advise on:

1.1.1 The appropriate procurement route to select a developer partner for the project;

1.1.2 The legal considerations where adopting a limited liability partnership (LLP) route;

1.1.3 Justification for a JV LLP approach;

1.1.4 The impact of BREXIT on the procurement route (if any).

1.2 Use of a framework[1] would not be appropriate for this Project because the project has certain features that will require detailed treatment in the legal agreements. No framework exists which readily lends itself to the type of joint venture LLP being contemplated.

1.3 Assuming a joint venture LLP, a free-standing OJEU would be significantly safer from a risk point of view. This enables the Council to develop its own documentation and legal requirements rather than being tied to the standard documents that must be used under a framework.

1.4 A limited liability partnership (LLP) will be lawful provided the dominant purpose of the Council is not commercial (and is therefore regeneration), notwithstanding that the LLP itself will seek to make a profit.

1.5 For a complex procurement of this kind, the Council may, and we advise should, elect to use competitive dialogue under the Public Contracts Regulations 2015.

1.6 The UK's departure from the EU will have no immediate impact on the choice of procurement route. Although change to the current rules are likely, these have not yet made their way into statute. The only noticeable difference will be the platforms on which the opportunity will be advertised (although soft market testing will ensure that there is strong market awareness).

2 Background

2.1 We have been instructed by Watford Borough Council (the "Council") to provide advice in respect of the Cultural Quarter project ("the Project").

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[1] By "framework" we mean an established framework of developers, such as those set up by Homes England and used for certain types of project in order to shorten and streamline the competitive process.

2.2 Background to the project is publicly available, including a July 2019 Masterplan. In general terms, the Council will seek to procure a development partner for this circa £150m project (by value).

2.3 It is a complex, multi-phase urban regeneration project combining a potential mix of uses – and circa 70 to 80% residential. As it stands, the Project will be taken to market under a competitive process of some kind.

2.4 In terms of commercial approach, the Council is considering and likely to adopt a corporate joint venture.

3 The appropriate procurement route to select a developer partner for the project

3.1 After investigation we advise that none of the pre-existing frameworks (e.g. Homes England – Delivery Partner Panel 3 (DPP3)) would be suited to this project. This, and other developer frameworks, are primarily designed for use where the relationship is to be governed by an arm's length agreement rather than a joint venture of the kind being recommended in this case.

3.2 **OJEU Procurement**

3.2.1 The preferable route would be a free-standing OJEU procurement under the Public Contracts Regulations 2015 (PCR).

3.2.2 The table below identifies the two relevant types of procurement procedures provided for in the Regulations.

3.2.3 Neither an Open nor Restricted Procedure would be appropriate in this case. The former is used for the purchase of commonly used supplies or services "off the shelf" and latter allows for no negotiation between the Council and potential partners.

3.2.4 Therefore, the choice is between Competitive Dialogue and Competitive Procedure with Negotiation.

Type	Description and relevance
Competitive Dialogue (CD)	Under which (following a selection process) the Council would dialogue with bidders, to develop one or more suitable solutions. Protracted dialogue can be mitigated by a well-planned procurement. Also, some degree of negotiation is permitted at preferred bidder stage.
Competitive Procedure with Negotiation (CPN)	Under which (following a selection process) the Council may negotiate the terms of a contract. This option allows a contracting authority to tailor its tender to meet its requirements. However, the main difficulty with CPN is that no further negotiation or clarification of the tender submission is

	permitted at preferred bidder stage.
Conclusion	**We recommend a CD route and not CPN. So far as we are aware, all similar regeneration projects have been procured under CD. In particular, under CPN there is no scope at all for clarifications at preferred bidder stage and that would place a material limitation on how the procurement would need to be conducted.**

3.3 **Rationale for use of competitive dialogue.** In order to use this procurement route, which enables dialogue to establish the solution, the Council must be satisfied that the necessary grounds exist under the Regulations. In this case, the Council may justify use of competitive dialogue because "the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them".

3.4 **Process.** Under an OJEU process, advertised in the required manner (on-line), any party may examine the procurement documents and submit an expression of interest by way of a completed selection questionnaire (SQ). The Council may also alert parties to publication of the notice (e.g. those it has engaged with in soft market testing).

3.5 The Council may then enter into dialogue in order to establish a solution capable of acceptance before calling for final tenders, evaluating those tenders and appointing a preferred bidder. Certain limited further negotiation on detailed terms is then permitted.

4 The legal considerations where adopting a limited liability partnership (LLP) route

4.1 A limited liability partnership (LLP) is a corporate vehicle in which two or more persons may participate with a view to profit. The main benefit of a LLP is tax transparency. This means that the LLP is not subject to corporation tax on profits; instead the distributed profit is taxed in the hands of its members. Since a local authority is not subject to income or corporation tax, this has the benefit of meaning that profits are received gross and not subject to tax.

4.2 For this reason, many regeneration joint ventures between local councils and developers have been formed as LLPs.

4.3 Under the Localism Act 2011 the Council has power to do anything that individuals generally may do. But this is subject to the proviso that where a council undertakes activity for a commercial purpose it must do so through a company (meaning a limited liability company that will be subject to corporation tax in the usual way). This statutory requirement is designed to ensure a level playing field where councils engage in purely commercial activity in the market.

4.4 In the case of *Peters v London Borough of Haringey* [2018] EWHC 192 (Admin) it was confirmed that a Limited Liability Partnership (LLP) structure can legitimately be used to create joint ventures with the private sector to promote regeneration objectives (being for a non-commercial purpose). It does not matter for these purposes that the LLP itself may generate profit[2]; it is the dominant purpose of the Council in being a member of the LLP that matters.

4.5 Although the Council has Housing Act powers, it may also rely on the Localism Act 2011 for the purpose of this project and in doing so (and in any event) would need to have regeneration purposes in mind (not commercial purposes) to form a LLP.

5 Justification for a JV LLP approach

5.1 The Council has been advised in relation to the pros and cons of a joint venture LLP approach.

5.2 Aside from the tax transparency tax benefits, a joint venture (whether as a company limited by shares or as a LLP) enables the Council to exercise a degree of "control" over the development that will be more flexible than is possible under a contractual arrangement, and also secures better scope to share in returns than may be achieved via overage or other purely contractual entitlement.

5.3 In short, a JV LLP will mean that the Council is sharing development risk and returns with the private sector partner and actively involved in business planning and decisions being made as the development is progressed. This is advantageous where a scheme may be subject to market fluctuations or other external factors that cannot be fully regulated under a traditional development agreement for example.

6 Impact of Brexit

6.1 The UK government has only enacted very modest changes to the procurement regulations following Brexit. Largely the changes are technical to ensure the regulations are consistent with the UK's status as a former EU Member State.

[2] Under the Limited Liabilities Partnerships Act 2000, a LLP has to be formed for carrying on a business *"with a view to profit"*. However, merely making a profit from activities or maximising return did not, in the Haringey case, mean that those activities were carried out with a commercial purpose.

6.2 References to the European Commission having any say in UK procurement have been removed as have the rights of EU businesses to bid for UK contracts outside of the GPA (the Agreement on Government Procurement). And the UK government has introduced a new electronic system for advertising tenders and publishing awards to apply in place of OJEU, to be called 'Find a Tender'. Besides that, nothing of substance will change immediately post-Brexit to the way UK public bodies across the UK have to run tenders and evaluate bids.

6.3 For the purposes of this project therefore, the working assumption should be the conduct of a procurement consistent with the existing Public Contracts Regulations. This should be kept under review. However, many of the core principles of procurement (e.g. equal treatment and non-discrimination) remain valid and likely to remain in law. It would therefore be prudent to establish a procurement for this project on the basis of prevailing law and existing good practice.

BROWNE JACOBSON LLP - 8TH November 2020