

ASSET DELIVERY PROGRAMME (ADP) CONTRACT AWARD

1 PURPOSE OF REPORT

1.1 To approve the Project Documents for the Asset Delivery Programme:

- (i) the draft Overarching Development Agreement (the “ODA”) set out at Exempt Appendix 1;
- (ii) the draft Conditional Sale Contract for the Transferring Sites (the “CSC1”) set out at Exempt Appendix 2;
- (iii) the Gainshare Lock In and Guarantee Agreement (the “Gainshare Agreement”) set out at Exempt Appendix 3; and
- (iv) the Buyback Option (the “Buyback Option”) as set out at Exempt Appendix 4;

And to delegate the final completion of these draft Project Documents to the Assistant Director, Asset and Commercial in consultation with the Leader of the Council including all necessary technical amendments and drafting provided that the final version of the Project Documents shall be substantially in the form as the drafts set out in this report.

- 1.2 To note that the draft Conditional Sale Contract for the Mill is yet to be drafted but will be in the form of CSC1 (to deal with the element of the Mill that will transfer to the Developer) with the development obligations from Schedule 1 of the ODA (to deal with the community facilities that the Developer will be providing for the Council)
- 1.3 To note the Preferred Bidder’s response to the Preferred Bidder Letter set out at Exempt Appendix 5;
- 1.4 To note the review of the Final Business Case set out at Exempt Appendix 6.
- 1.5 To note the Financial Due Diligence Report set out at Exempt Appendix 7;
- 1.6 To note the Risk Register set out at Exempt Appendix 8;
- 1.7 To note the Report on Contract setting out the terms of the proposed contractual arrangements for the Asset Delivery Programme as set out in Exempt Appendix 9;
- 1.8 To agree that the appointment of the Officers and Leader of the Council to the Partnership Board be on the basis as set out in Appendix 10.
- 1.9 To appoint the Assistant Director (Assets and Commercial) as the Council’s Senior Responsible Officer for the purposes of this project and to delegate to the Officers appointed to the Partnership Board decision making powers to

manage the operational day to day business of the Asset Delivery Programme.

- 1.10 To invite Council to appoint membership of the Partnership Panel for the Municipal year of 2020/21 on a pro rata basis as set out in Appendix 11.
- 1.11 To approve the drawdown from the Hard/Soft Infrastructure Reserve of £70,000 to fund additional programme costs as detailed in the Resource Implications (Section 11).

2 INTRODUCTION

- 2.1 The decision of Full Council on 19 May 2020, appointed GB Partnerships (“GBP”) as the Preferred Bidder for the Asset Delivery Programme (“ADP”).
- 2.2 In accordance with standard practice, as part of the procurement process a Preferred Bidder Letter was issued to GBP. This letter made the formal appointment of GBP as Preferred Bidder and set out a number of issues that needed to be addressed by the parties prior to completion of the formal contractual arrangements. These issues have formed part of the ongoing negotiations between the Council and GBP.
- 2.3 The Council’s Senior Responsible Officer (SRO) for this programme began negotiations with GBP in consultation with the then Portfolio Holder for Enterprise, Cllr Simon Wootton, now Leader of the Council. The negotiations (which remain commercially confidential) have successfully confirmed the legal and commercial arrangements between the parties and addressed the matters specifically referenced in the Preferred Bidder Letter.
- 2.4 Three workstreams were established to progress the negotiations. Each workstream was led by a member of the Council’s Leadership Team, supported by professional external advisers. The workstreams were:
 - (i) Legal and Commercial;
 - (ii) Design, Technical and Construction; and
 - (iii) Communication & Stakeholder Engagement.
- 2.5 As set out in the Management Case of the Final Business Case, these workstreams reported into a shadow Partnership Board consisting of GBP representatives, the Assistant Director, Assets & Commercial (who is the Council’s SRO), the Strategic Director, the s151 Officer and the Leader of the Council. The Partnership Board has been operating in a shadow format until the legal contracts are signed. It has been the role of the shadow Partnership Board to oversee the work of the three workstreams in order that the contracts between the parties can be concluded. Following contract execution, the Partnership Board will oversee the delivery of the ADP and the governance that relates to that is set out in paragraph 8 below.

3 STRUCTURE OF THE CONTRACTUAL TERMS

- 3.1 There are four contractual documents (together the “Project Documents”) which give effect to the commercial deal between the Council and the Developer. These documents are set out in paragraph 1.1 above.
- 3.2 The Project Documents are all legally interlinked and will all be executed at the same time. The contractual documents remain in draft form pending final completion of the legal drafting. There are, however, no remaining commercial issues between the parties and the outstanding drafting to be completed is of a routine nature.
- 3.3 The ODA sets out the overall relationship between the parties, including their respective obligations and governs the development of the Freight House site. The ODA follows the form and structure of commercially similar development agreements and also deals specifically with how the other contractual documents fit into the deal structure.
- 3.4 The sites which will transfer to the Developer will do so in two tranches under two legal contracts – the CSC1 and the CSC2. The transfer for the CSC2 will not include that part of the site on which the new community facilities are to be built (because that will be retained by the Council) but will include provisions for the development of the new community facilities in Rayleigh. The CSC1 and the CSC2 are what is known as conditional sale agreements, which means that the sites will only be sold once the conditions contained within them (the “Conditions Precedent”) are met by the Developer. If they are not met, then the sale does not take place.
- 3.5 The Gainshare Agreement sets out the protections and guarantees the Council has negotiated to support the delivery of the Programme.
- 3.6 The Buyback Option sets out the terms by which the Council can buy back a site or sites if the Developer fails to develop them in a timely manner.
- 3.7 The details within the Project Documents are summarised in the Report on Contract which can be found at Exempt Appendix 9;

4 PREFERRED BIDDER LETTER

- 4.1 In the Preferred Bidder Letter sent to GBP the Council set out the issues which it required to be resolved prior to formal contract award. These issues and the responses the Council received from GBP to address these concerns are set out in Exempt Appendix 5. During the negotiations the parties have worked through these issues and reported their progress to the shadow Programme Board. Officers and advisers are satisfied that all of these issues have now been resolved to mutual satisfaction and captured within the terms of the proposed Project Documents.

5 FINAL BUSINESS CASE REVIEW

- 5.1 The FBC presented to full Council on 19 May 2020 has been reviewed by officers and advisers in light of the COVID 19 pandemic. The conclusion reached is that the case for the ADP remains unchanged and indeed is strengthened because of the impact of COVID 19 on the Council's finances and the position with the leisure contract. As the pandemic is likely to be with us for the foreseeable future, the impacts of COVID 19 on the ADP are best monitored via the Risk Register where mitigations have been identified and will be managed as part of the Programme by the Partnership Board.
- 5.2 The review is set out in Exempt Appendix 6

6 FINANCIAL DUE DILIGENCE

- 6.1 At the beginning of the procurement process, financial due diligence was undertaken in respect of the Preferred Bidder and its stated supply chain. As the negotiations have been progressing, the Council's external financial advisers have further reviewed the financial standing of the Preferred Bidder and its supply chain to provide assurance as to its ability to deliver the Programme and meet its contractual obligations taking into account in particular, the impact of COVID 19. The Financial Due Diligence Report set out at Exempt Appendix 7 summarises the financial due diligence undertaken from the PQQ stage through to pre-contract execution.
- 6.2 Due diligence can only ever provide assurance that the party to a contract is financially able to meet its obligations. The ongoing financial stability of the Developer is a key Programme risk on the Risk Register which will be overseen and monitored by the programme governance.

7 PROGRAMME CHANGES AND IMPLICATIONS

- 7.1 One of the key objectives for the Council during contract negotiations was to achieve greater certainty on its maximum financial exposure relating to the Programme – i.e. to have certainty of the amount of capital receipt it would receive for the sites that will transfer and the cost of the works for the sites that will be retained. This has been achieved in two ways, firstly through the aggregation of the development into two tranches and secondly, by the introduction of two "Stop/Go" decision points into the contractual arrangements.
- 7.2 It is not possible to have absolute certainty on the Council's maximum financial exposure at the point of contract award. This is because GBF must undertake its site investigations (including surveys and boring) achieve planning consent and finalised its own costs before it can fix a price for the Council for the purchase of the land and the carrying out of the works.
- 7.3 As a result, the parties have agreed to aggregate the three South Street sites and Civic Suite plus the Freight House refurbishment and new build into

tranche 1 and the planned activities on the Mill Arts & Events Centre into tranche 2.

- 7.4 This means that for tranche 1 GBP will complete the pre-development/ planning stages of the programme for the three South Street sites and the Civic Suite, as well as for the Freight House construction works, before work on Freight House commences. This will provide the Council with greater price certainty on the combined value of all these sites.
- 7.5 At the same time as the proposals for tranche 1 are confirmed, outline proposals will be worked up for The Mill Arts & Events Centre site to provide indicative costs for the capital receipt of that part of the site which will transfer and indicative construction costs of the new community facilities. This will provide greater (but not absolute) price certainty for the Mill Arts & Events Centre site.
- 7.6 At this point, the Council is able to make an informed view of the likely overall financial exposure across the whole Programme and it has the opportunity to move ahead with the Programme at this point or not. This is the first “Stop/Go” decision point referred to above. If the Council agrees to move forward at this first “Stop/Go” decision point then the works for tranche 1 will begin and the Developer will proceed with its pre development/planning work for tranche 2 in order to finalise the financial offer (capital receipt and cost of development works). Once that point has been reached, there will be a second “Stop/Go” decision point for the Council to decide to proceed with the Mill Arts & Events Centre site.
- 7.7 It is intended that both “Stop/Go” decision points will be decisions for Extraordinary Meetings of Council.
- 7.8 At the Mill Arts & Events Centre site the assumption is that the new community facilities will be developed first while the existing Mill Arts & Events Centre building remains available for use by the Council and its partners. The new community facilities will be handed over before the residential element is boarded off and the existing Mill Arts & Events Centre building is decommissioned and demolished.
- 7.9 The Programme will require a decant from the Civic Suite. This will require the Council’s co-located partners to be moved to alternative office space while the new community facilities are built. The Council will explore the most appropriate options for this temporary accommodation with our partners. This work will form part of the Stakeholder Engagement Strategy.
- 7.10 The Civic Suite decant will also require the Council to temporarily relocate its public meeting spaces currently held in the Chamber and Room 4 until the Freight House work is completed. The Council will explore various options for this to ensure this function can be maintained, noting that the Council is currently holding all committee meetings virtually.

- 7.11 The Council will not have to decant from its 3-15 South Street offices until the Freight House is ready for occupation. This will avoid a ‘double-decant’ of staff, allowing them to move directly from South Street to the new Freight House development. The decant process for the Council’s employees will be managed through the Council’s ‘Connect’ Cultural and Transformation. It is likely that there will be some one-off cost associated with the move to the new Freight House, however it is not possible to accurately quantify at this stage. Any funding required associated with maintaining service provision during the temporary decant phase and the move to the new offices will be requested at the first ‘Stop/Go’ decision point, following consideration by a specific workstream.

8 GOVERNANCE

- 8.1 Members are invited to appoint the representatives to serve on the Partnership Board and Partnership Panel as the Council has direct working involvement.
- 8.2 The Project Documents provide for a Partnership Board which will be the primary forum for overseeing the delivery of the Programme including risks, reporting and escalation of issues arising. The Partnership Board is a contractual body comprised of representatives from the Council and the Developer on a 50:50 basis. (There is a dispute resolution process if required). The Membership for the Council will consist of three Officers representing the Council and the Leader of the Council for observation purposes. The Officer and Portfolio Appointees are set out in Appendix 11.
- 8.3 The Project Documents also provide for a cross party Partnership Panel which will be an Outside Body as per the Council’s Constitution and will be comprised of 7 elected members of the Council on a pro rata basis. The purpose of the Partnership Panel is to provide input and feedback directly to the Partnership Board from elected members of the Council to support the delivery of the Programme.
- 8.4 There will also be separate Stakeholder Focus Group(s) the purpose of which is to provide input and feedback to the Partnership Board from members of the public, the voluntary sector and other interested parties in relation to the various sites within the Programme. There may be more than one Stakeholder Focus Group depending on the needs of the Programme. These forums will be convened by the Council’s SRO and will specifically target the key stakeholders.
- 8.5 A visual representation of the Programme governance structure is set out at Appendix B to Schedule 5 of the ODA (Exempt Appendix 1).

9 NEXT STEPS

- 9.1 The draft Project Documents will be finalised by the Council’s SRO in consultation with Leader, taking into account advice from the Council’s

Monitoring Officer and external legal advisers, together with additional advice from the project team (internal and external) as required. There are no substantive commercial issues remaining between the parties and so completion of the Project Documents will comprise technical amendments and drafting to reflect the agreed position. The finalised documents will, therefore, be substantially in the form of the draft Project Documents. The finalised documents will be formally executed by the Monitoring Officer.

9.2 The Communications and Engagement Stakeholder Workstream have produced a draft Programme Launch Plan which covers the period leading up to and following commercial close which includes the following:

- A programme of Key dates and activities.
- Stakeholder Engagement Plan: a high-level summary of the groups and individuals to engage with. A more detailed summary of the meetings with these groups is outlined in the RACI (Responsible, Accountable, Consulted, Informed) document within the draft ODA (Schedule 7) Exempt Appendix 1.
- Branding and Partnership micro website: A micro website and Branding has already been developed and will be the portal for consistent and timely communications
- Communications Channels: All communications material will be developed so it can be used for multiple channels all modes of communication will be used such as traditional media newspaper, local radio, local TV as well as social media channels, Facebook, Twitter.

9.3 When formed the Stakeholder Focus Group(s) will provide the feedback to the Partnership Board from members of the public, the voluntary sector and other interested parties.

10 RISK IMPLICATIONS

10.1 The Risk Register was created early in the Programme and remains a live document that is regularly reviewed by senior Council officers and advisors. The register captures key risks, risk owners, provides a RAG status and list mitigating factors.

10.2 For ease of identification and management the Risk Register groups risks using the following categories: political, procurement, planning, financial/commercial, development/construction, operational and programme. The Council has also considered new risks which have arisen since the Preferred Bidder was appointed, and these are included within the Risk Register, including risks associated with Covid19.

10.3 Property Development programmes inherently carry risk and the Risk Register sets out the mitigation steps that can be taken for the key risks.

- 10.4 In general, apart from the normal risks concerning design acceptability, planning and timely programme delivery, the major risks in a disposal and development programme of this nature centre around changes in cost and changes in land values. Changes in market conditions can adversely affect land values in particular and hence adversely affect the forecast receipts for the Council when it disposes of its land. Covid19 has added an element of uncertainty that was not previously envisaged. Accordingly, the Risk Register highlights the steps that officers have taken to mitigate these risks and further detail is provided in the private and confidential papers on the specific measures that have been introduced to address them.

11 RESOURCE IMPLICATIONS

- 11.1 The commercial terms of the proposed legal agreements for the Programme, including financial implications, are set out in the confidential appendices to this report.
- 11.2 The Council has commissioned a team of external professional advisers who have provided capacity and expertise to progress the Programme to this point. This includes professional technical, legal and financial advice and project management support. This is a standard approach for complex projects of this type to ensure Value for Money is achieved for the Council.
- 11.3 Additional programme resources totalling £214,900 were agreed at FBC stage by Full Council on 19 May 2020 to cover the anticipated future costs of the Programme known at that point.
- 11.4 A further £70,000 is now requested to fund costs not anticipated at FBC stage, comprised of £20,000 to support the Communications & Stakeholder Engagement workstream whose scope has only been worked up since the Preferred Bidder was agreed in May and £50,000 to increase the budget for legal advice, since the volume and complexity of work required to negotiate the terms of the legal agreement with the Preferred Bidder has been higher than originally envisaged at FBC stage.

It is likely that there will be some one-off cost associated with the move to the new Freight House, however it is not possible to accurately quantify at this stage. Any funding required to ensure continuous service provision during the temporary decant phase and the move to the new offices will be estimated following consideration by a specific new workstream and requested at the first 'Stop/Go' decision point. For prudence a contingency sum has been included in the updated revenue cost assumptions within the Final Business Case figures.

12 LEGAL IMPLICATIONS

- 12.1 The draft documents are as close to final version as it can be at this stage with minor technical amendments to be closed off and there are no commercial terms and conditions outstanding to be discussed. Once finalised

the documents will be executed, and the Council's seal will be applied ready for completion by both parties. The terms and conditions of the commercial deal between the Council and GB Partnership will come into effect from the date of completion.

- 12.2 There are the various obligations required of the parties contained in the documents and include provisions for breaches by either the Developer or the Council. However, the intention is that the parties will work in partnership with each other, and in good faith to progress the Programme.
- 12.3 Full Council will be required to make two key decisions as to whether to progress with the programme once the conditions in the contract have been compiled with and the Council will have a fully informed view of its financial exposure. This is referred to above in the body of the report.
- 12.4 Other legal implications are identified in Exempt Appendix 9 – Report on Contract.

13 EQUALITY AND DIVERSITY IMPLICATIONS

- 13.1 An Equality Impact Assessment has been completed and there are not considered to be any equality and diversity implications at this stage.

14 RECOMMENDATION

- 14.1 To approve the Project Documents for the Asset Delivery Programme:
- (i) the draft Overarching Development Agreement (the “ODA”) set out at Exempt Appendix 1;
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Background Papers:-

None.

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