

Extension Works to Risborough Springs Swim & Fitness Centre - Procurement Process

Cabinet Member: Cllr Graham Peart

Ward(s) Affected: None

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RECOMMENDATION TO COUNCIL

- To provide an exemption from Contract Standing Orders (“CSO’s”) to allow the non-competitive award of a Development Agreement with a value of £1.2m to allow Places for People (“PFPL”) to complete development works at Risborough Springs Swim and Fitness Centre (“RSSFC”).
- To delegate authority for entering into a Development Agreement, Deed of Variation and any associated legal documents in relation to the existing Leisure Operator Agreement to the Head of Community Services, in consultation with the District Solicitor, Head of Finance and Commercial Services with the Cabinet Member for Community Services.
- To delegate authority for the surrender and re-grant of the lease to PFPL for RSSFC, and amendment as required to the ground lease for RSSFC with Princes Risborough Town Council to the Major Projects & Property Executive in consultation with the District Solicitor, the Cabinet Member for Growth and, Regeneration, the Head of Community Services and the Cabinet Member for Community Services.

Corporate Implications

Broad EU Principles and case law set the wider legal framework for those contracts which fall below the threshold for EU Procurement. The broad principles include the requirement to prevent, identify and remedy conflicts of interest, to avoid any distortion of competition and to ensure equal treatment of economic operators.

Officers have considered best value, case law and the EU principles, taking into account any risk, and recommend that the Council enters into a development agreement with People for Places directly without advertising to enable them to deliver the project.

The Council’s Contract Standing Order stipulate that its rules should not be waived without Member consent. This paper seeks that consent and sets out the alternative that Officers propose should be followed.

The scope of the project is within the 2017/18 approved capital programme.

Executive Summary

1. This report seeks an exemption from CSO's to allow the non-competitive award of a Development Agreement ("DA") with value of £1.2m for PFPL, the incumbent Leisure Operator to complete development works at RSSFC, which will provide larger studio and fitness facilities.

The Council's standard award process would be to advertise the opportunity on the Government's national portal "Contracts Finder" (Contracts Finder is a national website which provides information to potential bidders about contracts worth over £10,000 with the government and its agencies), and to run an open competitive tender exercise to select the most economically advantageous tender in accordance with relevant legislation and the Council's CSO's. In this case it is proposed that the Council will procure the design and improvement works via PFPL in order to utilise the benefit of its established supply chain to secure design and works that are competitively priced, of high quality and minimise delays and disruption to the day to day operations of the centre.

2. Sustainable Community Strategy/Council Priorities - Implications

3. The need to comply with a procurement process which achieves best value is a principle within UK law. This continues to apply alongside other requirements for contracts below the EU threshold. The Development Agreement (the "DA") and associated legal documents will include the requirement for PFPL to achieve and demonstrate competitive pricing through its supply chain and procurement procedures. This approach involves PFPL seeking best price from its building contractors, and using the same design team as it has used on similar procurement at other Local Authority owned leisure facilities so that a track record can be demonstrated.

Background and Issues

4. Research conducted on behalf of the Council has identified that there is already latent demand for leisure facilities at RSSC. The local plan proposes the building of around 2500 additional homes in the Princes Risborough area. The resulting increase in population will add to that demand. The Council intends to sign a DA with its current leisure management contractor PFPL so that PFPL can directly manage the building works from design through to construction of the enlarged health and fitness facilities at RSSC.
5. Officers believe the most appropriate procurement route is to:
 - (i) non-competitively sign a DA with PFPL, which will provide an agreed sum of money to develop and manage the works on the Council's behalf;

(ii) To enter into a Deed of Variation varying the Leisure Operator Agreement to allow for the improvement works to be carried out and varying the services to allow for the new facilities. There will also be a surrender and re-grant of leases on completion to take into account any changes in the plans for the facilities.

The characteristics of a Development Agreement (the “DA”) are as follows:

- a. It will form the legal agreement between the Council and PFPL as to the outline scope of what building works will be delivered and what funds are to be made available by WDC in order to do this. PFPL will be required to carry out and complete the improvement works in accordance with the requirements set out in the DA, using all reasonable endeavours to achieve completion by an agreed planned completion date.
 - b. It will set out mechanisms for collaborative working during the project, and also for reviewing costs and making payments against an agreed schedule. It will also include detail of how PFPL will communicate and manage any issues relating to cost or quality that may arise during design development and works.
 - c. PFPL would remain responsible for any latent defects arising in the improvement works.
 - d. The professional team appointed by PFPL and the eventual contractor selected by PFPL will be required to provide appropriate collateral warranties for the benefit of the Council and any other third party that has an interest in RSSC.
6. PFPL’s ownership of the procurement and management of the improvement works has been identified as the most suitable approach as this will mean they ‘own’ the quality of the design and works from the start; ensuring the works deliver a fit for purpose enlarged sports centre that provides an improved service to local residents. As well as this overarching reason for the chosen approach, Officers believe that non-competitive award of the DA to PFPL is the most appropriate procurement route because:
- A benefit to PFPL being awarded responsibility for the design and works via their established supply chain of contractors is that, as the current operator of the facility under the Leisure Operator Agreement, they are best placed to closely manage works to minimise closures and or disruption to the centre. PFPL’s established relationship with their contractors means that the contractors are experienced in ensuring any disruption is minimised and in H&S and other aspects of carrying out works in a ‘live’ site open to the public. For the Council to appoint a third party/ its own professional team and Design & Build contractor directly would be highly disruptive to the continued operation of the facility, and would present an increased delivery risk for the Council. This would include having to appoint professional team, manage multiple contracts directly and also having to manage any claims from PFPL if anything was to go wrong.
 - If there were any works changes required, the Council would have to manage that process and coordinate between contractor/s and PFPL and deal with

any impact those changes could have on PFPL's projected FM costs, as well as facilities mix and expected revenue. This could lead to a higher cost for the works from contractors/ consultants having to take into account those interface issues and possible associated delays. It would also be resource intensive – with cost implications - for the Council to manage this process. If PFPL procures and manages the design development and works, it manages those risks itself and will be able to utilise the benefits of having an established supply chain to achieve value for money.

- Another benefit is that if PFPL procures the improvement works, and once they are complete, PFPL will remain responsible for any latent defects in those works for the duration of the Leisure Operator Agreement and would have to rectify any such defects at its own costs, leaving PFPL with the risk of recovering any damages/ costs incurred and loss of revenue from the contractor in default. If the Council procures the Improvement Works, that risk remains with the Council.
 - In addition, under paragraph II.2.1 of the OJEU Contract Notice for the Council's appointment of PFPL to provide leisure management services, the scope of the required services includes the management, operation and maintenance of WDC's leisure centres. PFPL's project management of these works could be said to fit within the scope of this appointment given that PFPL is responsible for maintaining the new improved facilities.
7. In addition to the reasons stated above, in order to further ensure that the approach achieves value for money, PFPL have agreed to conduct a competitive procurement process.
8. It is necessary to exempt this procurement from the Council's CSOs because, subject to the commitments set out in the Development Agreement, the appointment of any advisors PFPL may require and the appointment of the works contractor will be in accordance with PFPL's processes and outside of the Council's control.
9. The Development Agreement has value of £1.2m and so is below the EU works threshold so the Public Contract Regulations 2015 as they relate to "above threshold contracts" do not apply.

However Part 4 Chapter 8 of the PCRs applies to contracts valued between £25,000 and relevant threshold ("Below Threshold Contracts"). PCRs require: "where a contracting authority advertises a contract award opportunity"... "In those circumstances the Contracting Authority shall publish information about the opportunity on Contracts Finder". The Council's CSOs require us to advertise contracts over £10,000, so following the standard Council process would result in this opportunity being advertised nationally.

Setting CSOs aside will remove this obligation so that the process outlined in this report can be followed.

Risks

10. The benefits this approach delivers in terms of financial and operational risks are stated above. Potential risks to the Council include the following:

- a. The works delivered under the contract established with PFPL's successful tenderer does not match the Council's requirements. This will be mitigated by clear procedures for collaborative working and agreement of designs (as permitted under the contractual approach adopted), plus reviews of works as they progress. Council officers will agree with PFPL the designs and then will let PFPL manage the D&B contract. A joint project Board and team has been set up and will be in constant communication throughout the project.
- b. The works costs of the PFPL procurement come in above budget. This would be dealt with contractually by PFPL as part of robust contract monitoring and management, and the joint Project Board will regularly review progress and cost reports. The Development Agreement will allow for the requirement for the joint Board to meet to review any issues arising and reach agreement as to way forward. This risk is also mitigated by the choice of a Design & Build contract type where the contractor will be responsible for delivering the works to the designs it has completed within its contractual budget.
- c. **Publication of contract award.** Where a Below Threshold Contract is awarded, Regulation 112 of PCRs requires Contracting Authorities to publish certain basic information about that contract on Contracts Finder, this obligation would apply to the Council's award of the DA to PFPL. For contacts below the EU Thresholds there are general requirements for transparency and competition imposed under EU Treaty Principles. If the procurement were to be found to be subject to these principles there is a risk of challenge. However PFPL have provided details that they have followed processes similar to that outlined above on several occasions and no such challenge has ensued.

The risk of challenge is considered low – the works are specialist in nature and are complex in terms of timing and linking to operations at the centre. The works relate to improving the current operations within the sports centre and PFPL regularly carry out improvement works of a smaller scale using their own contractors at the centres as part of their contractual responsibilities.

- d. Risks relating to increased costs for closure/ loss of income and operational related delays would be much higher with a new contractor brought in, that potentially has less experience (or none) of working on a 'live' site that is operational and open to the public during the period of the works.

11. **Next Steps**

If Council approves the decisions requested in this report, the next step will be for the Development Agreement, Deed of Variation and or any other associated legal documents to be completed under delegated authority, and then signed by the Council and PFPL. PFPL will then instruct their professional team to start on more detailed design, with a view to developing designs sufficiently to select their preferred Design & Build contractor.