

Appendix B

Draft 1: 13.12.2019

SUBJECT TO CONTRACT

SUBJECT TO PENDLE BOROUGH COUNCIL'S INTERNAL APPROVAL PROCESSES

[On headed notepaper of Pendle Borough Council]

[Pendle Business Park Limited (Company No: 11187817)]

Pegasus House
5Winckley Court
Mount Street
Preston
Lancashire
PR1 8BU]

[Insert date]

Dear [Party to be identified]

HEADS OF TERMS RELATING TO THE PROPOSED GRANT FUNDING AGREEMENT TO BE ENTERED INTO BETWEEN PENDLE BOROUGH COUNCIL AND THE RECIPIENT IN CONNECTION WITH THE PROPOSED EXTENSION TO THE LOMESHAYE INDUSTRIAL ESTATE

This letter sets out the principal terms and conditions on and subject to which Pendle Borough Council (the **Council**) is willing to enter into a detailed legally binding Grant Funding Agreement (the **Council GFA**) with [Pendle Business Park Limited] (the **Recipient**) subject to agreeing suitable and appropriate terms and conditions.

This letter is not exhaustive and is not intended to be legally binding between the Council and the Recipient, except where specifically stated.

1. BACKGROUND

The land upon which the Lomeshaye Industrial Estate Extension, Phase 2 (the **Site**) is proposed to be built has been acquired by the Recipient.

The Council secured £4m of grant funding from Lancashire Enterprise Partnership (the **LEP**) (hosted by Lancashire County Council) through the Local Growth Deal to deliver infrastructure works in order to open up the Site for development (the **LEP Grant**). The Council has agreed to match-fund the grant monies coming from the LEP pursuant to the LEP Grant up to £400,000.00 (less any costs incurred by the Council in connection with the Site up to and including the date of signing the Council GFA) in connection with the funded works to be delivered at the Site (the **Council Contribution**). The maximum amount of grant funding available in connection with the identified works required to be undertaken at the Site is therefore £4.4m.

The Council is party to a Grant Funding Agreement with the LEP in relation to the LEP Grant which contains the usual array of warranties, undertakings and obligations to deliver agreed outcomes in connection with the Site (and the works to be undertaken thereat) (the **LEP GFA**). A copy of the LEP GFA, once entered into, will form a schedule to any Council GFA ultimately entered into between the parties and it will be a key condition of the award of the grant funding by the Council to the Recipient that the Recipient acknowledges and agrees to obligations no less onerous than those which the Council agrees to pursuant to the LEP GFA. For the avoidance of doubt, the Recipient confirms that it has had sight of the latest version of the LEP GFA and is cognisant of all of its contents.

Commented [MF1]: Identity of the proposed recipient of the grant monies to be confirmed

Commented [MF2]: Drafting assumes that the land is owned by Pendle Business Park Limited and that they will be the "Recipient" in the first instance

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It is understood from initial discussions with the Recipient that it is their intention to form a corporate joint venture with a development partner (as yet to be ascertained). Once the structure of the proposed corporate joint venture vehicle is understood, the Council will need to undertake relevant due diligence on the financial standing and structure of this legal entity to determine how risks of non-performance triggering any remedies under the LEP GFA against it, should best be handled in the Council GFA. This will form part of the negotiations between the parties.

2. COMMERCIAL TERMS

The key commercial terms which the parties will require from each other are set out below (and which will be subject to further discussion and negotiation before the Council GFA will be drafted, negotiated and executed by the parties):

2.1 The parties acknowledge and confirm that the Council will be subject to the terms and conditions set out in the current version of the LEP GFA (once in a final form and executed) relating to the release of the LEP Grant, which will form the basis of the larger part of the grant monies being made available to the Recipient pursuant to the Council GFA and as such, the following considerations will be required to be reflected in the negotiations between the Council and the Recipient and in any resultant Council GFA:

2.1.1 the Recipient must accept all obligations which the Council assumes under the LEP GFA and which are owed by the Council to the LEP in connection with the works to be undertaken in connection with the project at the Site, which will include, but not be limited to the following:

2.1.1.1 provide a set of representations, warranties and undertakings to the Council in terms no less onerous (with necessary amendments being made for sense and context only) than those required to be given by the Council to the LEP pursuant to the LEP GFA;

2.1.1.2 give assurance to the Council that the Recipient has received appropriate State aid advice confirming that in it receiving the LEP Grant and the Council Contribution this will not contravene any State aid regulations and that it provides to the Council any and all relevant documentation which supports the receipt by the Recipient of the monies hereunder envisaged for State aid compliance purposes;

2.1.1.3 [procure any works to be undertaken using the LEP Grant and/or the Council Contribution in accordance with obligations under the Public Contracts Regulations 2015 as if the Recipient were a contracting authority for all intents and purposes;]

2.1.1.4 only to use any monies provided pursuant to the Council GFA for and in connection with the purposes for which it is supplied;

2.1.1.5 appoint a nominated project manager to be the main point of contact for the Council who will have overall responsibility for delivery of the project;

2.1.1.6 comply with all consent requirements associated with the delivery of the project;

2.1.1.7 demonstrate the securing of funding for the remaining infrastructure works and the remainder of the development itself (beyond that funded by the LEP Grant and the Council Contribution) in accordance with the requirements of the LEP GFA;

2.1.1.8 comply with all associated legal requirements relating to the delivery of the project at all times;

Commented [MF3]: Requires further discussion as to whether this is an absolute requirement of the LEP (clause 6.3 of LEP Grant) and/or Pendle. Subject to further discussion.

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- 2.1.1.9 meet all reporting requirements in good time such that the Council is able to meet its reporting requirements pursuant to the LEP Grant and for so long as the Council is required to do so;
- 2.1.1.10 prepare grant claims in a form and against a timetable which complies in all respects with the requirements of the LEP Grant, such that the Council is able to submit any such claims in compliance with the terms of the LEP Grant, for the avoidance of doubt, insofar as the Recipient fails to comply with any such obligations, the Council shall not be liable to the Recipient in respect of any refusal by the LEP to make payments to the Council (for onwards transmission to the Recipient) against non-compliant, inaccurate or late applications;
- 2.1.1.11 deliver all required Project Outputs, meet all Project Milestones and Project Outcomes (as which terms are defined in the LEP GFA);
- 2.1.1.12 comply with the terms of the Business Case (as which term is defined in the LEP GFA);
- 2.1.1.13 seek the prior consent in writing of the Council in connection with any proposed sale of any part of the Site; the parties acknowledging that it will be reasonable for the Council to refuse to give such consent in circumstances where the Recipient seeks or attempts to sell any part of the Site without all of the associated obligations owed to the Council pursuant to the Council GFA;
- 2.1.1.14 notifying the Council of any changes in the project including, without limitation, any change of control of the Recipient;
- 2.1.1.15 comply with any inspection and / or audit requests from the LEP (pursuant to the LEP GFA) and/or the Council, and cooperate therewith fully;
- 2.1.1.16 comply with any demands for repayment of any monies paid already to the Recipient (whether under the LEP Grant made of the Council, or under the Council GFA made of the Recipient direct);
- 2.1.1.17 to ring fence in its accounts any monies provided by the Council in connection with this project pursuant to the Council GFA.
- 2.1.2 there must be a requirement for the appointment of a Monitoring Surveyor (**MS**) to oversee delivery of the initial infrastructure works and for, inter alia, confirming contract value of such works and that they represent value for money. For the avoidance of doubt the MS's appointment will be required to be retained until the final claim for grant monies has been submitted, verified and paid and their appointment will be paid out of grant monies paid by the Council to the Recipient;
- 2.1.3 the Recipient will be required to acknowledge that the Council will, in no circumstances be liable to the Recipient (or any other third party associated with this project) for indirect, special or consequential loss;
- 2.1.4 the Council will:
- 2.1.4.1 use reasonable endeavours to pass on to the Recipient the benefit of any obligations complied with by the LEP pursuant to the LEP GFA, but for the avoidance of doubt, the

Commented [MF4]: Note that this Business Case is under review in light of the changed circumstances.

Commented [MF5]: The land forming the Site will, upon execution of the Council GFA require a Restriction inserting against the title notifying third parties of the existence of the rights and obligations attaching to the land which flow from the Council GFA

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Council shall not be liable to the Recipient insofar as and to the extent the LEP is in breach of the terms of the LEP GFA for whatever reason where such breach might prejudice the Recipient directly or indirectly;

2.1.4.2 agree to make payments under the Council GFA available to the Recipient upon terms and subject to conditions replicating those set out in the LEP GFA and to the extent that the Recipient complies with those obligations; the Council's obligation to pay monies to the Recipient which flow through the LEP GFA will be subject to and conditional upon receipt thereof by the Council from the LEP (for the avoidance of doubt, the Council will be under no greater liability to pay monies to the Recipient under the Council GFA (save in respect of the Council Contribution), than the LEP is to pay such monies across to the Council pursuant to the LEP GFA);

2.1.4.3 agree to make available the Council Contribution subject to the Recipient complying with relevant provisions of the Council GFA, and any associated provisions of the LEP Grant which act as a trigger to the release of said monies.

2.2 The Council will require to undertake an appropriate level of due diligence on the financial standing of the Recipient and, dependent upon the outcome of that exercise, will need adequate and appropriate security from the Recipient putting in place against non-performance of any element of the terms of the Council GFA, and any alleged breach of the LEP GFA by the Council caused by the Recipient's non-performance which triggers any liability to the Council thereunder (which might include, without limitation, future non-payment of grant monies, claw back of grant monies already paid and/or claims for damages etc). The exact nature of such security will depend upon the structure of any proposed legal structure put forward by the Recipient as part of future negotiations but will be expected to provide adequate cover on an indemnity-basis for the Council in such circumstances [examples for discussion: third party bank guarantee / performance bond / intra-group guarantee from established legal entity with strong trading history (subject to appropriate due diligence by the Council)].

3. TIME LIMITS

3.1 This *Paragraph 3* is legally binding.

3.2 The parties agree to negotiate in good faith with a view to executing the Council GFA on or before [Insert longstop date].

3.3 Either party may at any time by notice to the other, in writing, which does not include email, terminate negotiations for the Council GFA, without having to give any reasons for doing so or incurring any liability to any other party. Such termination shall not affect the continuance in force of *Paragraph 5* to *Paragraph 11* inclusive.

4. KEY PRE-CONDITIONS

Before the Council can agree to the terms of and authorise signing the Council GFA (once drafted), it will need confirmed certainty from the Recipient in relation to the following matters:

- (a) that due diligence on the financial standing of the Recipient has been undertaken to the reasonable satisfaction of the Council;
- (b) that the required security (see *Paragraph 2.2* above) is ready to be put into place simultaneously with the coming into force of the Council GFA (without which the Council GFA will remain conditional even if signed);

Commented [MF6]: This will depend upon LEP GFA deadlines and timing.

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- (c) that the Recipient has confirmed it is able to secure adequate funding for the remaining infrastructure works and the remainder of the development itself at the Site (see *Paragraph 2.1.1.16*) as required pursuant to the LEP GFA;
- (d) that the Recipient has provided the Council with a copy of its legal opinion confirming State aid compliance in respect of the receipt of any part of the LEP Grant (via the Council) and the Council Contribution from the Council in connection with this project; and
- (e) subject to any additional conditions imposed upon the Council by the LEP in the LEP GFA.

5. CONFIDENTIALITY

- 5.1 This *Paragraph 5* is legally binding.
- 5.2 Each party undertakes that it shall not at any time after the date of this letter disclose to any person any confidential information concerning the business, affairs, customers, clients or suppliers of the other party except as permitted by *Paragraph 5.3*.
- 5.3 Each party may disclose the other party's confidential information:
 - (a) to its employees, officers, representatives or advisers who need to know such information for the purposes of the evaluation of and the negotiation of the Council GFA. Each party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other party's confidential information comply with this *Paragraph 5*; and
 - (b) as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
- 5.4 No party shall use the other party's confidential information for any purpose other than the evaluation of and the negotiation of the Council GFA.

6. NON-SOLICITATION OF EMPLOYEES AND CUSTOMERS

- 6.1 This *Paragraph 6* is legally binding.
- 6.2 Neither party shall, for a period of twelve (12) months from the date of this letter, (except with the prior written consent of the other party) directly or indirectly solicit or entice away (or attempt to solicit or entice away):
 - (a) from the employment of that party, any employee of the other party who is employed or engaged in any services which are relevant to the Council GFA; or
 - (b) any customer of the other party who is in receipt of any services which are relevant to the Council GFA.
- 6.3 A party shall not be in breach of *Paragraph 6.2(a)* or *Paragraph 6.2(b)* as a result of running a national advertising campaign open to all comers and not specifically targeted at any of the staff or the customers of the other party.

7. COSTS

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- 7.1 This *Paragraph 7* is legally binding.
- 7.2 Each party shall pay its own costs incurred in connection with the proposed Council GFA, whether or not it proceeds (including without limitation the preparation and negotiation of this letter, the Council GFA and any documents contemplated by it).

8. INADEQUACY OF DAMAGES

- 8.1 This *Paragraph 8* is legally binding.
- 8.2 Without prejudice to any other rights or remedies that either party may have, each party acknowledges and agrees that damages alone would not be an adequate remedy for any breach of *Paragraph 5* by the other party. Accordingly, the non-defaulting party shall be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of *Paragraph 5*.

9. THIRD PARTY RIGHTS

- 9.1 This *Paragraph 9* is legally binding.
- 9.2 No one other than a party to this letter, their successors and permitted assignees, shall have any right to enforce any of its terms.

10. GOVERNING LAW

- 10.1 This *Paragraph 10* is legally binding.
- 10.2 This letter, and the negotiations between the parties in connection with the proposed Council GFA and all disputes or claims (including non-contractual disputes or claims) arising out of or in connection with them or their subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

11. JURISDICTION

- 11.1 This *Paragraph 11* is legally binding.
- 11.2 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this letter or its subject matter or formation.

.....

Signed by **DEAN LANGTON** for and on behalf of **PENDLE BOROUGH COUNCIL**

We confirm our agreement to the above.

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Signed by [NAME OF DIRECTOR] for and on behalf of [THE RECIPIENT]

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Copy of finalised LEP GFA