



REPORT OF: HOUSING, HEALTH AND ENGINEERING SERVICES
MANAGER

TO: POLICY AND RESOURCES COMMITTEE

DATE: 21st JANUARY, 2021

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JOINT VENTURE PROCUREMENT

PURPOSE OF REPORT

To seek approval to the procurement of a developer partner and the establishment of a new joint venture partnership.

RECOMMENDATIONS

To agree to:

- (1) Re-procure a joint venture partnership to deliver regeneration and development projects.
- (2) Undertake a new procurement exercise to select a developer partner using the 'competitive procedure with negotiation' process.
- (3) Receive a further report on the outcome of the procurement exercise before selecting a developer.

REASON FOR RECOMMENDATIONS

To continue to deliver regeneration and development projects in the Borough.

BACKGROUND

1. As Committee are aware, the Council currently has four Joint Venture (JV) companies. PEARL, PEARL2 and PEARL (Brierfield Mill) are JVs between Pendle Council and Barnfield Investment Properties and these deliver a range of regeneration and development schemes including commercial, residential, retail and leisure. PEARL

Together is a JV between Pendle Council, Barnfield and Together Housing and has been established to predominantly deliver housing schemes.

2. PEARL was established in 2007 to deliver the ACE Centre project. Due to Barnfield owning the site it was not necessary to go through a procurement exercise at the time.
3. PEARL2 was established in 2009 for a 10 year period following a European Compliant (OJEU) process. PEARL (Brierfield Mill) was established in 2012, as a subsidiary company to PEARL2 and is reliant on the same procurement process. In line with procurement regulations Members agreed at their meeting on 27th November 2018 to the extension of PEARL2 for a further 5 years (ie to November 2024) or 50% of contract value, whichever is the earliest.
4. PEARL Together was established in 2018. It has a different structure to the other three companies as the Council's shareholding is only 15% rather than the 30% we have with the three other companies and we only have 15% of the votes on the Board rather than 50%. Due to the structure of the PEARL Together JV, with a low level of public control, it is not classed as a Contracting Authority and is not covered by public procurement regulations.

ISSUE

5. When any publicly funded contracts are let through a JV arrangement it is necessary to ensure that any public procurement regulations have been complied with. External funders pay close attention to this when we receive grant funding. This arrangement has not been changed despite the United Kingdom leaving the European Union.
6. Since agreement to the extension of PEARL2 both Northlight and the Lomeshaye Phase 1 schemes have been progressed further and contracts let through those schemes will be included in the 50% extension to the original contract. That headway will shortly be exhausted.
7. There will be future opportunities arising through the Towns Fund, the new Levelling Up Fund and further grant programmes which may arise in coming years. It is likely that there will be elements of these schemes which we would wish to deliver through a JV arrangement,
8. Whilst we are able to let contracts through the PEARL Together JV without relying on public procurement regulations (but still ensuring value for money) there may be other developments of a more commercial nature which are not appropriate to deliver through that JV. We therefore need to consider how best to deliver our future regeneration and development priorities.

PROCUREMENT OPTIONS

9. Legal advice has been sought from Hill Dickinson about what options are available to the Council and they have advised on two alternative options.

Option 1 - Extending an existing arrangement

10. As set out above, the current arrangement with Barnfield, through PEARL2, has already been extended once using the provisions of Reg 72(1)(b) of the Public Contract Regulations 2015. A contract can be further extended under Reg 72(2)(a) provided that where several successive modifications are made the 50% threshold shall apply to the value of each modification but such successive modifications should not be made simply to avoid undertaking an advertised procurement.
11. In deciding whether or not the Council would be able to further extend the arrangements around PEARL2 we need to consider what level of interest in working with the Council currently exists in the market place amongst actual or potential competitors to Barnfield, given that the relationship with the Council has been in place for some years.
12. If an interested developer/contractor was unhappy about a further extension they could look to challenge the decision by undermining the justification for using Reg 72(1)(b) on the basis that the Council have effectively done so as a means simply to avoid having to undertake a procurement. Just because the existing arrangement is working well does not mean the Council can automatically keep extending it. Conversely, if the Council was aware and could show evidence that there was absolutely no viable alternative developer/contractor available or interested in the market, this could well be used as a justification for extending the Pearl arrangement under Reg 72(1)(b) on the understanding that a procurement would be a waste of time and public resource.
13. There is an obligation, when modifying a Contract using Reg 72(1)(b), to issue a contract modification notice which alerts the market to that decision. When a contract modification notice is issued there is a 30 day challenge period after a contract has been signed. However, it is important to note that if the basis for the Council using Reg 72(1)(b) in the first place is challenged successfully, then the challenge period is 6 months. In essence, there would be a residual risk for potentially 6 months from signing a new Agreement that the Council would remain exposed to challenge.

Option 2 – Re-procurement

14. The other option open to the Council would be to undertake an appropriate form of compliant procurement procedure; in the same way Pearl was original established back in 2008/ 2009. The form of procurement procedure the Council could use would depend very heavily upon how developed its specification was at the time when it wished to start the procurement, which would need to be advertised through the “Find a Tender” portal (which replaces OJEU from 1st January 2021).
15. The Council could use the open or restricted procedure if it required absolutely no discussions with developers / contractors around the contract terms to be awarded (eg percentage shareholdings / levels of development profit etc), but if there remains a requirement to have some form of constructive discussion with bidders before committing to contract terms, then neither of those procedures would be suitable. In addition, there

remains a potential risk with the open procedure that we would get a high number of applicants which could take a lot longer to process than was originally intended.

16. The alternative procedures which might be suitable would be either the competitive dialogue procedure (which is what we used initially for PEARL2), or the competitive procedure with negotiation. If our requirements and specification remain largely similar to the existing PEARL arrangements e.g. with a 70:30 share split in favour of the developer and 50% of voting rights, then the competitive procedure with negotiation might prove to be the best option. Given that after shortlisting we would require all shortlisted bidders to submit an initial tender, we can retain the right (in the procurement documents) to make an award without moving to negotiation if we are confident that a bidder comfortably meets all our requirements at that initial tender stage.

PROPOSED WAY FORWARD

17. It would appear from the advice that a further extension of the existing PEARL2 arrangement could open up the Council to legal challenge. No challenge was made to the initial extension but we are aware of other developers/contractors that are active in Pendle and the adjoining boroughs who may be interested in a strategic partnering arrangement. A re-procurement exercise would appear to be the best option to ensure that the Council is not seen as trying to avoid a new procurement.
18. Our existing PEARL2 arrangement has worked well and it is proposed that we should look to replicate a similar model under any new procurement. However, we wouldn't want to be so prescriptive that there was no option for any negotiation as that could restrict the Council's opportunity to benefit from different ideas or models that developers may put forward. The Competitive Dialogue process was used to procure PEARL2 but that can be a difficult process if the exact specification of projects is not known. This is the situation we are in with uncertainties about future public funding.
19. The competitive dialogue procedure with negotiation would seem to be the best option to provide some flexibility if needed but to also complete the process in a timely way. It is expected that the process could take up to 6 months.

IMPLICATIONS

Policy: None directly arising from this report

Financial: There is likely to be a need to obtain further procurement advice and support to take forward a procurement exercise. £20k from the Growth Development Reserve will be allocated for this.

Legal: As set out in the report

Risk Management: As set out in the report

Health and Safety: None directly arising from this report

Sustainability: None directly arising from this report

Community Safety: None directly arising from this report

Equality and Diversity: None directly arising from this report

APPENDIX

None

LIST OF BACKGROUND PAPERS

Previous reports to Executive and Policy & Resources Committee in relation to Joint Ventures