

Decision maker:	Cabinet member contracts and assets
Decision date:	Thursday 24 May 2018
Title of report:	To approve the contractual arrangements for the development and regeneration programme
Report by:	Programme director housing and growth

Classification

Open

Decision type

Non-key

Wards affected

(All Wards);

Purpose and summary

To approve the final contractual arrangements for implementing the development and regeneration programme (DRP). While the finally agreed arrangements have been tailored to reflect organisational changes made by the preferred bidder, they are not materially different from those discussed during the procurement.

Recommendation(s)

That:

- (a) the council enters into overarching agreements (2) with Keepmoat Homes Ltd and Engie Regeneration Ltd as part of the council's development and regeneration programme.**
- (b) that the council enters into parent company guarantees with Keepmoat Ltd and Engie Services Holding UK Ltd are in place to underpin these overarching agreements.**

Alternative options

- 1 The council could choose not to enter into an overarching agreement through the arrangements outlined in this report, however, that would prevent the establishment of the Development and Regeneration Partnership and associated benefits to the council in supporting economic and housing growth and contributing to the council's longer term financial sustainability.
- 2 Alternative commissioning options exist for some, but not all, of the projects that are likely to be brought forward as part of the programme. The proposed approach was recommended as the partnership approach will allow the council to take advantage of its partners' expertise to ensure the success of the programme.
- 3 The overarching agreements could be entered into without putting in place parent company guarantees. This would provide less protection to the council in the event that its directly contracting partners get into financial difficulties.

Key considerations

- 4 In 2016 Cabinet approved the commissioning of a developer to progress the development of suitable sites in its ownership including the capability to progress development funding and provision of services and to be open for use with other collaboration partners as required.. The DRP is intended to support the delivery of the ambitious goals of the Invest Herefordshire economic development programme and support the council's financial sustainability and will include a mix of house building and regeneration projects that will be delivered over the next 10 to 20 years.
- 5 At the core of the DRP is an overarching agreement (OA) which is a contract that enables projects to be brought forward into the programme. Once the projects are developed and approved, each project would have its individual agreement or contract. These contracts will largely stand on their own, although the projects will still be subject to conditions in the overarching agreement e.g. reporting and performance management.
- 6 The council started to procure a delivery partner for its development and regeneration programme with the publication of an OJEU notice in June 2016. A detailed procurement process followed, through which four bidders were shortlisted including the organisation subsequently chosen as the preferred bidder: Keepmoat Ltd.
- 7 In July 2017 cabinet approved Keepmoat (specifically Keepmoat Ltd) as the preferred bidder for the council's development and regeneration programme. When Keepmoat Ltd were shortlisted for the procurement the company had two subsidiaries: Keepmoat Homes Ltd and Keepmoat Regeneration Ltd. The bid from Keepmoat Ltd proposed that the projects on the DRP would be delivered either by Keepmoat Homes Ltd or Keepmoat Regeneration Ltd depending on whether the main focus of the project was private residential properties for sale. These projects would be delivered by Keepmoat Homes Ltd and Keepmoat Regeneration Ltd.
- 8 During the tender evaluation process, on 30 April 2017 a transaction took place whereby Keepmoat Ltd transferred the regeneration business of the Keepmoat Group to ENGIE Services Holding UK Limited (Engie) (registered in England and Wales with company number 08155362), a member of the ENGIE group (the ENGIE Group). The transferred

organisation is now known as Engie Regeneration Ltd. The Engie group is a multi-national business partially owned by the French government and with its foundations in the energy market. Engie now provides a wide range of services to large and small businesses and public sector bodies across a number of countries and has an active presence in the UK not in the energy and renewables market but also in construction, engineering and maintenance projects and facilities management services as well as the construction of retirement housing and a range of other schemes and projects which the council would classify as “non-residential”/ regeneration.

- 9 This business reorganisation was clearly explained to the council by Keepmoat during the final stage of the procurement process and Engie was identified in the final bid as a potential development partner to the council for non-residential projects, with City Heart, which has also strong credentials as a developer of non-residential schemes including student housing, as a potential sub-contractor for certain projects.
- 10 The original tender proposal was for the project-level contracts to be entered into between the council and the delivery organisation, either Keepmoat Homes Ltd or Keepmoat Regeneration Ltd, with a parent company guarantee being provided by Keepmoat Ltd (as party to the OA). However, since the transaction between Keepmoat Ltd and Engie, Keepmoat no longer has the capability to assess or deliver non-housing (i.e. regeneration) projects. Following ongoing contract negotiations with the council, Keepmoat’s Board of Directors clarified their position in early April: the company’s revised business model would only support Keepmoat delivering residential projects and anything else would need to be subcontracted or assigned to another delivery partner. The council was informed that on a project-by-project basis, Keepmoat would not be likely to agree to underwrite the financial or delivery risk of those types of projects.
- 11 The council’s legal advice suggested that a material change to the procurement process, contrary to the Public Contract Regulations 2015, could occur if the council implemented the OA without the ability to progress regeneration projects, or in a scenario where the partner developer tried to assign or decline the risk of delivery of all non-residential projects which did not fit with their core business and effectively therefore only delivered residential projects. This was because that the published OJEU notice and subsequent procurement process had made it clear that the Council intended to procure a range of non-residential developments, as well as residential ones, over the life of the partnership. While the risk of legal challenge was assessed as low, the implications of any such challenge were considered unacceptable to the council. Equally importantly as the legal position, the council has an immediate requirement to appoint a developer partner to undertake a range of non-residential projects and so a solution which only brought forward residential developments would not be acceptable.
- 9 The council has therefore negotiated a revised approach with Keepmoat Ltd and Engie that both delivers the council’s original specification and is not considered to be a material change from the procurement (see legal implications section). The proposed approach is to implement two OAs: one with Keepmoat Homes Ltd; and one with Engie Regeneration Ltd (the former Keepmoat Regeneration Ltd). These agreements would be underpinned by parent company guarantees from Keepmoat Ltd and Engie Services Holding UK Ltd. Both parties to the OAs were involved in the original procurement and all organisations involved in the proposed arrangements pass the qualification test used in the procurement to assess financial standing, track record and suitability.
- 12 There is a clear definition and understanding between all the parties as to which OA to use for any potential DRP project. These arrangements, therefore, offer the capability and capacity to implement the full range of projects in the council’s DRP programme and

provide the council with the protections that were envisaged as part of the original OA. Whilst the creation of two OAs was not envisaged at the start of the process, changes to the arrangements are necessary to properly reflect the organisational changes that occurred in the bidding organisations after the start of the procurement.

- 13 The council team has confirmed that the proposed arrangements reflect the commitments made by the preferred bidder at the final tender stage of the procurement (see legal implications section). It is, therefore, recommended that the council enters into two overarching agreements, one with Keepmoat Homes Ltd for residential projects delivering homes for open market sales and one with Engie Regeneration Ltd for non-residential projects.

Community impact

- 14 The council's corporate plan 2016-2020 includes support the growth of our economy as a strategic priority. The wider Herefordshire economic vision sets out an ambitious framework for economic growth within the county and is supported by the core strategy. Delivery of the core strategy and economic vision will rely on significant investment in a variety of developments across the county.
- 15 Supporting the corporate plan and economic vision, the council's property strategy for 2016 to 2020 includes the objectives to maximise the economic benefits of the council's property asset base and to support economic development and housing growth.
- 16 Successful implementation of the DRP has the potential to significantly contribute to the corporate plan, through support for the economic vision and core strategy, and the corporate property strategy by allowing the council to maximise the financial benefits that it receives from its development sites.
- 17 A number of other commitments were made during the final tender to provide community benefits. These include: the implementation of a community investment vehicle funded through profits on residential developments; commitments to workforce development; and support for the development of the third sector in Herefordshire.

Equality duty

- 18 Under section 149 of the Equality Act 2010, the 'general duty' on public authorities is set out as follows:
- 19 A public authority must, in the exercise of its functions, have due regard to the need to:
- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 20 The public sector equality duty (specific duty) requires us to consider how we can positively contribute to the advancement of equality and good relations, and demonstrate that we are paying 'due regard' in our decision making in the design of policies and in the delivery of services. Our providers will be made aware of their contractual requirements

in regards to equality legislation. An equality impact assessment (included as appendix 1) was carried out as part of the procurement.

Resource implications

- 21 The resource implications of entering into the overarching agreements have already been explained in previous decision reports. The council's resource exposure under the overarching agreements is very limited and essentially relates to the staffing impact of supporting the Programme Board and project level activity while new projects are being scoped, appraised and progressed through the new projects approval process set out in the overarching agreements. Once a project is approved, the council will enter into project-specific legal agreements with the developer (for example, a development agreement or a construction contract) and the detailed resource implications for the council will be set out in those agreements.
- 22 Naturally each new project will be subject to its own detailed governance process within the council and the overarching agreements contemplates that the Executive may require the right to approve and refine a detailed project brief at least twice while it is worked through the appraisal stages. Previous decision reports have outlined how the new project approval process works to ensure that the developer partner's cost exposure is managed during the appraisal stage to the point that the council either approves or rejects a project. The council is responsible for meeting the costs of "improperly rejecting" any new project – this is effectively where the project proposal demonstrably satisfies a set of criteria which the council previously set and which it has now decided not to apply.
- 23 Initial feasibility costs incurred by the council against specific projects will be capitalised. If the specific project does not ultimately result in a capital asset the costs incurred will be reviewed and may need to be charged against the revenue budget. These costs will be financed by an earmarked revenue risk reserve the status of which will be reported through the quarterly finance reporting to Cabinet.
- 24 In terms of the specific resource implications of getting the overarching agreements from the start of the procurement process to the point of signature, there have been three separate decision reports agreed with a total budget of £390k. So far the council has incurred costs totalling £284k and expect another £61k of expenditure. This brings the total expected expenditure up to £345k, which is £45k less than the budgeted sum. The expected expenditure is split by £15k for signs, £6k for financial due diligence on Engie Ltd and £40k of legal fees.

Legal implications

- 25 This Report updates the previous recommendations to Cabinet which contemplated that the council would only need to enter into one overarching agreement in order to give effect to the completed procurement process and appoint the successful bidder as its preferred delivery partner for the DRP programme. This Report explains the technical reasons by which two overarching agreements are now required.
- 26 As explained in the Report, expert legal advice has been commissioned to fully understand the procurement implications of reorganising the contracting arrangements to reflect the business reorganisation of the preferred bidder organisation. Legal advisers are satisfied that there are good grounds for considering that the proposed arrangements are compatible with the Public Contract Regulations 2015 and specifically constitute a permitted modification of the contract in accordance with Regulation 72.

27 There are no other significant legal implications identified in this Report.

Risk management

28 The ability to establish a direct contracting relationship with Engie actually represents an improved risk position for the council from that originally tendered in view of Engie's significant financial standing and established reputation in the delivery of major construction projects.

Risk / opportunity	Mitigation
OAs cannot be agreed or are found to constitute a material change.	The council has investigated alternative arrangements for delivering DRP projects and, while the alternatives are not as attractive as the proposed solution, there are commissioning routes that could be explored for most projects
There is a delay to signing due to unforeseen issues	The council is progressing feasibility and other work to take forward projects through various mechanisms. The council will consider an extension of these arrangements or alternative commissioning arrangements depending on the length and nature of any delay
The cost of legal support is higher than anticipated due to the additional time and complexity	Some contingency was included in the original estimate of legal support. The team will monitor the forecast of cost of legal support and take appropriate action

29 Risks are managed according to the council's PROM framework, and recorded on a service risk register, being escalated to the directorate or corporate risk register according to the significance of the risk.

Consultees

30 None.

Appendices

Appendix 1 – Equality impact assessment

Background papers

None identified