

Title of report: Legal status of and financial arrangements with BBLP

Meeting: Cabinet

Meeting date: 26 October 2023

Cabinet member: Barry Durkin, Roads and Regulatory Services

Report by: Corporate Director, Economy and Environment

Report author: Service Director Environment and Highways

Classification

Open

Decision type

Non-key

This is a key decision because it is likely to be significant having regard to: the strategic nature of the decision; and / or whether the outcome will have an impact, for better or worse, on the amenity of the community or quality of service provided by the authority to a significant number of people living or working in the locality (two or more wards) affected.

Notice has been served in accordance with Part 3, Section 9 (Publicity in Connection with Key Decisions) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

Wards affected

(All Wards);

Purpose and summary

To provide information in respect of the council's contractual arrangements with Balfour Beatty Living Places and update Cabinet on progress made following recommendations made by its external auditors in the Auditor's Annual Report for the year ended 31 March 2022.

Recommendation(s)

That Cabinet :

- (a) Notes the contractual arrangements in respect of the council's public realm contract**

with Balfour Beatty Living Places Limited and its agency company status; and

(b) Notes the recommendations made by external auditors in respect of this arrangement and the actions taken by the council in response.

Alternative options

1. To novate the contract with Balfour Beatty Living Places Limited. This is not recommended as the council is satisfied that the arrangements in place represent an appropriate contractual relationship which does not expose the council to risk of contract delivery or remove the option of legal recourse in the event of a breach of contract

Key considerations

2. The Annual Auditor's Report for the year ended 31 March 2021 issued by the council's external auditors, Grant Thornton, identified a key improvement recommendation as part of work to consider the council's arrangements to deliver economy, efficiency and effectiveness in its use of resources.
3. The external auditors recommended that the council establish the validity of contractual and trading arrangements of its public realm contract with Balfour Beatty Living Places Limited (BBLP), noting that the company's annual filings at Companies House are submitted with dormant company status.
4. The public realm contract between the council and BBLP commenced on 1 September 2013 following competitive procurement in line with the council's Contract Procedure Rules. In the Pre-Qualification Questionnaire completed as part of the contract tender documentation, BBLP provided information outlining its legal status as that of an agency company of Balfour Beatty Group Limited.
5. Following the recommendation of external auditors, the council sought external legal advice in March 2022 to clarify the company's legal status and the implications of contracting with and making payments to a dormant company. Whilst this advice received confirmed that the council was "not fundamentally exposed" and that the contract was "not invalidated by the arrangements", it noted that issues could arise in the event of a major dispute between parties.
6. In addition to this legal advice, the council requested clarification from BBLP and its parent undertaking: Balfour Beatty Group Limited. In a written response, the Commercial Director of BBLP confirmed the trading status of the company as **an agency company** of Balfour Beatty Group. This status enables the company to "sign contracts, place orders and otherwise operate like any other conventional trading company, the key difference being that they do so for and on behalf of Balfour Beatty Group Limited" and "be sued, in both civil and criminal litigation".
7. This assertion was supported by written confirmation from Balfour Beatty PLC Group General Counsel and Company Secretary, identifying that BBLP operates as an agent of Balfour Beatty Group Limited with an agency agreement in place which binds the group entity to contract and other external obligations.
8. BBLP (registered company number 02067112) has an 'Active' company status per its Companies House record and files statutory accounts and returns as a dormant company under section 1169 of the Companies Act 2006.
9. The Annual Report and Unaudited Financial Statements of BBLP, filed annually at

Companies House, provide information in the Directors' Report which states:

"The company acts as an agent of Balfour Beatty Group Limited in the provision of infrastructure maintenance. The transactions in respect of the activities performed by Balfour Beatty Living Places Limited in its capacity as agent are dealt with in the financial statements of Balfour Beatty Group Limited. The company has been dormant as defined in section 1169 of the Companies Act 2006 throughout the current financial year. It is anticipated that the company will remain dormant for the foreseeable future."

10. The accounts of Balfour Beatty Group Limited note that the financial transactions and results of its agency companies are aggregated within the statutory accounts of Balfour Beatty Group Limited and discloses BBLP as its 100% owned subsidiary. The financial statements of Balfour Beatty Group Limited are subject to statutory audit; the accounts for the year ended 31 December 2022 include an unqualified audit opinion from external auditors KPMG LLP.
11. The contract between the council and BBLP, signed and dated 5 November 2013, includes a Parent Company Guarantee given by Balfour Beatty Group Limited to secure the performance of BBLP's obligations under the contract. Accordingly, in the event of a dispute between the council and BBLP the council will be entitled to escalate any dispute to Balfour Beatty Group Limited under the terms of the guarantee.
12. In the subsequent Annual Audit Report for the year ended 31 March 2022, reported to Audit & Governance Committee in June 2023, Grant Thornton noted the action taken by the council to clarify the arrangements and included a further recommendation that the council consider any residual risks and formally document this assessment and report to Cabinet.
13. The council sought further external legal advice in June 2023 to review the information and assurances provided by BBLP and to clarify the council's position and mitigation of risk provided by the agency agreement and guarantee given by Balfour Beatty Group Limited.
14. This external advice confirmed that the dormant company status was not unusual in contract relationships in the construction sector and that the legal status of BBLP and Balfour Beatty Group Limited was a matter between the companies, HM Revenue & Customs and Companies House.
15. Furthermore, the advice confirmed the council's interpretation of the mitigation provided by the agency arrangements and noted that in the event of a legal dispute or breach of contract, the council's legal recourse would be via a two-step approach: firstly to take action against BBLP as party to the contract. As a dormant company does not hold any assets to meet liabilities, the council's second step would be to take action against Balfour Beatty Group Limited under the Parent Company Guarantee.
16. The council reviews delivery of BBLP's contractual obligations, including measurement, monitoring and reporting of operational performance indicators and strategic performance indicators through a Quality Plan, reviewed by BBLP annually and reported to the council's contract management team. Risks in respect of the Public Realm contract are recorded on the Economy & Environment Risk Register and are monitored through the directorate risk management process.
17. It should be noted that an independent review of BBLP's contract performance and compliance is currently underway and the results of this review will be reported to Cabinet for consideration on 26 October 2023.

18. In addition, the current contract between BBLP and the council has an expiry date of August 2024. Options to extend this contract will be presented in a report to Cabinet on 26 October 2023.

Community impact

19. There are no community impacts arising from this report.

Equality duty

20. There are no equality issues arising from this report

Resource implications

21. There are no specific resource implications from the report itself.

Legal implications

22. The council has statutory duties to provide a number of the services which are contracted to BBLP under this arrangement. In addition the council has a general duty to secure best value in the exercise of all of its functions. The development and review of the annual plan, as part of the council's long term contractual relationship with BBLP, is a key mechanism for the discharge of these legal duties.
23. The council has a contract with BBLP to deliver services. These services are delivered and the council makes payments to BBLP in line with the Financial Procedure Rules and Scheme of Delegation. In this way, the parties are complying with the terms of the contract.
24. BBLP (registered company number 02067112) has an 'Active' company status per its Companies House record and files statutory accounts and returns as a dormant company under section 1169 of the Companies Act 2006. The status of the company is a matter for Balfour Beatty Group Limited, its auditors, Companies House and HM Revenue & Customs.

Risk management

25. The risks of the contractual arrangement between the council and BBLP and identified mitigations and assurances are noted in paragraphs 5 to 15 above

Risk / opportunity	Mitigation
Risk to delivery of services as per the contract between the council and BBLP.	External legal advice has confirmed that the contract is not invalidated by BBLP's trading status. Risks in respect of the Public Realm contract are managed through the directorate risk management process.
The council is not able to take legal action against BBLP in the event of a contract dispute.	External legal advice confirms the council has legal recourse via a two-step approach in the event of dispute and this is supported by the guarantee from

Consultees

None

Appendices

Appendix 1: Auditor's Annual Report 2021/22

Background papers

None