

<p>Cabinet</p> <p>3rd November 2015</p>	 <p>TOWER HAMLETS</p>
<p>Report of: Aman Dalvi - Corporate Director Development & Renewal</p>	<p>Classification: Unrestricted</p>
<p>EIA Review Contract</p>	

Lead Member	Councillor Blake, Cabinet Member for Strategic Development
Originating Officer(s)	Harriet Peacock, D&R/EIA Officer
Wards affected	All
Key Decision?	No
Community Plan Theme	Great Place to Live

Executive Summary

Environmental Impact Assessment (EIA) is a key statutory aspect of many large scale planning applications and is required under European and domestic legislation.

LBTH has an existing EIA Review Contract, which commenced in summer 2013. This contract was meant to be in place from August 2013 to July 2016. However, spend on the contract has exceeded previous expectations, and therefore a new contract is now required to be procured.

Sign off is required from Cabinet before procurement of a new EIA Review Contract can commence.

Recommendations:

1. The Mayor in Cabinet is recommended to agree to the procurement of the EIA Review Contract.
2. The Mayor in Cabinet is recommended to delegate to the Corporate Director Development and Renewal or to such other officer who then receives such delegation in accordance with Part A of the Scheme of Management in Part 3 of the Council's constitution the power to agree to entering into the contract with the winner or winners (as the case may be) of the procurement of the EIA Review Contract

1. REASONS FOR THE DECISIONS

Current EIA Review Contract

- 1.1 The current Environmental Impact Assessment (EIA) Review Contract commenced in summer 2013.
- 1.2 This contract was meant to be in place from August 2013 to July 2016. However, spend on the contract has exceeded previous expectations, and therefore we are nearing the maximum contract value. Any overspend above 15%, may lead to legal challenges and as such procurement of a new contract is sought.
- 1.3 The reasons contract spend has been higher than anticipated is:
 - more applications submitted than anticipated - this is in part as a result of 'coming out' of the recession. This includes schemes that have been resubmitted due to a change in situation e.g. now seeking residential rather than office lead schemes;
 - more outline applications than anticipated, requiring reserved matters applications and therefore ES Addendums that need to be reviewed;
 - the Plan Making Team (D&R) used the EIA Review Contract for the South Quay Masterplan Strategic Environmental Assessment (SEA), and work on Ailsa Street; and
 - using the EIA Review Contract to procure the review of daylight and sunlight assessments – this has been an additional fee per application. Note, this was stopped last year, due to the high spend on the contract.

Procurement of New EIA Review Contract

- 1.4 The new contract will mostly be the same as the existing contract, although it will be amended with respect to the maximum budget and timescales.

2. ALTERNATIVE OPTIONS

- 2.1 Consideration has been given to a range of alternatives. The primary alternative would be to procure the Contract for a shorter period of time, for example one year. It is however, considered prudent to procure a longer 3 year contract in order to continue to achieve best value for money, and encourage innovation/ best practice amongst consultants.
- 2.2 The current Contract has been a fixed contract with one Consultant. This has ensured a consistent approach to the EIA Review process.
- 2.3 Consideration has been given to procuring a small number of consultants, who will each undertake the work based on the outcome of internal mini-tenders. This is considered to be time consuming and costly, and therefore an inefficient implementation of the contract, particularly as the council only has

16 weeks to determine an EIA application.

- 2.4 The Consultants who will be tendering for this Contract tend to be large multi-disciplinary companies due to the nature of EIA projects. This ensures that the Consultant has sufficient resources and can ensure delivery.
- 2.5 Consideration has also been given to the "do nothing" scenario e.g. no EIA Review Contract. Without the EIA Review Contract in place, the Council would no longer have the expertise of an environmental consultant to rely upon and therefore the Council would have to undertake EIA Reviews itself.
- 2.6 The Council does not currently have enough staff in the relevant disciplines to accommodate the number of EIA Scoping Reports and ESs currently being submitted to the Council. It is therefore likely that the Council would need to recruit a large number of environmental specialists into their existing teams to ensure that the Council had sufficient capacity, which would cost significantly more than the EIA Review Contract.
- 2.7 EIAs also tend to cover very niche environmental topics, for example wind microclimate assessments, which the Council is required to consider as part of the EIA Review. A review of this topic requires specific expertise (and sometimes equipment) to identify whether the assessment has been undertaken accurately. The Council does not currently employ these specialist disciplines and therefore the Council would be required to employ new staff in these areas to ensure that the EIA Review was acceptable.

3. DETAILS OF REPORT

- 3.1 EIA is a key statutory aspect of many large scale planning applications and is required under European and domestic legislation. EIA is an information gathering exercise which enables a Local Planning Authority (LPA) to understand the environmental effects of a development before deciding whether or not it should go ahead. The emphasis is on using the best available sources of objective information and in carrying out a systematic and holistic process which should be bias free.
- 3.2 As part of determining large planning applications the Council must consider Environmental Statements (ES) submitted by developers. This requires expert advice from professionals from a wide variety of environmental disciplines. To ensure planning applications can be determined expeditiously, having retained consultants in place to carry out this review is business critical to the Council's planning service, and mitigates the risk of Judicial Review.
- 3.3 The EIA Review Contract will be for the independent review of ESs, submitted with planning applications, independent review of draft ESs submitted during pre-application discussions and provision of advice on the scope of ESs.
- 3.4 In the absence of a replacement contract the Council would be left without the ability to expediently procure an independent review of any ES, and other

related environmental information submitted with a planning application, diminishing the Council's ability to perform its statutory obligations as an LPA.

Other Local Planning Authorities

- 3.5 The table below sets out the number of planning applications and ESs submitted to LBTH, compared against other local planning authorities. This table demonstrates that LBTH receives a much higher volume of ESs (albeit a lower number of planning applications overall), when compared against other local planning authorities.

Local Authority	Planning Applications annually	Number of ESs annually
Tower Hamlets	1,710	21
Hackney	2,371	2
Southwark	2,206	5
Greenwich	1,694	7
Newham	1,578	8

- 3.6 Due to the relatively small number of ESs received, other local planning authorities tend to commission the review of ESs on a case by case basis. Whilst this approach may be appropriate for other local planning authorities that only receive a small number of ESs, this is not considered appropriate for LBTH.
- 3.7 LBTH can get a better deal through the use of an EIA Review contract, as suppliers have to competitively tender for the contract. This leads to a reduction in cost, as the tenders are scored 60:40 against cost and quality. Also, tenders will often reduce the costs further, as the Contract secures work for the company over a 3 (and potentially to 4 to 5) year period.
- 3.8 The use of a Contract for LBTH ensures that the Council has a competitive rate for the contract, and also that the work can be commissioned quickly to ensure that there is no delay to the determination of the planning application.

Contract

- 3.9 It is proposed to procure the new EIA Review contract through an OJEU Notice. It is anticipated that the tender process would be an open procedure i.e. advertised and tender documents made available to all.
- 3.10 Consideration was given to the use of an existing framework to procure this contract. Whilst there are a number of environmental frameworks available, they did not include a sufficient number of organisations with appropriate

experience. It was considered that procuring through these frameworks would not provide LBTH with a high quality contract.

- 3.11 Given the number of specialisms covered by the ES, it is normally larger multi-disciplinary organisations that can offer this service. There are therefore a limited number of organisations that will have the appropriate skills to tender for this contract. That said, whilst the review of EIAs is a relatively niche area of work, there are a number of consultancies that undertake this work within London and therefore an appropriately competitive tender process will be able to be achieved.
- 3.12 As with the existing contract, the Council seeks cost recovery of this contract by implementing Planning Performance Agreements (PPAs) with developers. The PPAs includes a clause requiring developers to agree to reimburse the reasonable costs to LBTH of obtaining external consultants advice. This allows the Council to recoup the costs of the review of the ES.
- 3.13 It is intended to award two contracts: to the main supplier (1); and a secondary supplier (2), to allow for periods of high work load, and also to avoid conflicts of interest. This will be stated in the ITT documents.
- 3.14 It is not considered that a pricing mechanism would be appropriate for this Contract, as the appointed consultant will be required to meet specific deadlines for a set fee. The second supplier will however ensure that there is sufficient capacity in the contract for periods of high work flow, and also ensure that conflicts of interest are avoided.
- 3.15 The Contract will be awarded through the application of the principle of 'most economical and advantageous tender' and will apply the cost and quality assessment of the Contractor, in a 60:40 cost: quality split.
- 3.16 The cost element will be based on a tender analysis of the percentage costs provided, as well as an assessment of time charge for specific items. Scores will be calculated against the costs offered. The OJEU Notice will include an incentive to reduce the price. For example, the lowest price will receive the highest score, in relation to cost.
- 3.17 The quality assessment will comprise a written submission. As part of the submission the Consultant will be expected to outline their experience in each particular field and provide evidence and examples of such and provide references for all examples given as well as outlining their proposals for this project.
- 3.18 The new contract will seek to make improvements to the current contract, whilst maintaining a similar price. For example, assisting with the identification of planning conditions, as part of the review of the ES.

Duration of EIA Review Contract

- 3.19 The Procurement Team has advised that the contract should be written to allow for an extension to the contract e.g. 3 + 2 years.
- 3.20 This allows the Council to cease the contract if needed, but also extend if necessary. A longer contract would allow continuity of service throughout more applications. Also the procurement process is itself resource intensive, and therefore a longer contract would mean that this would need to be undertaken less frequently.
- 3.21 The Council will seek a reduction in cost due to the length of the contract, as the contract will provide guaranteed work for appointed consultant.

Contract Value

- 3.22 The cost of the Contract will depend on the number of ESs reviewed annually, but the maximum budget of the contract will be up to £2,500,000 (over the 3 + 2 years). Other than time spent by officers on the procurement of the contract (i.e. internal to the Council) there are no other one off set up costs.
- 3.23 The total value of the contract has been increased to ensure that there is sufficient budget for the life of the contract. It should be noted this is a maximum budget and will not necessarily be spent in full.
- 3.24 This figure has been calculated based on the current spend, with additional headroom to cover unforeseen work requirements. This will ensure that LBTH has sufficient budget during the life of the contract, and will avoid the Council having to reproduce a new contract before the end of the contract (as is currently the case).

4. COMMENTS OF THE CHIEF FINANCE OFFICER

- 4.1 This report requests the Mayor in Cabinet to agree to the procurement of the Environmental Impact Assessment (EIA) Review Contract. The current contract for the undertaking of independent reviews of Environmental Impact Assessments was entered into in 2013, and was scheduled to run for a three year period.
- 4.2 A significantly higher number of planning applications than expected has led to increased demand for the service. In addition, the use of the contract to undertake EIAs in respect of specific initiatives e.g. masterplanning and daylight/sunlight assessments, has led to commitments approaching the overall contract sum after approximately two years of the agreement.
- 4.3 The contract delivers a review system which speeds up the decision making on planning applications and mitigates against the risk of external legal challenges arising from the EIA process. In order to ensure that there are no delays in the planning process, this report seeks approval to enter a new

contract, which it is proposed to award for a period of three years with scope for a further extension of two years if necessary. The anticipated contract sum is £500,000 per year, totalling £2,500,000 over the life of the contract if the two year extension is included.

- 4.4 As stated in paragraph 3.22 it is not anticipated that there will be any costs to the Authority arising from the procurement of the contract, and any Officer time spent on this will be absorbed from within existing budgets.
- 4.5 EIA reviews are undertaken on an “on demand” basis at a fixed unit price. There is no guaranteed level of expenditure stipulated within the contract so the Council will only pay for the individual EIAs commissioned i.e. if no EIAs are undertaken there is no charge to the Council.
- 4.6 . There is direct provision within the P&BC Development Management budget for consultant support but this does not cover the total costs to the Council. The balance is met through a combination of statutory planning fees and re-charges to applicants under Planning Performance Agreements (PPAs). The Service employs a dedicated resource (which will be consolidated in the current restructure) to ensure that the obligations to cover the Council’s costs are complied with.

5. LEGAL COMMENTS

- 5.1 The Council has the following obligations to carry out environmental impact assessments –
- 5.2 The Council has a duty under the Environmental Impact Assessment Directive 2011/92/EU as a local planning authority to assess and if possible, mitigate the effect of significant environmental impacts of any development project prior to considering granting consent. Some projects automatically need an assessment; others may or may not depending on the scale of the project and the environmental sensitivity of the particular site.
- 5.3 The Council has a duty under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011(as amended), which requires that whenever an application for planning permission is submitted the Council must 1) consider whether a full environment assessment is required through a formal screening process and 2) ensure that where the assessment is required it is done properly so that it can be taken into account when the decision is made. Both stages often require expert oversight hence the requirement to contract with specialist organisations in order to implement the assessments. Procuring the Services should assist the Council in satisfying its statutory duties.
- 5.4 The Council has power to enter into a contract for a third party to deliver any necessary environmental impact assessments. This arises by virtue of section 111 of the Local Government Act 1972, pursuant to which the Council

has power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.

- 5.5 The subject matter of the proposed contract falls within the description of “social and other specific services” under regulation 74 and Schedule 3 of the Public Contracts Regulations 2015 and the estimated value of the contract (£500,000 per annum for 5 years) exceeds the relevant threshold contained in the Public Contracts Regulations. In view of this the Council is required to fully comply with the Regulations and to subject the contract to a level of competition to ensure compliance with the principles of transparency and equal treatment. In addition, the Council would be required to place an advert in the Official Journal of the European Union (OJEU) together with a further notice in the OJEU when a contract is awarded, amongst other things.
- 5.6 The Council’s Procurement Procedures require that for this type and value of procurement, the “tollgate” process is followed and it would appear from the information provided that those relevant requirements have been complied with to date. The contract should be tendered as one procurement procedure on a ‘main and reserve’ tenderer basis. The reserve tenderer should be used where the main tenderer does not have capacity and where there is a conflict of interest in that the main tenderer has been working with the contractor on the scheme previously.
- 5.7 The current contract for the Services has exceeded its contractual budget and contracting significantly further under it may result in the Council breaching the Public Contracts Regulations as any additional expenditure may be regarded as a ‘direct contract award’ and expose the Council to legal proceedings in respect of that illegality. However, it should be noted that the figure against which this is measured is the estimate of the contract value stated in the original procurement advert and so it is uncertain as to how much excess spend would trigger this risk. However, further spend of such a sum as would render the original estimate unreasonable would clearly trigger this risk.
- 5.8 In particular, a claim might be brought by an organisation claiming damages in respect of the lost opportunity and an application to have any direct award contract annulled. A decision of the Council not to procure the Services may also lead to allegations that the Council is failing to comply with European law in relation to public procurement, particularly principles such as equal treatment and transparency and non-discrimination under the Treaty on the Functioning of the European Union. This may expose the Council to scrutiny from the Cabinet Office and further, to the imposition of financial penalties by the European Commission. If the Council decided not to procure the Services and engage a different contractor to carry out work to satisfy its statutory duties, this would also likely be regarded as a direct contract award and expose the Council to the risks highlighted in this paragraph.
- 5.9 The Council is required by the Public Services (Social Value) Act 2012 to consider how its procurement activities might secure the improvement of the economic, social and environmental well-being of Tower Hamlets. It would

appear from the information provided within this report at paragraph 3.5, that some consideration has been given to these duties. However, the Council should note that it would be appropriate for officers to explore these duties further prior to the procurement exercise beginning. At the time of awarding any contracts when the procurement exercise is concluded, the Council should be satisfied that due regard has been given to these duties.

- 5.10 The Council has an obligation as a best value authority under section 3 of the Local Government Act 1999 to “make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.” Compliance by the Council with its own Procurement Procedures in tendering for the Services and complying with the requirements of the Regulations should assist to satisfy these requirements. However, the Council would also need to be satisfied that entering into a contract with a main and reserve tenderer also provides best value.
- 5.11 When considering its approach to contracting, the Council must have due regard to the need to eliminate unlawful conduct under the Equality Act 2010, the need to advance equality of opportunity and the need to foster good relations between persons who share a protected characteristic and those who do not (the public sector equality duty). Officers are expected to continuously consider, at every stage, the way in which procurements conducted and contracts awarded satisfy the requirements of the public sector equality duty. This includes, where appropriate, completing an equality impact assessment which should be proportionate to the function in question and its potential impacts.

6. ONE TOWER HAMLETS CONSIDERATIONS

Equality

- 6.1 For the most part, this contract does not involve customer facing services. All potential contractors will be required to demonstrate their compliance with Equal Opportunities legislation, ISO 9001 and ISO 14000.
- 6.2 The Consultant will be required to demonstrate how local facilities will be utilised as part of the tendering process, to ensure that Tower Hamlets is benefitting from the procurement of this Contract e.g. involving local companies, giving talks to local schools and/ or taking on apprentices. The specific inputs will be identified through the tendering process.

Community Benefits

- 6.3 The existing EIA Review Contract secured the following community benefits over the life of the contract:
- attendance at job fairs;
 - work support;

- use of local business;
- training;
- work placements; and
- donations.

6.4 The procurement of the new contract is anticipated to include similar community benefits.

6.5 The appointed consultant will be required to pay the London Living Wage to all employees. This will be included in the Invitation to Tender.

7. BEST VALUE (BV) IMPLICATIONS

7.1 To ensure that the Consultants are meeting the requirements of the EIA Review Contract, the EIA Officer will monitor their performance and hold Quarterly Contract Review meetings to discuss progress to date.

8. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

8.1 The Council is committed to promoting diversity and equality through our work to improve the quality of life for everyone living, working and visiting Tower Hamlets. As a service provider and employer, we will seek to provide accessible and responsive services that enable everyone to take part in the social, cultural and economic wealth of the Borough. Advertisements for the service will be placed locally in Eastend Life, as well as specialist publications and through the OJEU process.

The EIA Process

8.2 Sustainability is embedded into the EIA process. It aims to modify and improve the design of a proposed development to avoid adverse, irreversible damage to environmental receptors. The EIA process therefore specifically assesses the potential effects of a development on receptors, for example nearby residents that may be adversely effected by noise, air quality, views etc. To ensure that the potential for adverse effects is fully understood, the EIA process always assesses the 'worst case' scenario and covers topics such as air quality, noise, waste, heritage, townscape, views and socio-economics (although the topics assessed within an EIA are dependent on the specific size, nature and location of the development).

8.3 The EIA process aims to minimise significant adverse effects wherever possible, and promote the incorporation of enhancement measures into the design of the development. This is achieved through the inclusion of appropriate mitigation measures e.g. noise barriers, to ensure that the local community is not adversely affected, and enhancement measures such as bird and bat boxes. An appropriately design development can bring huge environmental benefits to the local community e.g. new community facilities, or new transport links.

- 8.4 The Council uses the outcome of the EIA process to inform planning decisions. An ES that has identified a large number of significant adverse effects is unlikely to be granted planning permission.

General Best Practise:

- 8.5 The Council has a responsibility to manage the risks associated with this service and to ensure these are reviewed throughout the procurement and operational stages.
- 8.6 In terms of the process itself, the Council will be seeking to ensure that wherever possible ES and related documents are submitted electronically and if hard copies are required, they are printed on recycled paper.
- 8.7 As part of the procurement process the tendering Consultants will need to demonstrate how they will minimise their environmental impact whilst employed under this Contract e.g. video conferences rather than travelling to meetings, electronic correspondence etc.
- 8.8 There is a direct link to the 'a great place to live' theme of the Community Strategy, in that the EIA process is a tool for understanding and minimising adverse environmental effects, as well as providing an opportunity to integrate environmental enhancement into the design of the development. This leads to more sustainable forms of development, which are considered more beneficial to the existing environment.

9. RISK MANAGEMENT IMPLICATIONS

- 9.1 The repercussions of not undertaking the EIA Review process adequately is that the Council is more open to legal challenge (e.g. Judicial Review), which could affect planning application timescales and decisions. In a worst case scenario, the Council could be liable to pay large amounts of compensatory money, damaging the Council's future budgets and reputation.

10. CRIME AND DISORDER REDUCTION IMPLICATIONS

- 10.1 The contract will not directly contribute to the reduction of crime and disorder.

11. SAFEGUARDING IMPLICATIONS

- 11.1 The timescales and cost of the contract have been increased, to avoid having to procure a new contract early again.
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Linked Reports, Appendices and Background Documents

Linked Report

- NONE

Appendices

- NONE

Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012

- NONE

Officer contact details for documents: Harriet Peacock EIA Officer 020 3674 3620