West Bromwich Town Centre development – options paper

Sandwell Metropolitan Borough Council

17 December 2024

Browne Jacobson

1 Introduction

1.1 We have been instructed by Sandwell Metropolitan Borough Council ("**SMBC**") to provide legal advice on the potential delivery structures for the delivery of development for SMBC and the procurement of a private sector partner for the same.

1.2 The general background of this instruction is that SMBC have been working with Savills in respect of a development masterplan comprising of four 'priority packages' that SMBC are seeking to develop:

1.2.1 **Priority Package 1 – Town Centre**, which comprises of 5 phases with a total indicative GDV of c. £250m. It is anticipated, on the basis of the masterplan, that once developed the Package will comprise of residential, office, retail, F&B, community / leisure, health and car park space.

1.2.2 **Priority Package 2 – Cultural Quarter**, which we understand has been recommended for land sale but that it may be possible for this to be 'grouped' with Priority Package 1' and delivered under the same structure / with the same procured partner.

1.2.3 **Priority Package 3 – George Street Living**, which comprises of 3 phases with a total indicative GDC of c. £114m. It is anticipated, on the basis of the masterplan, that once developed the Package will comprise of residential, community / leisure and car park space. We understand that this package is not yet within the ownership of SMBC and therefore further actions in respect of site assembly are required before it can be delivered.

1.2.4 **Priority Package 4 – Pocket Park**, which we understand lends itself more to delivery by way of a build contract with SMBC acting as employer.

1.3 Savills have provided advice previously in respect of proposed delivery options for each of the priority packages. To date the decisions have been that the most suitable route for delivery is the procurement of a private sector development partner (under whatever structure) as opposed to a land transaction (i.e. the sale of a site or sites).

1.4 Further to that advice, a workshop was held between SMBC, Savills and Browne Jacobson to determine the possible commercial structures that could be taken to market. This workshop also focused on SMBC's objectives / 'redlines' for the eventual structure. Those are summarised as:

1.4.1 SMBC's main driver is deliverability.

1.4.2 SMBC is keen that any delivery solution optimises risk transfer between SMBC and any partner engaged.

1.4.3 SMBC want to limit providing any further capital, debt, or equity, leaving this aspect of project finance to the private sector partner although SMBC does anticipate securing grant funding to support the project.

1.4.4 SMBC wish to strike an appropriate balance between Council officer / consultant resource required by the delivery solution and an adequate / suitable degree of control / influence over the development(s) and how the same are brought forward.

1.4.5 SMBC's priority is high quality design rather than maximising land value (albeit the same is still of importance). SMBC also wish o retain control in respect of ensuring quality.

1.4.6 SMBC have some appetite for income generation (i.e retaining assets).

1.4.7 The preference is for all priority packages to have a route for delivery under a single procured commercial structure (as opposed to multiple standalone structures / procurements).

2 Executive summary

2.1 In summary, we recommend the bundling of the priority sites into one transaction – under a master developer 'partnering agreement'. For this delivery route an overarching agreement between SMBC (as landowner) and selected the Development Partner will be entered into, under which SMBC and the Development Partner will enter into site specific agreements – likely a Development Agreement for the delivery of individual sites (whether those be the priority packages or parcels within those packages).

2.2 The selection / appointment of a developer partner is subject to the procurement regulations. As such, we recommend that SMBC carry out a competitive, two stage procurement exercise (likely under the Procurement Act 2023).

3 Delivery options

3.1 A number of delivery options / structures have been considered in preparing this paper:

3.1.1 **Self-delivery** – SMBC acting as the 'client' appointing a contractor to deliver construction works. This option has been discounted given SMBC wish to transfer risk and are unable to commit significant capital or revenue resources (as well as lack of SMBC resource and specialist expertise to self-deliver).

3.1.2 **Land deal** – sale of the sites by SMBC to developer purchasers. This option has been discounted given it would afford SMBC very limited control / influence (essentially relying on negative controls and the planning process to inform what is delivered).

3.1.3 **Master Developer 'Partnering' Agreement –** SMBC procure a single developer to enter into an overarching partnering agreement under which that developer 'draws down' packages into development agreements. This option is explored in more detail below.

3.1.4 **Single (Phased) Development Agreement(s)** – SMBC procure a developer to enter into a development agreement for the delivery of a package or packages. This could be a single agreement seeking to cover multiple sites or multiple agreements. This option is explored in more detail below.

3.1.5 **Corporate joint venture** – SMBC procure a developer partner with whom they form a corporate joint venture entity, and that entity acts as the 'developer'. This option is explored in more detail below.

Factors	Master Developer 'Partnering' Agreement	Single (Phased) Development Agreement(s)	Corporate joint venture
Overview	This is the suggested delivery route in light of SMBC's objectives.	This is a suitable alternative delivery route (should the Master Developer 'Partnering' Agreement be decided against) but would be more complex in respect of the delivery of a number of sites with multiple phases.	This is unlikely to be a suitable structure as it may be more complex than is needed for the proposed developments and requires more risk and finance on the part of SMBC that is desired.
Structure	Overarching agreement between the Council (as landowner) and selected Development Partner, under which the Council and the Development Partner enter into site specific agreements – likely a Development Agreement. Activity under overarching agreement can be tailored as required – likely high level feasibility work etc. prior to entering into the specific agreements. Developer Partner may be granted exclusivity over the sites. Site specific agreement can be largely the same as a single development agreement (i.e conditional land transfer).	Agreement, between the Council (as landowner) and selected Development Partner, obliging the Development Partner (as Developer) to carry out the development. Land transfer to the Developer will be conditional on planning and other pre-conditions (with suitable longstops for e.g submission on planning application and satisfaction of all conditions). A single, phased DA will be capable of capturing 1 or more sites.	A corporate entity (LLP) established between the Council and selected Development Partner, with the LLP entity acting as Developer (and taking development risk). Returns shared against development receipts and pro rata each party's investment. Land agreement or development agreement between the Developer LLP and the Council (as landowner). Development Management Agreement between Developer LLP and DM (who would likely be the Development Partner). Land transfer to the Developer LLP will be conditional on planning and other pre-conditions.
Control	Control in respect of sites 'going into' DAs (with reference to pre-set measures). This is suitable when stood against SMBC's objectives as it affords SMBC the ability to 'park' some discussions of detail in respect of how to make future priority packages stack up until closer to delivery – i.e in respect of priority package 3 where substantial site assembly is still required prior to delivery. Once under DAs, control and influence over the development by way of	Control and influence over the development by way of obligations and restrictions in the Development Agreement – including approval rights over, for example, the planning application. This control can be shaped to suit SMBC's needs / wants – i.e SMBC can seek a high level of control over points that are of importance but can leave other areas to sit within the Developer Partner's control / expertise.	50 / 50 control as a member of the Developer LLP. Day to day decisions made by Developer LLP (via a LLP Board), with limited matters 'reserved' for members (i.e Council and Development Partner) but still requiring unanimous decision. This is a very high level of control but also means that (i) SMBC are a very active participate in the day to day decisions and (ii) on all decisions the control does not sit fully within SMBC's remit given decisions are made 50:50 with the Development Partner.

	obligations and restrictions in the Development Agreement – including approval rights over, for example, the planning application and design. This control can be shaped to suit SMBC's needs / wants – i.e. SMBC can seek a high level of control over points that are of importance but can leave other areas to sit within the Developer Partner's control / expertise.		Potential for further control as landowner under land agreement / development agreement but likely to receive strong pushback from Development Partner re 'two bites of the cherry'. For example, if SMBC were to seek control re design under the land agreement a Development Partner will likely push back given SMBC will be involved in design decisions as a Developer LLP member.
Risk	Depending on approach to 'partnering' agreement work – i.e. whether SMBC funds (or partner funds) pre-DA work. PCSA could be utilised for SMBC to 'de-risk' sites where suitable. Otherwise, once under DAs, Development Partner takes planning / pre-development risk, build risk and sales risk.	Development Partner takes planning / pre-development risk, build risk and sales risk. PCSA could be utilised for SMBC to 'de-risk' sites where suitable.	Risk is shared with the Development Partner as members of the Developer LLP. In practice meaning that the LLP members share in the financial risks, e.g. funding of extra costs to obtain planning or not recovering cash or land value invested.
Financial requirement on SMBC	Depending on approach to 'partnering' agreement work – i.e. whether SMBC funds (or part funds) pre-DA work. Once under DAs, as under the single DA route – If viable, no financial requirement on SMBC save for SMBC's own costs in respect of vacant possession activity and resourcing. If not viable, the Partnering Agreement can provide for cross subsidy between sites (see below) so that a viable scheme can help to subsidise the delivery of a non-viable one (by way of the overage / super profit being 'carried over' and / or by the land value from the first site being help in a project account and applied to future sites).	If viable, no financial requirement on SMBC save for SMBC's own costs in respect of vacant possession activity and resourcing. If not viable, the Development Agreement can provide for cross subsidy between sites (see below) so that a viable scheme can help to subsidise the delivery of a non-viable one (by way of the overage / super profit being 'carried over' and / or by the land value from the first site being help in a project account and applied to future sites).	Likely expectation of 'matched' funding (i.e. 50/50 investment). Council puts land in and gets loan notes (i.e IOU) for the land value. Developer puts cash in and gets loan notes (i.e IOU) for the value. Both parties cover any equity required, with balance of development costs covered by debt finance obtained by the LLP. The expectation under this structure is that SMBC would provide equity funding as required and the land value would be 'tied up' in loan notes until profit is realised.

Financial gain for SMBC	If viable, land value (timing of which is a point for commercial discussion). Overage / profit share provision. Financial gain in respect of land value / overage is dependent on the viability of the scheme, but each Development Agreement could be structured in the most appropriate way for the relevant site – i.e. the parties could agree to deferred land value payment. Site specific development agreements can provide for SMBC to retain / acquire income generating assets. Exploration of whether such assets can be provided can be dealt with under the Partnering Agreement.	If viable, land value (timing of which is a point for commercial discussion). Overage / profit share provision. Timing of land payment would need to be settled in drafting at the point of execution of the agreement (i.e. that could not be 'parked' and determined at a later date, unlike under the Partnering Agreement approach). However, quantum could be determined during the conditional period. The agreement can provide for SMBC to retain / acquire income generating assets. The intentions in that respect would likely need to be worked out at an early juncture compared to the other two delivery routes explored.	Share of profit which repays loan notes issued and any surplus profit shared between members (i.e Council get 50% of surplus). SMBC's land value would be 'tied up' in loan notes until profit is realised. Financial gain in respect of land value / profit is fully dependent on the 'success' of the schemes. Land agreement / development can provide for SMBC to retain / acquire income generating assets. Exploration of whether such assets can be provided can be dealt with under the business case process of the JV.
Cross subsidy ability between packages / phases	Either: • Phases under a DA may be able to 'cross subsidise' each other with the appropriate drafting in the agreement and / or the use of a project account; and / or • Sites under the overarching agreement may be able to 'cross subsidise' each other with the appropriate drafting in the agreement and / or the use of a project account.	Phases may be able to 'cross subsidise' each other with the appropriate drafting in the agreement and / or the use of a project account.	Cross subsidy provided for by way of the Developer LLP having its own accounts and profit distribution mechanisms / restrictions.
Funding/Subsidy	More flexibility for addressing any subsidies on a DA-by-DA basis but subsidies become more complex the further they are removed from the original procurement process.	Depending on evaluation approach, may be simpler to address any subsidies if confirmed at point of procurement. Realistically the subsidy position for all packages is unlikely to be confirmed at the point of procurement though, so any	More options for addressing any subsidies confirmed after award, but subsidy position potentially more complex. Theoretically, subsidy risk may be mitigated if immediate risk sits with the vehicle but realistically that risk is likely to

<table>
<tr><td></td><td>Based on our experience, the subsidy position is unlikely to be settled at the point of procurement, so the additional flexibility offered by this approach is likely to be useful.</td><td>advantage from a simpler approach to subsidies is unlikely to be realised under this option.</td><td>spill over to SMBC and Developer.</td></tr>
<tr><td>Resource requirement</td><td>SMBC resource required to:
Under DPA
Sit on ‘overarching’ board – if required (which could, for example, monitor across the DAs if simultaneous). The role of this board and the extent of resource required could be tailored within the drafting, but this would be significantly less than a corporate joint venture
Under each DA
Action obligations such as VP and site assembly
Sit on operational board
Exercise approvals / check compliance etc.
Save for in respect of VP / site assembly (which will be a SMBC obligation), resource requirement will be directly linked to the level of input and approval SMBC require.</td><td>SMBC resource required to:
Action obligations such as VP
Sit on operational board
Exercise approvals / check compliance etc.
Save for in respect of VP / site assembly (which will be a SMBC obligation), resource requirement will be directly linked to the level of input and approval SMBC require.</td><td>SMBC resource required to:
Be 50% of the Developer LLP board – making day to day decisions
Exercise approvals / check compliance etc re those matter that have been ‘reserved’ for members.
Also, SMBC will need to be resourced generally to review and challenge day-to-day materials presented to the LLP by the development manager. This will likely be more involved in under a JV structure than as landowner under a DAs.</td></tr>
<tr><td>Flexibility</td><td>Could provide for flexibility to include future sites (if suitable) – i.e. sites in addition to the packages (for example any site suitable for development within a set GDV range in West Bromwich).

Flexible in the sense that change control mechanisms can be provided for.</td><td>Flexible in the sense that change control mechanisms can be provided for.</td><td>Would likely give flexibility to shape the delivery of the overall scheme / schemes (as 50% of the Developer LLP) and possibly to include future sites (if suitable).</td></tr>
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Procurement	Single overarching procurement exercise (potentially covering more than one Site). The procurement process would involve more documentation (in that there are more contractual documents) but more can be left to be addressed within the 'partnership'. Care would be needed to ensure the procurement process remains robust when elements are left to future decisions.	Procurement exercise per agreement (if more than one is to be entered into – as we would expect if more than one priority package is being delivered), or multiple lots under one procurement exercise. Potentially more 'front loading' of requirements into procurement process as less to be worked up through wider relationship. Procurement process per agreement would be relatively straightforward but doubled up and any lotting approach would be complex in terms of evaluation.	Single overarching procurement exercise (potentially covering more than one Site). The procurement process would involve more documentation (in that there are more contractual documents) but more can be left to be addressed within / by the JV. Care would be needed to ensure the procurement process remains robust when elements are left to future decisions.
Likely market appetite	We understand from Savills that it is expected that there would be good market interest in this delivery route.	We understand from Savills that it is expected that there would be good market interest in this delivery route.	We understand from Savills that it is expected that a corporate joint venture is not likely to be attractive to the market and would have limited interest.

3.2 Based on the assessment above, our recommendation is that the Master Developer 'Partnering' Agreement is the most suitable for SMBC. This delivery route allows for a single, focused procurement exercise (finding the right 'partner') and retains suitable flexibility for SMBC to work with the Developer to address commercial constraints and site constraints whilst limiting SMBC's risk and cost exposure.

4 Procurement approach

4.1 A public works contract falls under the Public Contract Regulations 2015 ("**PCR**") / Procurement Act 2023 ("**PA 23**") if the contracting authority exercises a decisive influence over the design and the contract contains an enforceable obligation to carry out specified works – this is the case under all of the delivery option structures considered in paragraph 3 above The leading case of *Faraday Development Ltd v West Berkshire Council [2018] EWCA Civ 2532* sets out the general legal position.

<u>Frameworks (including Dynamic Purchasing Systems (**DPS**))</u>

4.2 There are differences between a framework route (provided for under the PCR and PA) and a regulated procurement route in terms of the procurement steps - of marginal significance in our view given the nature of the contract(s) required. The essential differences being –

4.2.1 Use of a framework eliminates the need to run the selection stage (i.e. assessment of the bidder's financial standing and experience) as the same will have been run in setting up the framework;

4.2.2 As such only the developers on the framework may be used;

4.2.3 A mini-competition (assuming SMBC would not seek to make a direct award) must be run in accordance with the rules laid down by the framework. That mini-competition would save some, but not significant, time in the overall process when taken in the round;

4.2.4 The form of contract will be regulated by the framework and (as a general position) cannot be bespoke;

4.2.5 SMBC may pay an access fee to the framework holder and be under other general obligations (e.g. reporting).

4.3 If the opportunity (or any one of the priority packages) is pursued via a DA, then a framework route might be suitable. However, that is only the case if all the right 'players' are on the relevant framework and the template form of DA can be adapted and made suitable for the relevant project. In the case of any framework, the mandatory use of the template DA might cause significant commercial difficulty. Also, any panel which consists predominantly of housebuilders and registered providers, with only a handful of master developers, may prejudice the ability of SMBC to find the right partner.

4.4 We understand that SMBC and Savills have previously considered, and discounted, the use of frameworks (such as Pagabo) as a procurement route for this opportunity. This is largely as those frameworks that would potentially have been suitable (i) do not include many the anticipated interested developers and (ii) do not reflect SMBC's preferred contractual structure(s) and / or include sufficient flexibility to accommodate the preferred structure(s).

4.5 On the basis that a framework procurement has been discounted, SMBC will be running a public procurement under PCR / PA 23.

<u>PCR and PA 23</u>

4.6 The current procurement regime is PCR, however new procurement legislation, the PA 2023, will come into full force and effect on 24 February 2025. This means that procurements (and resulting contracts) started on or after 24 February 2025 must comply with the PA 2023 regime. It is expected that this procurement will launch after that date and therefore the section below focuses on PA 2023.

4.7 Under section 20 PA 23, the multiple procedures PCR are replaced with two competitive tendering procedures:

4.7.1 an "open procedure" – a single stage process which is without restriction as to who may submit tenders; and

4.7.2 a "competitive flexible procedure" – a process within which there is some flexibility for an authority to design a competitive tendering process that appropriately meets the needs of a particular project or reflects specific market conditions (including flexibility to limit the number of parties who may submit tenders by adopting a multi-stage approach).

4.8 The competitive flexible procedure is non-prescriptive, leaving authorities with considerable flexibility to design something to suit their specific requirements – in the context of a complex procurement such as this that flexibility is beneficial.

High level procurement overview

4.9 Whether under PCR or PA 23, the competitive procedure will likely follow the same five key stages. Those stages are considered at a high level below and will be addressed in further detail in the procurement strategy prepared at the next step of this process.

4.9.1 **Published Contract Notice** – advertising the opportunity to the market and asking for expressions of interest.

4.9.2 **Selection Stage** - via a completed selection questionnaire (SQ) with supporting information (e.g. annual accounts and case studies).

4.9.3 **Tender stage** – a competitive process undertaken with a view to establishing the solution best suited to the Council's requirements

4.9.4 **Tender evaluation** - The final submissions evaluated against the evaluation criteria and may involve fine tuning and clarification before reaching a decision on the preferred developer.

4.9.5 **Preferred tenderer** - The successful tenderer is appointed, and then final steps taken to reach a contract close i.e. signing of the contractual documents).

4.10 In conducting a procurement, SMBC would be bound to observe the general principles enshrined in the PCR (equal treatment, non-discrimination, transparency and proportionality) or PA 23,)(value for money, maximising public benefit, transparency and acting with integrity).

4.11 A key area of focus in this type of procurement (and generally true for any competition) is the framing of (i) the project requirements (or 'brief'), and (ii) the bidder selection and contract award criteria. The latter, including the weightings and scoring method are of crucial importance.

4.12 Soft market testing is allowed for (and encouraged) under both PCR and PA 23. That permits market consultations with a view to preparing the procurement and informing potential bidder of SMBC's procurement plans and requirements. The caveat being that this must not have the effect of distorting competition or result in a violation of the principles of non-discrimination and transparency. Accordingly, any procurement strategy / SMT brief must ensure that no such distortion of competition will occur especially by ensuring that all bidders have access to the same information and that the procurement process treats all bidders on an equal footing insofar as possible. Further detail on soft marketing testing can / will be set out under a more detailed procurement strategy to be prepare.

5 Next steps

5.1 Subject to SMBC's views on our recommendations as set out in this paper, we suggest next steps as follows:

5.1.1 Browne Jacobson to prepare a commercial structure summary paper setting out the framework / skeleton of the proposed commercial structure in further detail.

This note will also act as the route to Browne Jacobson obtaining a number of instructions on various points of detail.

5.1.2 Browne Jacobson to work with Savills to prepare a more detailed procurement strategy. This strategy would build further detail on the stages set out above and would provide further suggestions in respect of indicative shortlisting and award criteria.

5.1.3 Savills to continue soft marketing testing / market engagement with a view to confirming potential bidders' appetite for the proposed structure and any key, initial observations.

5.2 In addition to the above key actions, Browne Jacobson and Savills can work together to prepare a draft programme to procurement launch, including detail on the workstreams / actions required.

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Browne Jacobson LLP

brownejacobson.com
+44 (0)370 270 6000

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Browne Jacobson