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| <b>Item No.</b><br>6.              | <b>Classification:</b><br>Open | <b>Date:</b><br>June 19 2008  | <b>Meeting Name:</b><br>Major Projects Board |
| <b>Report title:</b>               |                                | Selection of Preferred Bidder for Multi Utilities Services Company (MUSCo) Commercial Partner |  |
| <b>Ward(s) or groups affected:</b> |                                | Cathedrals, Chaucer, East Walworth and Newington  |  |
| <b>From:</b>                       |                                | Strategic Director of Major Projects  |  |

## RECOMMENDATIONS

1. That the major projects board considers the report of the evaluation team and agrees to select one of the short listed bidders as its preferred MUSCo commercial partner to final negotiation stage based on the terms included in the invitation to submit a best and final offer and response to that document.
2. That the major projects board instruct officers to proceed with detailed negotiations in order to conclude full contractual documentation in order to give affect to the proposed joint working arrangements acceptable to the Council subject to final approval of the Project Agreement and associated documentation at the contract award (Gateway 2) stage.

## BACKGROUND INFORMATION

### Report Summary

3. This report seeks to select a preferred Private Sector Partner (PSP) for delivery of a Multi Utility Services Company and progress with the preferred bidder to Gateway 2

## KEY ISSUES FOR CONSIDERATION

### Policy Context

4. The Supplementary Planning Guidance (SPG) for the Elephant and Castle sets clear guidelines for the environmental standards for the development. This includes the following: -
  - A commitment to net zero growth of carbon emissions.
  - A reduction of the consumption of potable water.
  - The formation of an Energy Services Company (ESCo) for the delivery of sustainable services into the development.
5. The Sustainable Development and Construction Supplementary Planning Document (SPD) to the London Plan adopted by the GLA prioritises the use of district heating and other decentralised energy networks. This is a strategy, which the deployment of the MUSCo addresses in a comprehensive manner.
6. Southwark's adopted Sustainable Development and Construction SPD prioritises the

deployment of decentralised energy networks for the achievement of carbon emission reductions and sets a standard of Code for sustainable homes at level four (CFSH 4). Connection to the MUSCo network by any building that meets building regulations will ensure the achievement of CFSH 4 for energy; as a result this will be the base standard for the scheme as a whole without accounting for further building mounted or centralised low and zero carbon technologies. In addition, in the longer term a comprehensive district network can accommodate refuelling by lower carbon fuels and generation technologies.

7. The additional investment brought into the scheme by the MUSCo partner will allow the development to achieve this level of the code for sustainable homes at broadly the same cost to the developer as a building regulations compliant building. The costs for achieving this were outlined in the report produced by Cyril Sweett for English Partnerships and the Housing Corporation in February 2007: In a development where investment in a district network by a third party has not occurred it would cost the developer an average of £8,070 per unit for a high rise apartment for the developer.
8. The Climate Change Strategy for the borough adopted by the executive in December 2006 commits the council to achieving significant carbon reductions for the borough. The deployment of the MUSCo infrastructure will yield significant carbon savings for the Elephant and Castle development area, achieving net zero carbon growth for this area.
9. The Southwark Alliance's document "Southwark 2016", outlines an overall strategy for the improvement of Southwark, which includes, among other things, stratagems to enhance service delivery, improve life chances, develop enterprise, enhance community safety, and encourage sustainability. The provision of the MUSCo infrastructure should raise local ICT infrastructure to enable enhanced public services, encourage and retain businesses, provide an infrastructure for enhanced CCTV and other monitoring technology along with providing heat and power services that will enhance the sustainability of all buildings using it.

### **Context for this procurement**

10. The Gateway 1 report for the procurement of a partner to form a MUSCo was agreed by the council's executive on July 18 2006. This included the services that would be procured as part of the selection which include the following: -
  - a comprehensive district network delivering heat and electricity to the development
  - a non-potable water network and an open access fibre optic communications network
  - the scope to explore the feasibility of the inclusion of other services such as mechanised waste removal and cooling.
  - Delivered as a services concession over 35 years
  - The council granting leases and wayleaves to facilitate the scheme
11. The Gateway 1 report identified preferred sites for energy centres as the plot to the north of St Mary's Churchyard and the location of the current Heygate boiler house.

12. As a result of the approval of the Gateway 1 report, a contract notice was lodged with Official Journal of the European Union, to which the Council received expressions of interest from fifteen organisations. The majority of these organisations were offering discrete services within the MUSCo. All but one of these organisations were invited to form consortia and submit tenders for the second stage of the procurement.
13. Three consortia submitted responses to the stage 2 tender documents. All three were then short-listed and following executive approval of a report on April 24 2007 invited to the third stage of the procurement process.
14. At this stage there was a delay to enable the project team to appoint the Master Development Partner for the Elephant and Castle. This was necessary in order that they were able to participate in the MUSCo partner procurement. Subsequently, stage three commenced in August 2007 with the full participation of the preferred Master Development Partner for the Elephant and Castle development, Lend Lease.
15. The third stage of the process commenced in August 2007. It is this stage which has now concluded and on which a decision is sought. The process included a series of briefing sessions and workshops on each of the key subject areas for the submissions. Each of these sessions was preceded by the release of a corresponding part of the bid document for this stage of the procurement and the discussion of these documents and the bidders approach to responding to them formed the core of these sessions. All three organisations submitted their formal responses to this stage on December 3 2007.
16. The analysis of these submissions began in January and February 2008 with a series of review sessions focusing on carbon accounting methods and other technical assumptions from the bids. These discussions resulted in the bidders recasting their technical and financial models and resubmitting them in March 2008.
17. Based on these resubmitted models, clarification meetings on finance and risk were held at Price Waterhouse Coopers (PwC) offices in March 2008. PwC then followed these up with more detailed meetings on the accounting and other financial assumptions in the submitted models. An interim report on the financial statements included in the submissions was then produced by PwC to inform the Best and Final Offer (BAFO) request process.
18. Following a review of the bids, a set of core principles for the project agreement and joint working between selection and financial close were formulated. Best and Final Offer submissions have now been received and finally clarified and the Council is in a position to make a decision on which bidder to take forward to the next stage of the process.

### **Community Impact Assessment**

19. The MUSCo is a vehicle that will deliver sustainable and affordable services and enhance the quality of life for all residents in the Elephant and Castle Opportunity Area. The proposed preferred bidder has committed to deliver services that will guarantee cost savings for consumers in comparison to services delivered by mainstream means. In addition they will set up a hardship fund to assist vulnerable

individuals' management of their bills.

20. An Equalities Impact Assessment for the MUSCo project will be presented MPB once the full scope of the project and its interface with the Elephant and Castle Masterplan are clear and terms of the project agreement have been agreed. This will follow Gateway 2 approval currently scheduled for December 2008
21. The consultation around the Elephant and Castle development and associated housing sites has included information about the approach to energy, and more widely sustainability. An active period of period of consultation and promotion of the MUSCo will take place as part of the consultation on the Elephant and Castle Masterplanning process.

## **SUPPLEMENTARY ADVICE FROM OTHER OFFICERS**

### **Director of Legal and Democratic Services**

22. The Council is conducting a 3-stage procurement process in order to select a private sector partner (PSP) to plan, develop, finance and implement, through MUSCo, a package of sustainable infrastructure to provide various utility services to the Elephant and Castle development area. When doing so, the Council is required to ensure compliance with EU procurement law, as well as local authority best value principles.
23. Herbert Smith advised in 2006 that the arrangement with the MUSCo partner could best be categorised as a "public services concession" under EU law, on the basis that the PSP would bear a substantive part of the economic risk entailed in providing its services. That sharing of risk would be evidenced by the PSP/MUSCo receiving some or all of its consideration or remuneration by charging end-users, rather than by the PSP receiving guaranteed fees from the Council.
24. A services concession falls outside the scope of the Regulations but, according to European Court caselaw, still has to be subject to "a degree of advertising" and competition in order to satisfy EC Treaty principles of transparency and non-discrimination. The Treaty principles do not necessarily require publication of a notice in the EU Official Journal (OJEU) but such publication would certainly be sufficient to meet those Treaty obligations. The Council therefore decided to follow "voluntarily" the steps required under the most flexible procedure under the Public Contracts Regulations 2006, i.e. the competitive negotiated procedure.
25. At the first stage of the procurement process, the Council issued a Prior Information Notice (PIN) on 23 May 2006, followed by a contract notice in the OJEU on 12 August 2006. Applicants were required to complete a Pre-Qualification Questionnaire by 14 September 2006. In the second stage, the Council issued an invitation to tender to the shortlisted bidders. Three consortia of bidders (Thamesway, London ESCO and Dalkia) submitted fully populated bids at the end of 2007, which the Council reviewed together with its consultants (Brian Dunlop and Kerry Thompson) and PwC. After reviewing these bids, the Council conducted a few rounds of clarificatory meetings with the various consortia in early 2008.

26. The Council is comfortable that it now has sufficient information to select a preferred bidder. Together with PwC and Herbert Smith, the Council has therefore put together a best and final offer (BAFO) letter which was sent to bidders on 24th April, responses were sent to the Council on 6th May 2008. The intention is to pick a preferred bidder within the next month and then start discussions on the heads of terms for the Project Agreement.
27. The Council was transparent in its initial advertisement of the opportunity in the OJEU and, we understand, has made its short-listing and selection decisions to date in accordance with objective, non-discriminatory criteria. We also understand that the Council has selected as preferred bidder the bidder which it considers has put forward the most economically advantageous offer, in terms of the objective criteria stated in the Council's invitation to tender. Accordingly, we are not aware of any issues which could render the procurement of the preferred bidder susceptible to a successful challenge under EU procurement law.
28. Finally, we do not consider that the selection of the preferred bidder will raise any issues of State aid. The fact that the Council has conducted an EC-compliant competitive procurement procedure to select the partner gives rise to an assumption that it obtained the best commercial terms possible from the market and thus that there is no element of State aid. We are not aware of any factors (such as a gratuitous benefit to be granted to the preferred partner, outside the process) that would cast doubt on that assumption.

**Director of Finance**

29. Contained in closed report

**Director of Environment and Housing**

30. Contained in closed report

**Head of Property**

31. Contained in closed report

**REASONS FOR URGENCY**

32. There is early development already in construction, such as the Strata Tower. The business plan for the deployment of MUSCo services comprehensively across the development site is dependent on such early developments such as Strata Tower taking in MUSCo services. In total these developments represent a total of 1,242 units. It is crucial that the MUSCo commercial Partner is selected as soon as possible to interface with these developments to ensure compatibility with the specific technical requirements of the preferred bidder and their specific strategy for the integration of these early developments. It is also crucial to the success of the project that the MUSCo Commercial Partner is fully involved with the masterplanning process that is due to take place between July and December of this year. In order to be at the table from the beginning of July given the time required to mobilise post

selection, consideration of this item on June 19<sup>th</sup> is crucial. Equally it is also crucial for the development of the masterplan that commencement of the project agreement with the MUSCo commercial partner takes place and there is a full understanding of the approach to the deployment of infrastructure as the development progresses. Delaying the decision would mean that the opportunity to coordinate these processes during the significant early period of the masterplanning and development agreement process would be missed and the viability of the MUSCo, and ability of the Elephant and Castle development to meet its sustainability objectives could be impaired. It is therefore urgent that Major Projects Board considers this item.

## REASONS FOR LATENESS

33. The reason for lateness is that it has not been possible to finalise issues in the report in the time available since final scoring of bids.

## BACKGROUND DOCUMENTS

| Background Papers   | Held   | Contact   |
|---|--|---|
| Southwark Plan post inquiry modifications and E&C SPG adopted Feb. 2004 | All papers held at Elephant & Castle Development Team<br>Coburg House<br>63-67 Newington Causeway<br>SE1 6LS | Jon Abbott<br>020-7525-4902<br><a href="mailto:jon.abbott@southwark.gov.uk">jon.abbott@southwark.gov.uk</a>       |
| MUSCo PSP<br>Procurement Gateway 1                                      |  | Tony Moseley<br>0207 525 4903<br><a href="mailto:tony.moseley@southwark.gov.uk">tony.moseley@southwark.gov.uk</a> |
| Sustainability Strategy   | Chatelaine House<br>186 Walworth Road  | Bob Fiddik<br><a href="mailto:Bob.fiddik@southwark.gov.uk">Bob.fiddik@southwark.gov.uk</a><br>020 7525 3804       |

**AUDIT TRAIL**

|   |  |                           |
|---|--|---------------------------|
| <b>Lead Officer</b>   | Jon Abbott, Assistant Project Director, Major Projects |                           |
| <b>Report Author</b>  | Tony Moseley, Project Director, Major Projects         |                           |
| <b>Version</b>  | Final  |                           |
| <b>Dated</b>  | 13.6.8   |                           |
| <b>Key Decision?</b>  | Yes  |                           |
| <b>CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / EXECUTIVE MEMBER</b> |  |                           |
| <b>Officer Title</b>  | <b>Comments Sought</b>                                 | <b>Comments included</b>  |
| Strategic Director of Legal and Democratic Services                       | Yes  | Yes                       |
| Finance Director  | Yes  | Included in closed report |
| Strategic Director of Environment and Housing                             | Yes  | Included in closed report |
| Head of Property  | Yes  | Included in closed report |
| <b>Executive Member for Regeneration</b>                                  | Yes  | No                        |
| <b>Date final report sent to Constitutional Support Services</b>          | June 13 2008   |                           |