

London Borough of Hammersmith & Fulham

LEADER'S URGENCY REPORT

February 2019



INVESTIGATION INTO THE CIRCUMSTANCES LEADING TO SALE OF COUNCIL LAND

Report of the Strategic Director of Growth and Place

Open Report with exempt appendix

The appendix is exempt from disclosure on the grounds that it contains information relating to the **financial or business affairs of a particular person (including the authority holding that information) under paragraph 3** of Schedule 12A of the Local Government Act 1972, and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

Classification - For Decision

Key Decision: Yes

Consultation

Information Team, Legal, Procurement, Finance, Business and IT

Wards Affected: North End

Accountable Director: Jo Rowlands – Strategic Director of Growth and Place

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Reasons for Urgency:

Following the decision to investigate all the circumstances that led to the signing of a Conditional Land Sale Agreement with a private developer in 2013, in relation to West Kensington and Gibbs Green Estates; there is an urgent need to appoint an investigative company and an eDiscovery company to conduct the investigation which in part involves processing historical electronic data held by the council.

The urgency arises from:

- The monthly cost of retaining historical electronic data which is costing the council £18,750 per month until its deleted;
- The need for a speedy conclusion of the investigation to allow savings to be realised and give the council control over the project costs; and
- The risk that further delay may have on the investigation and its outcomes arising from contractual and/or statutory liability limitation.

Date by which decision is required: 1 March 2019

AUTHORISED BY:

The Leader has signed this report.

DATE: 27 February 2019

1. EXECUTIVE SUMMARY

- 1.1 This report seeks a waiver from Contract Standing Orders to seek public quotations and instead seeks authority to directly appoint:
- (i). Kroll Associates U.K. Limited (“Kroll”) to conduct an independent investigation into the Cabinet decision dated 3rd of September 2012 which authorised the council to enter into a Conditional Land Sale Agreement (“CLSA”) with EC Estates, a subsidiary of Capital & Counties PLC (“CapCo”), for the redevelopment of the West Kensington and Gibbs Green estates (the “Regeneration Agreement”); and
 - (ii). KLDDiscovery Limited to provide technical, forensic and eDiscovery support to the investigation. This second appointment is needed to ensure the availability of all relevant documents to Kroll through the utilisation of the KLDDiscovery’s technical expertise and tools for processing and reviewing; documents, emails, attachments etc. and make them available to the Kroll through a secure user-friendly interface.
- 1.2 The value of anticipated cost of the contract with Kroll as outlined in the exempt appendix A.
- 1.3 The value of anticipated cost of the contract with KLDDiscovery as outlined in the exempt appendix A.
- 1.4 The report also seeks a waiver of the requirement to produce a procurement strategy and a business case, and approval of a budget for the full investigation.

2. RECOMMENDATIONS

The Leader is recommended to approve:

- 2.1 A waiver pursuant to Contract Standing Orders (CSO) 3.1 in relation to the competition requirements of CSO 10.2 (to advertise contract and seek quotations or use a framework) to enable the direct award of two separate contracts for provision of investigative services, on the grounds that:
- (i). The nature of the market for the services to be provided has been investigated and is demonstrated to be such that a departure from these CSOs is justifiable; and
 - (ii). it is in the council’s overall interest to pursue this route;
- 2.2 The award of a contract to Kroll to conduct the investigation at a cost contained in exempt appendix A.
- 2.3 The award of a contract to KLDDiscovery to provide technical, forensic and eDiscovery support to the investigation at a cost contained in exempt appendix A.

- 2.4 Delegate authority to the Assistant Director of Legal and Democratic Services to finalise the terms of both contracts.
- 2.5 A project budget for the investigation as set out in exempt appendix A and which includes the amounts included in recommendations 2.2 and 2.3 above.

3. REASONS FOR DECISION

- 3.1 To fully investigate some explicit concerns surrounding Cabinet authorisation, in September 2012, of the sale of council estate land to a private developer. This investigation follows a motion passed by the Full Council in May 2018, which outlined the grounds to pursue legal avenues to question the validity of the original sale and to investigate the full circumstances and decision-making process of the Regeneration Agreement.
- 3.2 Some of the main concerns that gave rise to the proposed investigation are as follows:
- The decision-making process around the transaction and its transparency;
 - Allegations of inappropriate inducements offered to residents to support the scheme;
 - The original sale price of the land was significantly below realisable value;
 - That certain senior personnel involved in the scheme had undisclosed conflicts of interest;
 - Inappropriate coordination between certain individuals;
 - Inappropriate and/or undue influence of certain individuals promoting the scheme; and
 - The redevelopment plans do not sufficiently consider the housing needs for residents on low and middle incomes, and that the proposed level of density and affordable housing cannot be supported or delivered by CapCo.
- 3.3 Those cumulative shortcomings bring into question the appropriateness, correctness and lawfulness of acts and, as the case may be, omissions of LBHF employees and appointed external advisors on which the council had based its 2012 decision.
- 3.4 Therefore, the investigation will explore matters that led to the 2012 decision, including:
- conduct of officers and members involved in, or having influence of, appointment and instruction of financial and legal advisers;
 - drafting and preparing of relevant Cabinet reports which were relied upon by the council to reach the decision;
 - consideration of whether formal governance processes were breached; and,

- existence on any potential wrong-doing.

3.5 The outcome of the investigation would, therefore, provide a good basis to:

- Review safety and legality of the decision;
- Inform on any possibility of actionable remedies;
- Review internal governance and decision-making processes; and
- Advise on “lessons learned” to be applied on future major development.

3.6 The proposal to appoint Kroll is due to their unique specialism and capabilities, allowing them to compare and contrast council provided information with publicly available records including social media records. Kroll has a demonstrable extensive experience in:

- i. managing and advising on potential risks arising from investigations, whether or not an actual misconduct was to be established;
- ii. conducting thorough, impartial, and objective investigations looking in to potential mismanagement, misconduct, bribery and corruption;
- iii. carrying out complex investigations involving financial and land transactions including financial irregularities;
- iv. understanding complex financial appraisal methodology and investigate sources of any unsupported assumptions and/or predictions that affected valuations/appraisals outcomes;
- v. prioritising different lines of enquiries to ensure time is not wasted on lines of the enquiry that are unlikely to be useful or chasing uncooperative potential witnesses;
- vi. understanding public body decision making process with the ability to focus on decision makers and influencers to ensure each and every decision or influence is attributable to a specific decision maker and influencer; and
- vii. ability to process and review and extract relevant data from a huge amount of electronic data held by the council.

3.7 The reason for seeking to appoint KLDDiscovery is due to its demonstrable extensive specialist experience in data recovery and processing in support of investigation involving complex litigation and regulatory compliance.

3.8 The simultaneous appointment of Kroll and KLDDiscovery is in recognition of their extensive previous expertise in working closely with each other on complex investigations. This will eliminate the need for further council resources to provide operational liaison and coordination between them.

3.9 The reason for seeking a waiver from CSO, to permit the making of two direct awards, is that for every month of a delay, the council will incur a cost of £18,750 for maintaining historical electronic data (detailed in paragraph **Error!**

Reference source not found. below). Awarding contracts to KLDDiscovery and Kroll will allow the council to realise savings from discontinuing with such data.

- 3.10 In addition, the making of simultaneous direct awards, compared to other options, will save time and costs through swift commencement and conclusion of the investigation, therefore provide the council with an overall control of the project costs.
- 3.11 The nature of the market for these unique services has been investigated and no other companies have been found that offer a combination of the level of expertise and close working relationship as offered by Kroll and KLDDiscovery, demonstrating a justifiable departure from the CSOs.
- 3.12 In addition, compliance with the CSOs will result in a slower process that will result in a significant cost increase, further demonstrating that the waiver proposed is in the council's overall interest.

4. PROPOSAL AND ISSUES

- 4.1 A recent scoping exercise, recommended the commencement of a full investigation in to the circumstances leading up to the signing of a CLSA with EC Estates, a subsidiary of CapCo, for the redevelopment of the West Kensington and Gibbs Green estates under the authority of a Cabinet decision dated 3 September 2012.
- 4.2 Prior to the scoping study, a review of the financial advice, provided to the council prior to the 2012 decision, had been carried out by GVA (real estate advisory consultants). This considered whether the advice was materially deficient in its analysis and justification to the council.
- 4.3 In summary, GVA's review concluded that the financial advice was inadequate in several respects. This established the need to investigate all circumstances that led to the 2012 decision, including the conduct of officers and members involved in, or having influence of, instruction and/or briefing of financial and legal advisers and drafting/preparing relevant cabinet and member reports which the council relied upon in ultimately reaching the 2012 decision. Given the outcome of both reviews this report proposes a full investigation into the 2012 decision and the appointment of two contractors to support this aim.

Investigation Roles

- 4.4 The appointment of Kroll as a specialist company is in recognition of its unique technical expertise, tools and resources that are needed for the investigation and which are not available to the council internally or through any other single provider in so far as being able to include public records and media platforms in its investigation.
- 4.5 Kroll will conduct the investigation in three stages:
 - i. Initial Data Review – which would involve review of both electronic data and hard copies of available documentations;

- ii. Detailed investigation and analysis – which would involve analysis, corroboration and interrogation of findings from the first stage as well fact-finding interviews and the sourcing of, and review of, public records and social media platforms; and,
 - iii. Reporting Stage – which would involve where appropriate approaching third parties for comments on findings. This stage will conclude with the preparation and production of the investigation report.
- 4.6 The appointment of KLDDiscovery, as a specialist company, is for the provision of necessary eDiscovery tools and review platform.
- i. The eDiscovery tools will allow the efficient review and processing of vast electronic data held by the council and extraction of relevant data for the investigation.
 - ii. The review platform provided by KLDDiscovery will provide an efficient platform on which data selected as relevant can be further analysed, reviewed, and categorised.

The use of these tools and review platform would allow for a timely and cost-efficient conclusion of the investigation.

- 4.7 The simultaneous appointments of Kroll and KLDDiscovery is in recognition of their close working relationship and their use of the same analytical tools and IT infrastructure which will reduce the council's client and project management costs, and in doing so reduce the overall cost of the investigation as well as maintain the overall integrity of the investigation.
- 4.8 The waiver to standing orders and direct award will reduce future IT storage costs. Email data relevant to the investigation are currently held in an historic archive system and the council is in the process of decommissioning it. The delay in decommissioning the system will cost the council £18,750 per month. Consequently, any further delay in appointments may result in significant costs to the council.
- 4.9 In addition, and due to the time period between this investigation and when the cabinet decision was taken, any further delay may also result in individuals or entities not being available for the investigation or at the very least impact the investigation and its outcomes due to contractual or statutory limitations.

Investigation Budget

- 4.10 For the investigation to be conducted in accordance with the recommendations of this report, the budget contained in exempt appendix A is required.
- 4.11 The contingency included in, the budget, is recognition of the fact that the estimated costs are based on:
- i. review and analysis of an estimated 500GB of data; and
 - ii. a limited number of interviews and follow ups.

Should a need arise, during the investigation, for new lines of investigations to be followed, or for aspects of the investigation to be handed over to law enforcement agencies, the council will need to approve extension of the scope.

Investigation Stages

4.12 The investigation programme will incorporate four distinct investigative stages to be completed within 10 weeks of the decision as outlined below:

Preparatory Stage (weeks 1 to 2) (already underway)

This stage will include

- Extraction of historical archive data from the council electronic archive system. Extracted data to be passed to KLDDiscovery for electronic analysis and processing;
- KLDDiscovery to extract a sub-set of data that is relevant to the investigation;
- Extracted relevant data to be passed to Kroll.

Initial Review Stage (weeks 3 to 5)

This stage will include:

- Kroll to further review, analyse and categorise the data provided by KLDDiscovery;
- Kroll to review, analyse and categorise hard copies of available documents which are mostly from Legal archives;
- Kroll to disregard any data not relevant of the investigation;
- Kroll and KLDDiscovery to work closely with each other to ensure any addition to refined data is carried out promptly and efficiently.

Detailed Investigation (weeks 6 to 7)

This stage will include:

- Kroll conducting the detailed investigation including: fact finding interviews; correspondence with third parties; investigation into undisclosed associations; review of public records; and follow up on any new, or developing, lines of enquiries.

Reporting Stage (weeks 8 to 10)

This stage will include:

- Preparatory work on investigation report including approaching third parties for comments, where appropriate;
- Production and presentation of the investigation report and its findings.

4.13 The project's key milestones with estimated dates are as follow:

Date	Milestone
4 th Mar 2019	Preparatory Stage (KLDDiscovery)
18 Mar 2019	Initial Review Stage (Kroll)

1 st Apr 2019	Detailed Investigation Stage (Kroll)
15 th Apr 2019	Decommissioning of Electronic Archive System
23 Apr 2019	Review & Reporting Stage (Kroll)
13 th May 2019	Investigation Report (Kroll)

5. OPTIONS AND ANALYSIS OF OPTIONS

5.1 Due to the specialisation needed for the work, the options available are considered below:

5.2 Option 1: Do Nothing (not recommended)

- i. This option may mean either (1) not to proceed with the investigation or (2) for it to be conducted wholly internally.
- ii. Conducting an internal investigation is likely to bring the integrity of the investigation and its conclusion into question and thus limit its usefulness.
- iii. Due to the council lacking specialism in processing electronic data internally, officers may inadvertently limit or restrict availability of relevant documentations/evidence for examination and therefore, unintentionally limit the usefulness, completeness and impartiality of the investigation.
- iv. Not proceeding with it might also mean, the loss of an opportunity to learn lessons which could help protect estate lands from being sold to private developers on unfavourable terms.
- v. Not proceeding with this investigation would mean the loss of any redress that might be available to the council where an actionable wrong doing was to be discovered.

5.3 Option 2: Procure via CCS Frameworks (not recommended)

- i. This option is not recommended for the appointment of the investigation company due to lack of available frameworks with suppliers who can meet the complex aspects of the investigation requiring the investigation company to possess both the technical tools (eDiscovery and review platform) and the expertise in such matters such as:
 - Anti-corruption investigations
 - Conflicts of interest and hidden agreements
 - Undisclosed concert relationships
 - Material misstatements and omissions in public filings or statements
 - Prior records of value creation or destruction
 - Intentional omissions of relevant facts
 - Asset tracing
 - Data mining and analytics
 - Expert and fact witness testimony
 - Forensic due diligence
 - Indemnity/Insurance claims
 - Internal controls assessment and remediation

- Money laundering analysis and remediation
 - Purchase price dispute analysis
 - Reconstruction of financial transactions
 - Whistle-blower allegation assessment and investigation
- ii. While it is possible to appoint another company other than KLDiscovery through CCS Framework to carry out the eDiscovery element of the investigation, this would not be cost effective due to the need for the council to provide resources to liaise between the two companies that may not have worked together before and who may operate different or incompatible systems potentially resulting in duplication, need for training and familiarisation and ultimately result in an overall increase in the cost of the investigation.
 - iii. Further, consecutive procurement of the contracts may result in further delaying the investigation as opposed to concurrent procurement of the 2 contracts as recommended in option 4.
 - iv. In addition, the use of a framework, whilst quicker than option 3 below, is nonetheless still slower than option 4.

5.4 Option 3: Tender for new contracts (not recommended)

- i. This option may add a significant time to the procurement process requiring an open tender, through the council's capitalEsourcing portal; which cannot guarantee a cheaper contract but the delay in procurement will certainly increase the cost of retaining historical electronic data which cost the council £18,750 per month. Due to the specialist nature of the contracts there is risk that the council would not receive many tender responses adequate to fulfil the tender brief.
- ii. Due to the urgency arising from the cost of maintaining historical electronic data coupled with specialism, contractual and statutory limitations, this option is not recommended.

5.5 Option 4: Waiver to award contracts (recommended)

- i. A waiver to appoint a specialist eDiscovery company and another to appoint a high profile experienced investigative company is recommended due to market limitation and difficulties in finding a suitable company who are capable of conducting a high profile, detailed, thorough, and complete investigation that commands the respect of the wider public.
- ii. This limited market is further restricted by the need for the investigative company and the eDiscovery company to be able to work closely between them to help speed up the investigation.
- iii. The market is further limited by the need for an investigative company with the experience in examining appropriateness, correctness, and lawfulness of acts and omissions of officers and appointed external advisors in a hierarchical environment.

- iv. Due to the sensitivity of the investigation, and to protect its impartiality, appointments of local companies is neither desirable nor offer any added benefit to the investigation.
- v. Given the level of skills and experience required as well as the need for the investigation to be conducted thoroughly, swiftly, and objectively by competent and highly experienced companies, it would not be possible to ring-fence a tender exercise to locally based eDiscovery or investigative company.
- vi. To limit the risk to the investigation from its inherent limitation, in so far as not being able to compel individuals and external parties to participate, the appointments of an eDiscovery company to support an investigative company with extensive experiences in dealing with similar investigations and enquiries are essential; further limiting the market.

6. CONTRACT PACKAGE, LENGTH AND SPECIFICATIONS

- 6.1. The full cost will be dependent on the length and number of interviews and documents reviewed.
- 6.2. It is not possible, at this stage, to determine the exact cost of the contract. This is because the duration of the investigation and the number of different lines of enquiry are dependent on the volume of documentation or evidence uncovered during the investigation as well as facts uncovered during interviewing of witnesses.
- 6.3. Both contracts will explicitly require compliance with data protection laws and council's related policies as well as all requirements under the projects Privacy Impact Assessment.
- 6.4. Both KLDISCOVERY and Kroll have confirmed their data protection policies comply with relevant law.

7. CONSULTATION

- 7.1 No external consultation has taken place regarding this decision to procure the contract.
- 7.2 Implications verified/completed by Matt Rumble, Head of Regeneration Area - tel. 07786 747 488.

8. EQUALITY IMPLICATIONS

- 8.1 It is not anticipated that there will be any negative impacts on any groups with protected characteristics, under the terms of the Equality Act 2010, from the commissioning of this investigation.
- 8.2 *Implications verified by Peter Smith, Head of Policy & Strategy, tel. 020 8753 2206.*

9. LEGAL IMPLICATIONS

- 9.1 The investigation is within the public interest as the Council (as public authority using public funds) has a duty to ensure that any investment and divestment decisions made in relation to publicly owned land were made appropriately and lawfully so as to ensure that any expenditure of public money was valid.
- 9.2 On receipt of the investigation report, the legal implications of the findings and any recommendations will be considered and further legal advice provided as appropriate.
- 9.3 Further legal implications contained within exempt appendix A
- 9.4 *Implications drafted by Rhian Davies, Assistant Director of Legal and Democratic Services.*

10. FINANCIAL IMPLICATIONS

- 10.1 As part of the council's overall desktop strategy, it was planned to decommission the Electronic Archive System (EAS) by November 2018. The costs related to retaining access to the EAS beyond this point are £18,750 per month until such time that the system is decommissioned in full. However, the EAS is required for part of this investigation.
- 10.2 Retention of the EAS and any additional delay to the decommissioning of this system beyond the expected project timelines outlined in this report will result in unbudgeted spend being incurred by the HRA.
- 10.3 A credit search was carried out on Kroll Associates UK Limited on the 23rd of November 2018, which showed they have a Creditsafe score of 79 which is deemed to be reflective of a very low financial risk. Their average turnover of the last two years is £27.4 million which is considerably higher than the required minimum of double the anticipated contract value.
- 10.4 A credit search was carried out on KLDDiscovery Limited on the 12th of February 2019, which showed they have a Creditsafe score of 87 which is deemed to be reflective of a very low financial risk. Their average turnover of the last two years is £22.6 million which is considerably higher than the required minimum of double the anticipated contract value.

10.5 Financial Context

- 10.6 The current projected level of HRA cashable reserves before any appropriation or transfer to the reserve for the 2018/19 financial year outturn, is forecast to be £35.8m¹. The proposal in this report is not expected to adversely impact on

¹ At the time of writing the forecast going for approval at March 4th Cabinet in the Corporate Revenue Monitoring report is for reserves to be £31.7m.

the level of debt in the HRA as measured by the HRA Capital Financing Requirement (CFR), as the Capital Programme Monitor & Budget Variations, 2018/19 (First Quarter) report that went to Cabinet on 4 February 2019 sets out that the CFR is forecast to be within prudential borrowing limits.

10.7 There are further financial implications contained within exempt appendix A.

10.8 *Implications completed by: Firas Al-Sheikh, Head of Financial Investment & Strategy (Growth & Place), 020 8753 4790*

10.9 *Implications verified by: Emily Hill, Assistant Director, Corporate Finance, tel 020 8753 3145.*

11. IMPLICATIONS FOR LOCAL BUSINESS

11.1 Due to the sensitivity of the investigation and to protect the integrity, impartiality, and independence of the investigation as a whole, a local investigative company is neither desirable nor offer any added benefit to the investigation.

11.2 Some positive implications of the investigation might arise from any actionable recommendation which can further help strengthen the council's decision-making process including appointment and briefing of external advisors.

11.3 *Implications verified by: David Burns, Assistant Director of Growth, 0208 753 6090*

12. COMMERCIAL IMPLICATIONS

12.1 The report seeks approval to waive the CSOs requirements of seeking competitive tenders and directly award the following contracts as follows:

- Directly award a contract to Kroll to conduct an investigation at the estimated cost contained in exempt appendix A.
- Directly award a contract to KLDISCOVERY to provide technical, forensic and eDiscovery support to the investigation at the estimated contained in appendix A.

12.2 A waiver can be approved by the Relevant Person (in this case the appropriate Cabinet Member(s) and the Leader of the council) if they are satisfied that a waiver is justified under any of the reasons stated in CSO 3.1.

12.3 12.3 The value of the contracts is below the statutory threshold for contracts, £181,302. Therefore, the full Public Contracts Regulations (PCR) 2015 do not apply. However, in accordance with Regulation 18, *Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*

12.4 A Privacy Impact Assessment (PIA) has been conducted and was signed off by the Relevant Information Officer.

- 12.5 A contract entry must be created in the contracts register for each of the contracts. This will ensure compliance with statutory transparency regulations.
- 12.6 *Implications completed by Andra Ulianov, Procurement Consultant, x2284.*

13. IT IMPLICATIONS

- 13.1 The continued maintenance of the council's electronic archive system is currently costing the council £18,750 per month. Under the council's MTFs cost savings strategy, the archive system was scheduled to be decommissioned and it is only maintained now for the sole purpose of enabling this investigation.
- 13.2 IT Services has investigated the cost of a third-party supplier hosting the extracted data and it is recommended that the existing infrastructure is used for this investigation as it delivers better value.
- 13.3 A quick conclusion to this investigation would enable the council to realise significant savings from the decommissioning of the obsolete archive system. The IT costs assume data extraction can be completed in April and the EAS system decommissioned then.
- 13.4 IT Services are currently supporting the work to extract the data referred to in this report under a dedicated project.
- 13.5 IM implications: the Privacy Impact Assessment (PIA) for the above project will also need to include an assessment of the data risks around the investigation to be carried out by Kroll to ensure all potential risks in relation to their investigation are properly assessed with mitigating actions agreed and implemented. For example, a contract data protection and processing schedule or an information sharing agreement template and a Supplier Security Checklist to ensure the systems used by the contractor comply with H&F's regulatory requirements.
- 13.6 Each proposed contract will need to include H&F's new data protection clauses and processing schedule. These are compliant with the General Data Protection Regulation (GDPR) enacted from 25 May 2018.
- 13.7 Implications verified/completed by: Veronica Barella, Chief Information Officer, tel 020 8753 2927.

14. RISK MANAGEMENT

- 14.1. Outcomes from the investigation that might arise from an actionable recommendation can further help strengthen the council's decision-making process including the future appointment and briefing of external advisors. This is in accordance with management of our corporate risk 11, decision making and maintaining reputation and service standards, delivering good governance, conduct, for our local community.

- 14.2. The areas of risk, in procuring and undertaking (or not undertaking) the investigation, are mainly covered in the report, along with mitigating actions to address those risks.
- 14.3. Implications verified by: Michael Sloniowski, Risk Manager, telephone 020 8753 2587

14 OTHER IMPLICATIONS

- 14.1 All implications arising from this decision have been considered and addressed in this report.
- 14.2 Implications verified/completed by Matt Rumble, Head of Regeneration Area - tel. 07786 747 488.

15 BACKGROUND PAPERS USED IN PREPARING THIS REPORT

None

LIST OF APPENDICES:

Exempt Appendix A