

**CABINET MEETING:**

**23 SEPTEMBER 2021**

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## **INDOOR ARENA FULL BUSINESS CASE**

### **INVESTMENT & DEVELOPMENT (CLLR RUSSELL GOODWAY)**

#### **AGENDA ITEM:**

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#### **PORTFOLIO: INVESTMENT & DEVELOPMENT**

Appendices 2 to 7 of this report are not for publication as they contain exempt information of the description contained in paragraphs 14 (Information relating to the financial or business affairs of any particular person (including the authority holding that information) and 16 (Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings) of Schedule 12A of the Local Government Act 1972.

#### **Reason for this Report**

1. To seek approval of the Full Business Case and associated legal agreements to conclude the procurement process for delivery of the new Indoor Arena and replacement Travelodge Hotel at Atlantic Wharf, Butetown.
2. To formally appoint the Live Nation consortium as the successful bidder.
3. To approve the appropriation of land for planning purposes required for the delivery of the new Indoor Arena.
4. As required to seek in-principle authority for the making of a Compulsory Purchase Order for the acquisition of land to facilitate the delivery of the Indoor Arena and wider Atlantic Wharf masterplan.
5. To seek approval for the delivery of an enabling works package and to further extend the Council's cost underwrite.

## Background

6. Delivering a new Indoor Arena remains a key strategic regeneration priority for the Council, supporting a number of Corporate Plan commitments, Council priorities and strategies, including:
  - Attracting more visitors to the city that stay longer
  - Supporting growth in the local economy and creating jobs
  - Supporting the next phase regeneration of Cardiff Bay
  - Eliminating poverty and promoting equality
  - Promoting culture and creativity
  - Supporting the Cardiff Music Strategy
7. In July 2019, Cabinet gave authority to commence a public procurement process to secure a developer/operator consortium to deliver an Indoor Arena at Atlantic Wharf, Butetown with a minimum capacity of 15,000 as part of a wider regeneration strategy for Cardiff Bay.
8. The Council subsequently launched a competitive tendering exercise in August 2019 via the publication of a Concession Notice in the Official Journal of the European Union (“OJEU”). This was for the purposes of alerting the market of an opportunity whereby the Council was seeking to appoint a developer and operator to design, construct, maintain and operate a new, larger capacity indoor arena in Cardiff Bay.
9. As the procurement process fell under the scope of the Concession Contracts Regulations 2016 (“CCR”) it is afforded a greater degree of flexibility in the structure and conduct of the competition. The Council therefore adopted a process similar to the Competitive Dialogue procedure (as more particularly described in the Public Contracts Regulations 2015 (as amended) (“PCR”) but was bound by the rules or formalities that would have applied under the PCR. A detailed overview of the procurement process is set out at Appendix 1.
10. In November 2020, Cabinet approved the appointment of the Live Nation consortium as the Preferred Bidder in the procurement process to deliver a new Indoor Arena in Butetown, Cardiff Bay. At the same meeting Cabinet gave authority for the Council to enter into a Pre-Contract Service Agreement (PCSA) which included the under-writing of costs up to an agreed cap to enable the Preferred Bidder to develop detailed designs. Cabinet authority was also provided to progress a Land Strategy to ensure the Council secures full control of all land required to deliver the project.
11. The PCSA was, amongst other things, for the purposes of enabling the Live Nation consortium to develop their proposal and designs to complete a Full Business Case to obtain further certainty on the deliverability of the project. As previously reported, entry into the PCSA committed the Council to underwrite the Live Nation consortium’s costs in certain circumstances (up to a pre-agreed cap) as set out in Confidential Appendix 2. If the project proceeds as expected, these costs will be absorbed within the overall development cost of delivering the Arena development.

12. Since November, under the PCSA, and as part of completing the Full Business Case, significant progress on the project has been made. The detailed design has been taken forward to RIBA Stage 2 ready for the submission of a planning application in October. The Live Nation consortium has also engaged with the Local Planning Authority and has commenced Pre Application Consultation on a Hybrid Application covering the Arena in detail and the wider masterplan in outline.
13. Alongside the development of detailed designs, the Live Nation consortium has also taken forward the development of detailed costs. These costs have been reviewed by the Council's appointed cost consultants and are attached as part of the Full Business Case at Confidential Appendix 2.
14. In order to move from a PCSA to a Development and Funding Agreement for Lease the full suite of legal documents required to enter a contract at financial close need to be agreed in principle. These documents are now substantially agreed and are attached as Confidential Appendix 5.
15. The suite of legal documents includes the Development and Funding Agreement for Lease (DFA) and the Lease. Initially the Council had explored an Income Strip approach to the financial delivery of the project. Following extensive due diligence the Council is now proposing to fund the project through direct Council funding. Details are set out in the Financial Report attached as Confidential Appendix 6.
16. During the PCSA stage the Council has been working to ensure all land required to deliver the project is secured under the Council's control. The Council has progressed the Land Strategy and has agreed terms to acquire land interests from Welsh Government, Taylor Wimpey and Carillion.
17. The Preferred Bidder stage of the competition and the deliverables under the PCSA have been completed successfully. The Full Business Case is attached at Confidential Appendix 2 and confirms that the project is deliverable within the financial envelope established by the Council at the outset of the procurement process. Approving the Full Business Case will enable the Council to enter into the DFA with the successful bidder. The DFA is included in the suite of legal documents attached at Confidential Appendix 5.

## **Issues**

18. This report seeks Cabinet authority to award the contract for the delivery of a new Indoor Arena to the Live Nation consortium. The DFA, once signed, remains subject to a number of conditions being satisfied before the Lease can be completed. In entering into the DFA the Council is underwriting costs for the satisfaction of the conditions and development of the detailed design to RIBA Stage 4, further extending the Council's exposure, as set out in Confidential Appendix 2 and 6. These costs are only payable by the Council in the event that the Council chooses not to proceed with the project before financial close and will otherwise be consumed within the Live Nation consortium's overall costs for delivering the project.

19. The UK's exit from the European Union has led to a significant increase in the overall costs of delivery. The Live Nation consortium has projected a significant increase in cost over and above their original submission (see Confidential Appendix 2). This is due to significant supply chain issues with materials. These costs are a development risk which the Live Nation consortium has agreed to absorb to ensure the project remains within the financial envelope established by the procurement process. However, the implication of dealing with these cost increases has meant that the completion of the Full Business Case has taken circa 4 months longer than had originally been expected and in turn will result in the Arena being delivered later than originally expected.
20. To establish the site for the development of the Arena, Schooner Way will need to be closed (stopped-up) and the services currently underneath Schooner Way diverted. The long-term intention is to reconnect Schooner Way to Hemmingway Road via a new road connection if the County Hall site is redeveloped in the future. Over the short term controlled access will be provided connecting Schooner Way to Hemmingway Road through the existing County Hall car park spine road. This will primarily be to enable the effective operation of the Arena only. Following the terrorist attack on the Manchester Arena new legislation has been introduced known as Martin's Law, which restricts vehicular access to crowded places by requiring up to a 30m buffer zone. The County Hall car park spine road will be within a few meters of the Arena and therefore will only be able to be utilised with access control.
21. The Live Nation consortium has embarked upon consultation and engagement with local businesses and residents as part of the pre-application planning process. The closure of Schooner Way has become one of the key issues for local residents mainly concerned with traffic movements in the area. This issue will need to be addressed through the planning process.
22. The requirement to close Schooner way has also created a land assembly issue for the Council, which in turn has led to the project incurring some additional unforeseen costs. The Council is being held to ransom by the owner of two small parcels of land, one to the west and one to the north of the Arena site. The land sits outside of the Arena red line boundary, but is nonetheless required for public realm improvements surrounding the new Indoor Arena. This has led to a number of mitigating actions to avoid significant impacts to the delivery programme, which in turn would have resulted in significant additional cost. In particular, the Arena redline boundary has been shifted 3m to the south and 2m to the east to avoid an issue over build-over rights. This in turn has led to the need for additional enabling works to avoid delays to the programme as set out in Confidential Appendix 2. The Council may now need to pursue acquisition of these parcels of land through the use of Compulsory Purchase Order powers.
23. In addition to the costs associated with the requirement for additional enabling works, avoiding the ransom land has also resulted in the construction programme being extended from circa 26 months to circa 32 months. Furthermore, to mitigate the risk of this extended construction period it is

proposed to extend the length of lease from 45 years (2+43) to 46 years (3+43).

24. In order for the Council to meet its obligations all of the required land needs to be appropriated for planning purposes. This process can only begin once the development has secured planning permission and will take an estimated 8 weeks to complete. The rationale is presented in the document attached at Appendix 8.
25. Entering into a Development Agreement with the successful bidder will place a number of obligations on the Council. These obligations are outlined below in this report and set out in detail in the Conditions Precedent document attached at Confidential Appendix 3. Cabinet will need to be satisfied that the obligations can be achieved so as to avoid any potential abortive costs.

### **Contract Award Decision**

26. Cabinet, in reaching a contract award decision will be giving approval for the Council to enter into the DFA referred to above following observing a mandatory 10-day standstill period.
27. Once signed, the DFA will remain subject to the satisfaction of several conditions. Once these conditions are met, the Council will grant a lease to the Live Nation consortium. The conditions here include Planning, Car Parking, Restrictive Covenant, Site Assembly, Highways, Hotel, Car Parking, Arena Licence, Consents, Surveys and Funding. If the Conditions are not met because of the Council's failure to satisfy the Restrictive Covenant Condition, Site Assembly Condition, Car Park Condition, [submit the relevant Highways Application/obtain the relevant Highways Orders,] or because the planning permission is not granted due to a reason relating to the Masterplan development (rather than the Arena application) then the Council will be required to pay the Live Nation consortium's costs up to a pre-agreed cap.
28. The legal advice dated 13<sup>th</sup> September 2021 contained in Appendix 7 of this report, sets out a number of considerations arising from the contract award decision as set out in Paragraph 9 of that advice that will need to be considered by Cabinet.

### **Conditions Precedent**

#### Land Strategy

29. As part of the Arena and wider Atlantic Wharf masterplan (to facilitate the provision of neighbouring public realm) the Council is required to acquire a number of parcels of land. Originally it was envisaged that all of the land would be assembled by the time the Full Business Case is approved. The Land Strategy is set out in Confidential Appendix 4.
30. Further to the above, the most immediate parcel of land that the Council needs to seek approval from Cabinet to acquire now, is that relating to a parcel of land to the west of the Arena site (the Outstanding Parcel), outside of the Arena

redline as illustrated at Confidential Appendix 4, reference WA374945. Whilst the Outstanding Parcel is not directly necessary for the construction of the Arena itself, the acquisition of the land is required to provide public realm to facilitate the regeneration of the area surrounding the Arena.

31. The Council has considered whether it would have sufficient powers under Highways legislation to carry out the required works to the Outstanding Parcel but has concluded that it needs overall control for the following reasons:
  - Although part of the land lies within the adopted highway and the Council would have some powers to carry out works relating to the installation and maintenance of services, not all of the land is within the adopted highway; and
  - In the event that any part of the land is stopped up to allow the creation of public realm, control of the relevant land would revert to the original owner and the Council would then not have sufficient powers to carry out maintenance works to the services in this area of the land.
32. Unfortunately, it has not been possible to delay the acquisition of the Outstanding Parcel because it would cause significant delay to the delivery programme which in turn would incur substantial costs and jeopardise the viability of the project.
33. The Council contacted the owners of the Outstanding Parcel by letter to two addresses shown on the title search to seek to acquire it by agreement in February 2020, and opened informal discussions shortly after. The Council procured a valuation and the figure was presented to the owner. The owners have responded and indicated that they would be prepared to sell the Outstanding Parcel by agreement to the Council but their aspiration is significantly higher than the Council's valuation. As part of the process, the Council's agent made a formal offer in writing to the owner, but given the very significant differences between the two parties it seems apparent that the Outstanding Parcel will not be acquired by agreement within a reasonable timescale. Authority to acquire the abovementioned land by way of a Compulsory Purchase Order is therefore required.
34. It is proposed that the Council may use its powers under section 226(1)(a) of the Town and Country Planning Act 1990 in order to acquire the Outstanding Parcel, if it cannot be acquired by agreement. Under section 226(1)(a) of the Act, the Council, upon being authorised, can acquire any land in their area:

*“if the Council thinks that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in the land”.*
35. The exercise of the power also requires that the Council:

“thinks, that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects:-

  - the promotion or improvement of the economic wellbeing of their area
  - the promotion or improvement to the social wellbeing of their area

- the promotion or improvement of the environmental wellbeing of their area”
36. The Welsh Government Circular 003/2019 “Compulsory Purchase in Wales and ‘The Crichef Down Rules (Wales Version, 2020)” sets out guidance for acquiring authorities in relation to the making of Compulsory Purchase Orders, including when it is appropriate for compulsory purchase powers to be utilised pursuant to section 226(1)(a). The Guidance sets out the key tests which need to be satisfied before a Compulsory Purchase Order will be confirmed – these are considered by the Welsh Ministers prior to deciding whether to confirm the Order and must be considered by the Council prior to the making of any Order. Further details of these tests and the justification for making the Order will be provided to Cabinet in a subsequent report if it should prove necessary to seek authority from Cabinet to make a compulsory purchase order in the future. If a Compulsory Purchase Order in respect of the Outstanding Parcel is made it will be critical to demonstrate to the Welsh Ministers that there are no hurdles to the delivery to the Development that cannot be overcome, including the fact that planning permission has been or will be granted.
  37. It is considered that the criteria within section 226(1)(a) are likely to be satisfied, as the acquisition of the Outstanding Parcel will facilitate the delivery of significant benefits by the Development, that will improve the economic, social and environmental wellbeing of the area. These benefits include:
    - The delivery of an Indoor Arena with a minimum capacity of 15,000;
    - The delivery of circa 2,000 jobs during the construction phase and circa 1,000 jobs during the operational phase of the Arena;
    - Significant improvements to public realm in the vicinity of the Indoor Arena;
    - Improvements to transport links to the area; and
    - A catalyst for the further regeneration of Atlantic Wharf.
  38. The draft Order, Order Map and Statement of Reasons would be provided for consideration and approval by Cabinet in the event that it should prove necessary to seek authority from Cabinet to make a Compulsory Purchase Order in the future.

#### Car Parking Provision

39. The Conditions Precedent contain an obligation on the Council to retain the existing car parking provision at Atlantic Wharf, with a minimum of 1,300 car parking spaces being available no later than the time of opening of the new Arena, subject to planning.
40. As part of the November 2020 Cabinet decision for the new Indoor Arena, Cabinet approved the development of an outline business case to determine the preferred solution for the delivery of the car park provision.
41. This business case was included within the Atlantic Wharf update report presented separately to Cabinet in July 2021 where Cabinet granted authority for the Council to progress a Full Business Case for the proposed new Multi-Storey Car Park.

#### Associated British Ports (“ABP”) Covenant

42. As part of the Land Strategy the Council has worked with ABP to understand various site constraints including a restrictive covenant over the use of the County Hall site. The Council agreed Heads of Terms with ABP to remove the restrictive covenant, permit the Arena to be built adjacent to the dock feeder and to provide technical advice relating to a number of site constraints including the re-alignment of the dock feeder. These Heads of Terms were incorporated into a binding Agreement with ABP which exchanged on 11th February 2021.

### Travelodge Hotel

43. In June 2020, Travelodge went into Company Voluntary Agreement (CVA) and as part of this the Council was given an option to accept a new rental payment structure and/or agree to a break clause (planned for 5 months from the date of the CVA). The Council accepted this proposal by proxy. However, given the delays with progressing the PCSA, the break date has been extended to allow the negotiations in relation to the Agreement for Surrender and Lease with Travelodge to be concluded.
44. Over the course of the Preferred Bidder stage, the Council and the Live Nation consortium have continued dialogue with Travelodge regarding the delivery of a new Travelodge Hotel as part of the Arena development.

### **Alternative Funding Instrument**

45. The procurement process has, to date confirmed that a new Indoor Arena is able to be a commercially viable business proposition, without any ongoing Council subsidy once it is delivered.
46. The procurement process (and basis on which bids were submitted) assumed that bidders would secure their own finance arrangements to obtain the necessary funding to deliver the Arena. Upon execution of the Development Agreement (subject to the satisfaction of several conditions), it was intended that the Council will grant a lease to the Live Nation consortium or its funder and the income strip / lease and lease back arrangements would then be entered into at financial close. However, it is now recommended that the Council consider an alternative funding instrument. Cabinet approval is now sought on the preferred, alternative funding instrument, as explained further, below.
47. Despite the situation regarding the COVID-19 pandemic improving, the disruption caused to the entertainment/hospitality industry in particular continues to devastate businesses worldwide. Whilst it is encouraging to note that with the relaxation of the lockdown rules the return of live events is a real possibility in the near months the construction industry and the availability/price of materials appears to be an ongoing issue.
48. Further to the above, and given that the Council is prepared to make a significant financial commitment to delivering the Arena, the Council created flexibility within the procurement documents to utilise alternative financial instruments to deliver an equivalent level of funding to bidders (in line with their



final tender submissions). The aim behind this drafting was to not tie the Council down to having to utilise a prescribed funding approach but to allow the Council to explore alternative funding options, to boost the prospects of the project being completed.

49. Details of the proposed change in structure is contained within the Financial Report attached as Confidential Appendix 6. The proposed change will allow the Council to secure a more optimum funding approach, which will aid the Council in achieving best value. Additionally, the alternative structure would seek to preserve Live Nation's final tender submission and the financial commitments contained within that submission. The new funding structure replicates the fundamental features and obligations of the risk profile and terms of the previous financing arrangement.
50. As a result of the above financial restructuring, this will have an impact on the contractual suite that Council anticipates entering at the conclusion of the process as set out below.

### **Contractual Suite**

51. Subject to receiving approval from Cabinet to award a contract to the Live Nation consortium, the Council would be required to enter into a number of contractual documents. In light of the proposal to utilise an alternative funding instrument to deliver the equivalent level of funding to the Live Nation consortium, there is a reduction in the number of documents required and consequential changes to the remaining contractual documents.
52. An overview of the purpose of each document comprising the contractual suite along with a final-form version of each document is contained in Confidential Appendix 5.

### **Enabling Works**

53. In order to deliver the Arena and replacement Travelodge hotel the Live Nation consortium will be required to carry out enabling works at/around the site.
54. In addition to the above, the Council is also required to undertake/commission further enabling works on the land that it will be seeking to acquire as referred to in the Land Strategy section, above.
55. Further details on this additional package of works is also set out in Confidential Appendix 2.

### **COVID-19 Pandemic**

56. In March 2020, the COVID-19 pandemic emerged across Europe and has resulted in a full shut-down of the live entertainment industry since then.
57. Despite this, the procurement process to secure a developer/operator consortium for the new Indoor Arena in Cardiff has progressed unabated. The procurement process involved the two largest Arena operator/promoters globally who were extremely confident of the long term resilience of the sector.

58. As set out above, the Cardiff project is a private sector led proposal, supported by the Council. That means the private sector will be taking the lion's share of the risk associated with delivery of the project, in the form of a commitment to a long-term commercial lease. Furthermore, the Live Nation consortium has provided a Parent Company Guarantee which provides the Council with an additional level of security.
59. It is viewed by the industry that the COVID-19 pandemic has caused a 'pause' in the live entertainment calendar rather than a loss of business, as the vast majority of shows will still be presented once restrictions allow, likely resulting in a much more congested 2021/22 event calendar. In some countries where the pandemic is under greater control, there has already been a return of live events.
60. The competition for market share has continued during lockdown. New Arena developments have progressed in Europe and in recent weeks new arenas have been announced for Milan and for Manchester. The arenas in Gateshead and most notably in Bristol are still progressing. The Live Nation consortium strategy is to establish the Cardiff Arena as a top tier UK Arena and the premier Arena in the South West region of England and Wales.
61. The June 11 2020, '*Restart Recover Renew*' Cabinet Report noted the need to consider the opportunity for the Council to stimulate local development, and that renewal work would be led by major projects that would have the most positive impact on job creation, inward investment and the environment. In light of the need to accelerate such investment, the new Indoor Arena represents a significant 'oven ready' project of scale that would make a sizable impact on job creation and business development. Put simply, the new Arena project represents an opportunity to lever much needed capital investment to support the renewal of the city economy.

### **Financial Due Diligence**

62. As a result of the COVID-19 Pandemic the Council appointed independent advisors to carry out further financial due diligence on the project. No significant issues were identified. Further details are outlined in the Financial Implications to this report and in the Financial Report attached at Confidential Appendix 6.

### **Programme and Next Steps**

63. The development of the Full Business Case has taken a little longer to complete than first anticipated due to Brexit related issues. Delivery of the additional enabling works required to mitigate the land assembly issues will also add around six months to the 26 months construction programme, which means the project will take approximately an additional 10 months to complete. There is potential for the development still to be completed by the end of 2024, however until the various conditions set out in this report are met the programme is currently estimating on opening date in 2025.
64. The indicative programme is set out below:

- September 2021 - Cabinet Decision on FBC & DFA
- October 2021 - Contract Award Notice
- October 2021 - Live Nation consortium to submit Planning Application
- November 2021 - Live Nation consortium to submit RIBA S3 Report
- December 2021 - Sign DFA
- February 2022 - Planning Decision
- February 2022 - Initial Site Works – Site Clearance/Hoarding
- June 2022 - Financial Close (signing of Lease)
- 2025 - Arena Open

### **Reasons for Recommendation**

65. To appoint the Live Nation consortium as the most economically advantageous tender to proceed to award a contract to for the delivery of the new 15,000 capacity Indoor Arena and replacement Travelodge Hotel following successful completion of the Preferred Bidder stage.

### **Financial Implication**

66. This report, and in particular the confidential appendices, presents the outcome of the procurement process and seeks approval of the Full Business Case for the new Indoor Arena, including the recommendation to reach a decision to award a contract to the Live Nation consortium, as the successful bidder. This report (and its appendices) sets out the financial and legal commitments that the Council will enter into for the Indoor Arena to be delivered, the obligations that the Council must meet (Conditions Precedent), and the next steps to be taken.

#### Full Business Case

67. As detailed within the report, an independent Full Business Case has been completed and demonstrates an improvement in terms of values actually achieved through the procurement process in comparison with the anticipated values from the original and revised business cases previously presented to Cabinet. The final Full Business Case is attached at Confidential Appendix 2.
68. Overall, the procurement solution realised suggests value for money can be achieved in delivery of the Indoor Arena. The full business case captures the relevant costs and benefits of the proposed new Arena scheme (also detailed in Confidential Appendix 6) and demonstrates that based on a number of prudent assumptions, a positive return in terms of net direct costs/benefits is likely, with overall direct long-term financial benefits of scheme projected to be higher than direct costs incurred by the Council. In addition to the direct financial impact, the report also sets out the significant wider economic, social and environmental wellbeing benefits to the area of the new Arena. It should be noted though there remains a financial risk here as the majority of the Council investment is front-loaded with benefits being realised throughout 45-year lifespan of project. Further detail of the financial and economic impacts of Arena can be found within the Full Business Case attached at Confidential Appendix 2.

## Revised Funding Strategy

69. As set out within the November 2020 Cabinet report, the procurement process (and basis on which bids were submitted) initially assumed that bidders would be responsible for securing the necessary funding to deliver the Arena by utilising an income strip model. This would have enabled the Preferred Bidder to utilise the Council's superior financial covenant strength to obtain more attractive lease and finance terms to make the project more financially viable, whilst importantly the freehold land and property interests would be retained by the Council at all times. This original model would have included Council guaranteeing operator payments to a third-party fund for a number of years, as well as providing a capital contribution for any gap funding which has been set aside in the capital programme. The Council also established an affordability envelope to fund the upfront delivery costs associated with the Arena (approved by Council in February 2019) in the pursuit of the Council objective of delivering a new Arena in Cardiff Bay.
70. Following evaluation of Final Tenders, the financial commitments required to deliver the new Indoor Arena crystallised and became known for the first time, with the Preferred Bidder setting out the financial commitments required by the Council to enable delivery of the new Indoor Arena. Bidders' 'Final Tender' submission documents finally locked in key details of a proposed funding strategy and committed the bidders to a number of key terms that must now remain fixed.
71. However, given the volatility and uncertainty of the financial markets the Council reserved the right in the procurement documents to explore and utilise alternative funding solutions if it could realise efficiencies for the Council. In doing so, the Council would strive to ensure that key features of the procurement process and final tender submissions remained unchanged.
72. Further to the above, during the competition, the Council took the opportunity to review potential funding solutions in consultation with Council's Treasury Advisors. This is to ensure the optimal funding solution for delivery of the project could be achieved and best value for money delivered for the Council.
73. Detailed work completed by the Council's independent Treasury Advisors which identified that the optimal funding solution was for the Council to utilise a "direct funding" approach. This was deemed to be an improved funding solution when compared to original income strip model. By adopting this approach, the Council now becomes the project funder, and will therefore take on the associated risks and rewards that entails. Details of these risks and rewards, as well as sensitivity analysis on potential outcomes is included within Confidential Appendix 6.
74. An allowance has been included within the Capital Strategy to enable the Council to 'Direct Fund' the Arena construction (as an alternative to the original Income Strip / Third Party funding model previously agreed) subject to Cabinet approval of the Full Business Case (FBC). Cabinet are able to approve the proposal to 'Direct Fund' the Arena project within the existing budgetary framework as the Capital Strategy and Treasury Management Strategy were

approved by Cabinet (February 2021) and Full Council (March 2021) respectively as part of the 2021-22 Budget.

#### Council Capital Contribution

75. As set out within the November 2020 Cabinet report, the maximum level of capital contribution required was fixed as part of the bidders' final tender submissions. This capital contribution is due to be funded by a mixture of capital receipts and borrowing, with the most substantial element of the Council contribution due to be funded by earmarked capital receipts. However, at this stage some of these capital receipts are yet to be realised. Any significant delays or non-realisation of these capital receipts is likely to have an adverse impact on the Council's ability to meet this level of proposed gap funding contribution.

#### Arena Affordability Envelope / Project Costs

76. In February 2019, as part of the budget setting process, Council approved an affordability envelope in the Council's Medium-Term Financial Plan to support delivery of a new Indoor Arena. This included financial provisions for land assembly, as well as other associated costs required to deliver the Indoor Arena and associated facilities. In November 2020, the report set out the anticipated costs required to fund all project related expenditure between November 2020 and financial close including internal/external project team costs, land, and contingencies. Based on current projections it is anticipated the project can still be delivered within this approved budget. Further details are set out within Confidential Appendix 6.

#### Conditions Precedents

77. To facilitate the Arena development there are several contractual obligations (Conditions Precedents) that have been placed on the Council that will require substantial financial contributions to achieve. These include the Council completing land acquisitions, release of covenants, etc. within appropriate timescales to fit within the Arena programme of delivery. One key substantial financial obligation is that the Council will be obliged to deliver a new 1,300 space Multi Storey Car Park (MSCP) in Atlantic Wharf by the date of the Arena opening. This is a condition of the contractual documents and means that the Council must have appointed a contractor to deliver the MSCP by financial close. Cabinet previously approved an Outline Business Case (OBC) for delivery of a Multi-Storey Car Park in July 2021 and authorised the development of a Full Business Case (FBC) to be presented back to Cabinet for approval in due course.
78. A summary of the key Council Obligations, including actions to be taken and timescales for delivery, have been set out in Conditions Precedent documents in Confidential Appendix 3.

#### PCSA / Development Agreement Underwrite

79. As part of the November 2020 Cabinet, the Council had agreed an underwrite of PCSA costs for the Developer's Costs up to a pre-agreed cap, this was to

allow the Preferred Bidder to spend a significant amount of money with a level of comfort before having the commercial security of a Development Agreement. This spend also included further design development to RIBA Stage 3 in order that all parties can have more confidence that the affordability envelope can be met.

80. In order to progress to the next stage of the development a further underwrite of costs is required from Development Agreement to Financial Close. This will include further detailed designs to RIBA Stage 4 and further site surveys / due diligence will also be required to confirm the detailed cost plan and to ensure the project remains deliverable and within the affordability envelope. Details of this work and cost is set out in Confidential Appendix 2.
81. However, it is important to note that as per the underwrite of the PCSA costs these additional costs will become development costs to be covered by the Preferred Bidder if final approval is given to proceed. These costs only become payable by the Council in a scenario where bidders are able to meet agreed deadlines and remain within the current affordable envelope throughout, but the Council chooses not to proceed with the development or is unable to meet its obligations. The conditions here include Planning, Restrictive Covenant, Site Assembly, Highways, Hotel, Surveys, Consents, Car Parking, Arena Licence and Funding. If the Conditions are not met because of the Council's failure to satisfy the Restrictive Covenant, Site Assembly, or Car Park Conditions or the project does not achieve planning consent due to a matter linked to the wider Atlantic Wharf masterplan application then the Council will be required to pay the developer's costs up to a pre-agreed cap. It is important that Council have sufficient confidence that the conditions within the Development Agreement can be met in order to avoid potentially significant abortive costs at the next stage.

#### Financial Due Diligence

82. As a result of the obvious impact the COVID-19 pandemic had on the live entertainment sector the Council appointed independent advisors to carry out further financial due diligence on the Preferred Bidder. No significant issues were identified with the Live Nation consortium. The report concludes that prior to the onset of the Covid-19 pandemic, Live Nation was a growing business which traded profitably while also making significant investments in assets and acquisitions. Live Nation is equipped to withstand continued disruption and is well placed to benefit from the resumption of live entertainment events, including from pent up demand linked to delayed artist tours. The independent advisors report also highlights some key risks for the Council to be aware of and monitor moving forward, including further delays in the re-commencement of live entertainment, restricted numbers and/or reduction in demand for live entertainment. Further details are set out in independent report contained within Confidential Appendix 6.

#### Enabling Works

83. As set out within the 'Issues' section of this report, some land assembly issues have arisen during the PCSA stage which have directly impacted on the Arena programme, in particular a potential requirement to progress with a CPO to

acquire land required to fulfil the wider development. As a result, a number of mitigating actions have been required to be taken to avoid significant impacts to the delivery programme, but this has led to the project incurring some additional unforeseen costs. Further details regarding the enabling works strategy are set out within Confidential Appendix 2, with analysis and a summary of the financial implications of this considered in Confidential Appendix 6.

#### Compulsory Purchase Order

84. This report seeks Cabinet approval in principal to progress with a CPO in relation to some parcels of land that is required to deliver the Arena. The financial implications of not being able to negotiate a purchase on this land is detailed within the Enabling Works section of these financial implications and Confidential Appendix 2. However, the potential cost of this CPO legal process is budgeted for within existing Arena budgets approved by Cabinet in November 2020.

#### RDC Investment Asset

85. In December 2019, Cabinet approved the acquisition of the Red Dragon Centre to facilitate the delivery of the new Indoor Arena in Atlantic Wharf. This report now seeks final approval to conclude the Arena procurement process and enter into the contractual documentation with the Preferred Bidder consortium for delivery of the new Indoor Arena. By taking this decision, Cabinet should note the financial implications this will have on the Red Dragon Centre as an investment asset held by the Council, and in particular the implications of the investment income relating to this asset. Further detail of these financial implications is set out with Confidential Appendix 6.

#### Subsidy Control

86. Subsidy Control (previously state aid) is referenced in the report in the context of the Council's contribution to the construction of the Arena development and a change in the funding regime, so that instead of the consortium borrowing to fund the development through a forward funding arrangement with a third party, the Council will borrow and pay for the works directly. The Council has taken independent legal advice, set out in Confidential Appendix 7, which demonstrates how the Council could satisfy subsidy control requirements regarding the financial contribution towards the construction of the Arena.

#### Accounting and Tax Implications

87. The Council engaged with independent financial experts to provide specialist Tax and Accounting advice on the new funding approach and on the contractual documents. Initial VAT advice received by the Council on the status of Grant Funding suggests that any Council capital contribution may be subject to VAT. Therefore, in order for the Council to recover this VAT the Council have exercised an option to tax over the whole site, in order that any interests in land granted are taxable rather than exempt supplies. In principle, this would allow for VAT recovery on any costs directly associated with these interests. Similarly, the Council has included a clause that stipulates bidders cannot dis-

apply the option to tax in relation to the Land and will not do, or cause to be done, or omit to do anything which could lead to the option to tax being revoked or dis-applied by operation of law or otherwise. Further details of the Tax and Accounting advice is set out in Confidential Appendix 6.

#### Covid-19 / Brexit

88. Whilst the report details the current impact of Covid-19 to the live entertainment industry, it is important to note the combination of Covid-19 and Brexit has been widely reported as affecting the availability / price of materials within the construction industry and appears to be an ongoing issue. Whilst the risk of construction inflation is ultimately a risk for the developer, substantial market movements which increase the overall cost to deliver the Arena could have negative effects on project affordability.

#### Linkages to other Council projects

89. Whilst the report addresses the delivery of the Arena, there are a number of other significant major projects that the Council is trying to implement which will need to interlink with the Arena project to ensure all projects optimise value and costs. These include the wider Atlantic Wharf masterplan, Heat Network, the long-term future of the County Hall building, and the potential redevelopment of the Red Dragon Centre.
90. It is critical that the interlinkages between these projects is understood during the decision-making process given the potential knock-on effects and implications each could have on other Council priority projects. Whilst no decisions are being sought regarding any of these projects as part of this report, the delivery of the new Indoor Arena is regarded as the key anchor project and the first phase of the Atlantic Wharf regeneration proposals. Therefore, any decisions taken in this report may have a wider impact on viability of other Council priority projects.

### **Legal Implications**

#### Procurement

91. As noted in the November 2020 Cabinet report the Council received two final tender submissions prior to the Final Tender deadline. These were evaluated in accordance with the evaluation criteria and methodology set out in the CFT, which led to the identification and subsequent appointment of a Preferred Bidder who was the bidder who provided the most economically advantageous tender.
92. The Council worked with the Live Nation consortium during the Preferred Bidder stage with to work up designs for the Arena and Travelodge Hotel. This stage of the process was governed by the PCSA.
93. Entry into the PCSA meant that the Council agreed to underwrite the Live Nation consortium's bid costs where conditions within the PCSA were met. Further information on this is set out in Confidential Appendix 2.



94. Detailed advice in respect of the Preferred Bidder stage of the competition was previously provided to the Council and this is included again, (for completeness) in Confidential Appendix 7.
95. The Preferred Bidder stage was a key milestone in the procurement process, which has now been completed to the Council's satisfaction.
96. Further to the above, Cabinet approval is now sought to proceed to award the contract to the Live Nation consortium. Further advice on this contract award stage of the process is set out in Confidential Appendix 7.
97. Prior to entering into contract with the Live Nation consortium the Council will be required to provide debriefing information and observe a mandatory 10-day standstill period in accordance with the CCR.

#### State Aid/Subsidy Control

98. At the point at which the procurement process started, although the UK had served Notice to leave the European Union, it was still in the transitional period and EU state aid law still applied. At that stage it was unclear when the award decision would be made, and what if any state aid or equivalent rules would apply after the UK finally left the EU jurisdiction. With effect from 1 January 2021, the UK has now left the EU and the Transition period during which EU law still applied has ended. State aid law no longer applies to any new decisions to provide financial benefits to third parties. However from that point a new set of rules described as Subsidy Control have been brought into force as set out in the EU/UK Trade and co-operation agreement ("TCA") which sets out a new replacement regime. This is to be amplified and developed by the UK subsidy Control bill still before Parliament. Detailed advice on the application of the TCA subsidy control regime is set out in Appendix 6 to this report.
99. In summary the replacement of State aid law with Subsidy control does not materially affect the definition of aid/subsidy, but the new regime, while it gives greater flexibility to subsidy providing bodies, increases uncertainty, as it is a new set of rules, and there is limited guidance, and no case law to assist in interpreting the regime. Currently there are no formal block exemptions and where there is a subsidy, compliance is dependent on the subsidy being compatible with principles.
100. The finance restructuring could have the effect of taking the scheme outside the scope of subsidy control (and indeed State aid) on the basis that the Council is paying the developer arm of the Live Nation consortium a market price to build the Arena on Council land, and the terms of the Lease to the operator of the Live Nation consortium are market price or better. In our view given the process by which the proposed contracts have been arrived at, and the controls through the Development and Funding Agreement, this is a proper conclusion for the Council to draw, and consequently there is no subsidy; the Council is paying for the works, and letting the building on market terms

#### Powers

101. Section 120 of the Local Government Act 1972 enables the Council to acquire land for either (a) the benefit, improvement or development of its area or (b) for any of its functions under any enactment. Section 121 allows local authorities to acquire land compulsorily for the purposes of section 120.
102. Section 226 of the Town and Country Planning Act 1990 enables the Council to acquire land compulsorily for development and other planning purposes as defined in section 246 (1) of the Act for the promotion or improvement of the economic, social or environmental well-being of the area.
103. Section 145 of the Local Government Act 1972 enables the Council to do, or arrange for the doing of, or contribute towards the expenses of the doing of, anything necessary or expedient for the provision of entertainment of any nature or the provision of a theatre, concert hall, dance hall or other premises suitable for the giving of entertainments and any purposes incidental to that provision.
104. Section 12 of the Local Government Act 2003 enables the Council to invest (a) for any purpose relevant to its functions under any enactment or (b) for the purposes of the prudent management of its financial affairs.
105. The Cabinet needs to take account of the Council's fiduciary duties to the local residents and taxpayers. As such, proper consideration needs to be given to the risks, rewards and potential future liabilities of the proposals which are the subject of this report. The issue concerns whether the potential risks and liabilities described in the report and in the associated appendices are proportionate to securing the stated economic development objectives and thereby in the best interests of the local taxpayers and residents. Any viable alternatives for delivering the economic development objectives should be considered.
106. The report seeks authority from the Cabinet to select the Live Nation consortium as the successful bidder and proceed with the delivery and operation of a new Indoor Arena at Atlantic Wharf, Cardiff Bay through the execution of the various key documents. The Cabinet should note that there will be some further refinement to the documents but that this does not materially modify the essential aspects of the tender or the procurement and does not risk distorting competition or causing discrimination. Bevan Brittan LLP have confirmed that the structure of the legal suite is appropriate for a transaction of this nature and that the documentation reflects the outcome of the various meetings and discussions that have taken place in which the Council and lead advisors have participated during the procurement process.
107. The Cabinet must also make its decision having due regard to the Council's public sector equality duties pursuant to the Equality Act 2010 (including specific Welsh public sector duties). This requires the Council, in the exercise of its functions, to have due regard to the need to (1) eliminate unlawful discrimination, (2) advance equality of opportunity and (3) foster good relations on the basis of protected characteristics. The protected characteristics are: age, gender reassignment, sex, race - including ethnic or national origin, colour or nationality, disability, pregnancy and maternity, marriage and civil

partnership, sexual orientation, religion or belief – including lack of belief. If the recommendations in this report are accepted and when any alternative options are considered, the Council will have to consider further the equalities implication and an Equality Impact Assessment may need to be completed.

108. When taking strategic decisions, the Council also has a statutory duty to have due regard to the need to reduce inequalities of outcome resulting from socio-economic disadvantage ('the Socio-Economic Duty' imposed under section 1 of the Equality Act 2010). In considering this, the Council must take into account the statutory guidance issued by the Welsh Ministers ([WG42004 A More Equal Wales The Socio-economic Duty Equality Act 2010 \(gov.wales\)](#)) and must be able to demonstrate how it has discharged its duty.
109. Equalities impact assessments will be undertaken as necessary as the development, and the proposals described within this report, are developed.
110. The Well-Being of Future Generations (Wales) Act 2015 ("the Act") places a 'well-being duty' on public bodies aimed at achieving 7 national well-being goals for Wales – a Wales that is prosperous, resilient, healthier, more equal, has cohesive communities, a vibrant culture and thriving Welsh language, and is globally responsible.
111. In discharging its duties under the Act, the Council has set and published well-being objectives designed to maximise its contribution to achieving the national well-being goals. The well-being objectives are set out in Cardiff's Corporate Plan 2020-23:

<http://cmsprd.cardiff.gov.uk/ENG/Your-Council/Strategies-plans-and-policies/Corporate-Plan/Documents/Corporate%20Plan%202018-21.pdf>

112. The well-being duty also requires the Council to act in accordance with the 'sustainable development principle'. This principle requires the Council to act in a way which seeks to ensure that the needs of the present are met without comprising the ability of future generations to meet their own needs. Put simply, this means that Council decision makers must take account of the impact of their decisions on people living their lives in Wales in the future. In doing so, the Council must:
  - Look to the long term;
  - Focus on prevention by understanding the root causes of problems;
  - Deliver an integrates approach to achieving the 7 national well-being goals;
  - Work in collaboration with others to find shared sustainable solutions; and
  - Involve people from all sections of the community in the decisions which affect them.
113. The Cabinet must be satisfied that the proposed decision accords with the principles above; and due regard must be given to the Statutory Guidance issued by the Welsh Ministers, which is accessible using the link below:  
<http://gov.wales/topics/people-and-communities/people/future-generations-act/statutory-guidance/?lang=en>

114. The Council has to be mindful of the Welsh Language (Wales) Measure 2011 and the Welsh Language Standards when making any policy decisions and consider the impact upon the Welsh language.

### **Property Implications**

115. Strategic Estates has supported colleagues in the discussions with Travelodge on the CVA arrangements and prepared the relevant documentation to ratify the agreements. Discussions have continued on the Agreement for Surrender and Lease (AFL) required to document the relocation of the Hotel to include the specification and the Heads of Terms for the ongoing lease. We will continue to monitor the dates closely in respect of the CVA arrangement already agreed and documented through previous Cabinet Reports.
116. The Land Strategy attached at Confidential Appendix 4 identifies additional land outside of the Council ownership required to facilitate the development. Strategic Estates has led on the discussions and progress has been made on a number of key transactions. However, the Council has not been able to agree a reasonable value within the parameters of market value for the Outstanding Parcel which has left the Council with no alternative but to progress the acquisition of last resort which is the making of a Compulsory Purchase Order. We will continue to negotiate and discuss with the owners in order to avert this unnecessary action.
117. Alongside the legal department, Strategic Estates has prepared the necessary plans and notices to advertise the appropriation for planning purposes of the land currently in the ownership of the Council and the proposed land to be acquired under the Land Strategy.
118. Strategic Estates has supported the delivery team on the Conditions Precedent throughout the process and will continue to play a supporting role as and when required.
119. As part of the agreed terms for the acquisition of the Red Dragon Centre (RDC), in the event a planning application is submitted for development of an Arena on the RDC or the County Hall site by or on behalf of or with the consent of the Council, then there is an additional payment to be made 5 working days following submission of the planning application. Given the application is shortly to be submitted, this Cabinet is to note the requirement to make the payment.

### **RECOMMENDATION**

Cabinet is recommended to:

- (i) Approve the Full Business Case for the new Indoor Arena as set out in Confidential Appendix 2.

- (ii) Confirm the Live Nation consortium as the successful bidder to be the Council's partner to deliver and operate a new Indoor Arena and Travelodge Hotel at Atlantic Wharf, Butetown;
- (iii) To note the legal advice mentioned at Paragraph 28 of this report and proceed with Option 1 as recommended at paragraph 9.10 of that advice;
- (iv) Approve the legal documentation as detailed in Confidential Appendix 5 and delegate authority to the Director of Economic Development, in consultation with the Cabinet Member for Investment and Development, the Section 151 Officer and the Legal Officer to:
  - (a) approve the final terms of the legal documentation as detailed in Confidential Appendix 4 and in so doing approve any amendments to the legal documentation approved here as may be necessary, for reasons including but not limited to ensuring consistency between them and finalising any outstanding areas;
  - (b) approve any further deeds and documents which are ancillary to the legal documents approved here; and
  - (c) enter into all the necessary contractual documents associated with the delivery of the Arena.
- (v) Note the obligations that will be placed on the Council to support the delivery of the new Indoor Arena as set out in the Conditions Precedent document attached as Confidential Appendix 3;
- (vi) Approve in principle for a Compulsory Purchase Order for the acquisition of land outside of the Arena demise to facilitate the delivery of the wider Arena site and Atlantic Wharf masterplan.
- (vii) Pursuant to powers under Section 122 of the Local Government Act 1972 and Section 227 Town and Country Planning Act 1990, to facilitate the redevelopment of the land for an Indoor Arena in accordance with the development described in this report, to:
  - (a) approve the appropriation of the land that is within the Council's ownership edged red on the plan at Appendix 8 to planning purposes as it is no longer required for its current purpose; and
  - (b) delegate authority to the Director of Economic Development to take all steps necessary to appropriate to planning purposes:
    - (i) the land edged blue on the plan at Appendix 8 following the advertisement of all relevant public open space notices; and
    - (i) the land edged red on the plan at Appendix 8 following the surrender of the lease to Travelodge and the transfer of ownership of this land back to the Council;
- (viii) Approve for delivery associated enabling works to deliver the Indoor Arena and Travelodge Hotel as described in more detail in Confidential Appendix 2 and

the design development costs underwrite as detailed in Confidential Appendix 6.

<b>SENIOR RESPONSIBLE OFFICER</b>	<b>Neil Hanratty</b> <b>Director of Economic Development</b>
	<b>Date</b>

*The following appendices are attached:*

**Appendices 2 – 7 of this report are not for publication as they contain exempt information of the description contained in paragraphs 14 and 16 of part 4 of Schedule 12A of the Local Government Act 1972.**

- Appendix 1 - Overview of the Procurement Process
- Confidential Appendix 2 - Full Business Case
- Confidential Appendix 3 - Condition Precedents
- Confidential Appendix 4 - Land Strategy Report
- Confidential Appendix 5 - Legal Suite
- Confidential Appendix 6 - Financial Report
- Confidential Appendix 7 - Legal Advice
- Appendix 8 - Land Appropriation