

SECTION 4: COMMERCIAL

Confidential

SW2 Enterprise Centre: Final Tender



Contents

4.1 Approach to Legal Position 1

Appendices

A4.1 Latest version of Development Agreement

i Title Plans (1-10)

ii Programme of Works

iii Measurement Plans

iv Employers Requirements

v Appraisal

vi Local Labour Statement

vii Heads of Costs

SECTION 4: COMMERCIAL

4.1 APPROACH TO LEGAL POSITION

The submitted Development Agreement is attached at Appendix A4.1 in accordance with ISFT requirements.

We firmly believe that it is important to ensure that the Development Agreement permits the Council a degree of flexibility at the next stage in order to fully benefit from value for money during the process.

The Development Agreement now permits this in most cases although we have the following comments and proposed amendments to the document.

Please note that we have now entirely removed our amendments to Schedule 5 relating to Caps and Carve-outs in the main contract.

We would welcome the opportunity to engage with the Council and Eversheds in a collaborative manner to resolve these points.

Reference	Subject	Comments
Clause 1.1	Liability Period	It had been agreed that, following insolvency of a warrantor, a replacement would only be required during the design phase of the DA. This appears to have changed. We are not clear as to the reasons. We would require a reference to reasonableness in order to ensure this clause remains equitable. This also protects the Council from incurring the costs of appointing a warrantor and obtaining a warranty in unnecessary circumstances.
Clause 1.2.7 & Sch. 12	Guarantor's Liability Cap	The original 1.2.7 is deleted as there is only one developer. Because the Guarantor is a primary obligor we need to be clear that its liability and the Developer's liability is Joint, as opposed to Joint & Several, and the Developer's liability cap is their joint liability cap. This principle has been agreed between us and the Council, as well as lawyers, however we consider the wording to be insufficiently clear.
Sch. 5 & 6	Pre-construction Third Party Liability	The Council is sufficiently protected from third party fault by the quality of the design team, by the warranties that we will procure from the design team, by the design team's Professional Indemnity insurance and, where Kajima is at fault in failing to undertake our obligations, our liability under the DA for our own breach. Our proposed wording removes a risk burden on Kajima prior to the unconditional date for which we have not priced and which, if priced, we do not regard would represent value for money for the Council. We would be entirely comfortable with all pre-construction phase appointments being made jointly (or directly), which would give the Council a more direct recourse. This position has been accepted in respect of appointments to carry out intrusive surveys and we see no distinction between these two points. If, however, the Council were to insist on deleting our amendments we would seek to renegotiate our DM fee, either the initial discount or the overall quantum or both.
Sch. 7 Para 1.1.2	Development Obligations	We wish to retain the ability to manage the Programme of Works in the manner we consider most appropriate to fulfill our obligations to deliver the development. Whilst we accept that we should be reasonably obliged to procure that construction is carried out substantially in accordance with the Programme of Works, we need to reserve the right to deviate or make reasonable changes in the interests of good development management. This is in the best interests of the Council, who are protected in any case against programme delay by way of LADs. With regard to the Building Contract, we will seek to procure a main contractor on terms equal to or more onerous than our own obligations in this agreement. However it would not be logical, as a consequence of this, to subsequently have accepted a greater liability ourselves than we initially agreed to under the DA. The document has been amended to ensure we are fully incentivised to procure the most robust contract available.

SECTION 4: COMMERCIAL

4.1 APPROACH TO LEGAL POSITION

Reference	Subject	Comments
Sch. 7 Para 13.1	LADs	<p>The principle of LADs is accepted, subject to agreement of timing and quantum.</p> <p>Contractor LADs are typically subject to a short period of delay, typically 4-8 weeks but subject to negotiation, before taking effect. In return contractors will typically agree to remove the 1 year cap.</p> <p>We will be seeking to match or improve upon the LADs agreed in the DA. However if we are obliged to insist upon LADs being applicable from day one we may be fettered from securing the best value for money or the optimal programme period. This is not the most efficient basis to engage with a contractor during the tender process.</p> <p>We would therefore suggest that LADs are agreed subject to any amendments to bring them in line with the main contract that is agreed.</p> <p>With regard to the figures we require further understanding as to how the losses have been calculated.</p>
Sch. 8	Maximum monthly payment.	<p>The intention of this was to enable the Council to manage their expected cashflow during the pre-conditional period. We do not believe that there is any disagreement however we did not expect this to be a single monthly figure, which would be £650k to cover the month of greatest expenditure plus a margin. We expected monthly budgets subject to Council approval on a regular basis.</p> <p>We do not consider this to be a material matter, but this will be easily resolved in a discussion.</p>