

# Delivery & Procurement Strategy – Friar Park, Wednesbury

Prepared for

**West Midlands Combined  
Authority and Sandwell  
Borough Council**

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## 1. Introduction

- 1.1. West Midlands Combined Authority (WMCA) and Sandwell Borough Council (SMBC) are considering the process for the appointment of a development partner for the development opportunity area referred to as 'Friar Park' in Wednesbury.
- 1.2. Cushman & Wakefield (C&W) has been appointed by WMCA and SMBC to consider and advise on the most appropriate delivery and procurement strategy for this development opportunity. This paper sets out the key considerations for the determination of the most appropriate delivery mechanism and procurement route and demonstrates the due process undertaken to support the recommendation to the Client.
- 1.3. The advice provided in this paper is C&W's interpretation of procurement regulations as property procurement advisers as opposed to legal advisers. WMCA and SMBC should seek legal advice where they rely on legal matters, such as interpretation of regulations and in particular where they believe that there is a risk of legal challenge.

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## 2. Scope of Opportunity / Context

### The Opportunity

- 2.1. The subject site, measuring c.27 hectares (67 acres), is located to the east of Wednesbury town centre in the West Midlands, situated 10 miles northwest of Birmingham city centre. Junction 9 of the M6 motorway network is located 1.5 miles northwest of the site, with the A461 (Wood Green Road) running parallel, connecting Wednesbury to the M6 motorway.
- 2.2. The site itself can be accessed via Friar Park Road, which borders the site on the southern boundary. The western boundary borders Kent Road, while the northern and eastern boundaries back onto the railway line, with the M6 motorway located directly behind.
- 2.3. The Friar Park Millennium Centre is located within the Red Line plan of the site, alongside a new GP surgery (Tame Valley Medical Centre) and a community outdoor leisure area, with outdoor gym facilities and a fenced multisport pitch.
- 2.4. The current masterplan for the site proposes to deliver:
  - Around 630 new homes, including around 157 new affordable homes
  - A community park
  - Nature areas
  - New pedestrian and cycle routes
  - Areas of play
  - A village green
  - Over 10 hectares of open space

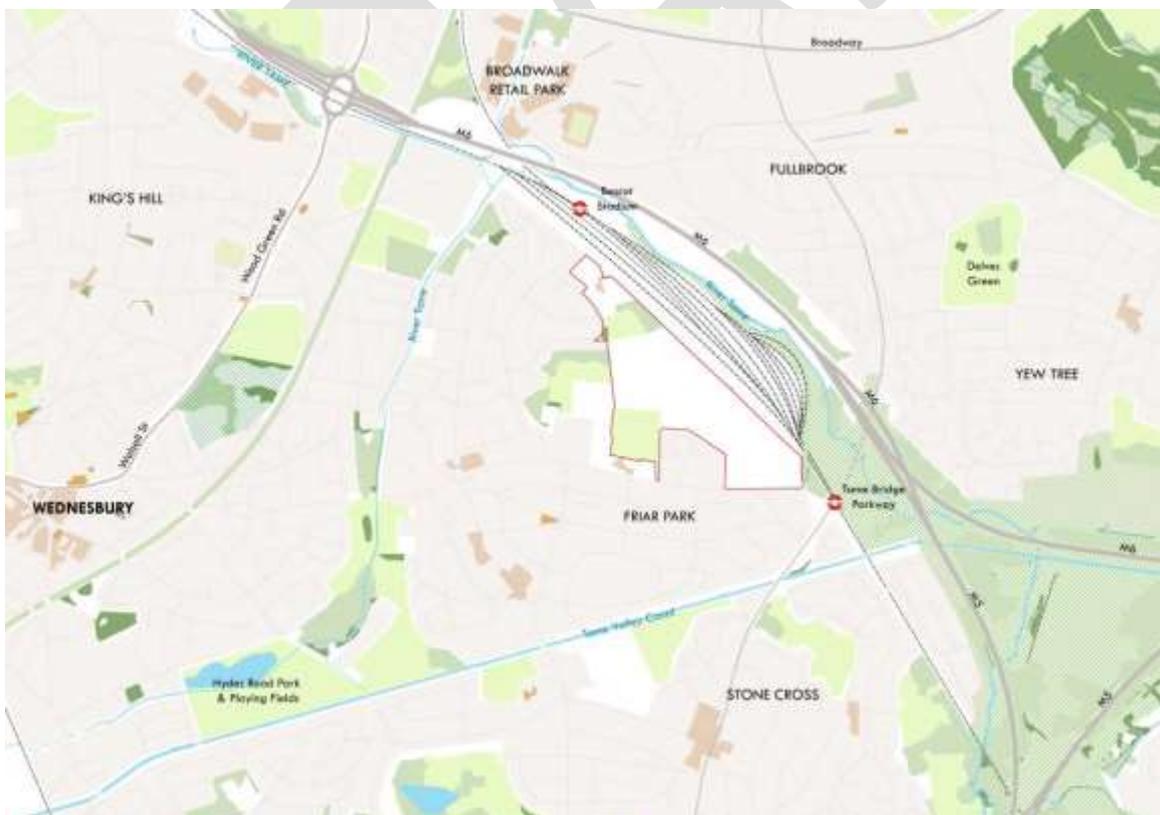


Figure 2.1: Site Location Plan

## The Masterplan

- 2.5. The Friar Park Urban Village Masterplan (2022) sets out an ambitious vision for the site:

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*Friar Park Urban Village will deliver a wonderful place to live, defined by an inspiring new landscape the whole community will enjoy. The Masterplan will deliver around 630 new homes as part of a sustainable urban village. Friar Park will leave a lasting, sustainable legacy for Sandwell, a liveable place that endures for centuries. A place where people connect with each other and nature to lead healthy and happy lifestyles. This modern urban village will become a benchmark residential community, a sustainable place that is embraced by landscape. A happy place, where people know their neighbours and are connected to their surroundings. ...A place to live, a place to be proud of, a place to belong.”*

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- 2.6. The Masterplan identifies 6 objectives, which have been inspired and tested by a series of interconnected principles which WMCA and Sandwell Metropolitan Borough Council follow. Critically, the Masterplan principles outlined below have been developed to align with principles of the Garden City

1. **A people focused, friendly and, engaged community** - A place that delivers a true sense of community where people feel part of its present and future, fostering community ownership of the place.
2. **A place full of possibilities** - A growing community that offers quality of life and opportunities for all generations to live for generations.
3. **A friendly, welcoming and, connected community** - A place where people know their neighbours and feel connected with the existing neighbourhood.
4. **A beautiful, imaginative and unique place** - Use of high quality and innovative design and use of materials to deliver a high quality of life and a unique identity.
5. **A green and natural place** - An attractive, multi-functional landscape which lets nature thrive alongside its community.
6. **A sustainable, active and healthy place** - A place that minimises its impact on the environment, that is resilient to change and encourages a healthy and engaged lifestyle.

## Land Interests

- 2.7. The Friar Park site is in the freehold ownership of the WMCA and Sandwell Metropolitan Borough Council. The WMCA ownership relates to the land that was occupied by the former sewage works owned by Severn Trent Water. Sandwell Metropolitan Borough Council's ownership incorporates various plots of land around the periphery of the site including land off Kent Road, rear of the Millennium Centre and various plots in the southern part of the site. There are several easements and covenants relating to protection of rights of way and pipeline safeguarding, but these will not impact substantially upon development and have been taken into account in the Masterplan proposals.

## Key Issues

2.8. There are a number of key issues that need to be considered:

- **Contamination** - A significant amount of the site was previously used as a sewage treatment plant, as well as for landfill and other industrial uses, which has resulted in contamination below the ground. This contaminated ground requires treatment before development can take place.
- **Nature Conservation** - A portion of the site is designated as a Site of Local Importance for Nature Conservation (SLINC) in the Local Plan, and so consideration should be given to the masterplan design to ensure ecology and biodiversity are taken into account.
- **Railway** – The site backs onto the sidings of the railway line, and as such the masterplan requires careful consideration to minimise the impact of noise pollution and vibrations from the railway.
- **Utilities** - The foul water main that runs behind the Millennium Centre and through the children's play area off Friar Park Road cannot be diverted so will need to be accommodated with the proposed development, including the required easement.
- **Levels and connectivity** - Surrounding land and uses are often at a higher level than the site, restricting physical and visual connections, resulting in the site feeling isolated from its surroundings. Potential re profiling of the site could be used as an opportunity to improve some of these connections. The site's enclosed nature also provides an opportunity to provide a distinctive neighbourhood, elevating the quality of local housing.
- **UK Subsidy** – We understand that the Council will appoint separate legal advice to understand whether they can fund this viability gap in a UK Subsidy compliant manner. Following the UK's departure from the EU these regulations have changed and so it is essential that expert advice is obtained.

### 3. Delivery Objectives

- 3.1. WMCA/SMBC's delivery objectives should be the key consideration for the identification of the most appropriate procurement route. These delivery objectives should capture what WMCA/SMBC wants to achieve from the procurement process along with the working arrangements in the procurement and delivery phases. As such, they are distinct from the broader project objectives which deal with the outputs and outcomes of the project.
- 3.2. The proposed delivery objectives for Friar Park are that the delivery mechanism and procurement process should:
  1. Maximise and maintain competition and procure the most appropriate development partner to deliver WMCA/SMBC's aspirations;
  2. Provide for an efficient, effective and timely procurement programme with an aspiration to achieve preferred bidder status (exclusivity) as soon as reasonably practical;
  3. Allow for meaningful engagement with the market during the procurement;
  4. Allow for WMCA/SMBC to have a high level of control / influence over the development, such as the masterplan and placemaking aspects (in addition to the Council's planning controls);
  5. Allow for WMCA/SMBC to engage with the market to determine the most appropriate apportionment of risks and rewards and incorporation of a funding agreement within the delivery structure;
  6. Adhere to relevant procurement regulations<sup>1</sup>, as relevant, such as the Public Contracts Regulations 2015 (as amended) (the Regulations), the Concession Contracts Regulations 2016, or updated UK procurement regulations following their publication, and the Council's Procurement Strategy and Rules for Contract to minimise the risk of procurement, judicial review or any other challenges.

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<sup>1</sup> Please see Section 7 of this report for further discussion of UK procurement regulations following the UK's departure from the EU

## 4. Project Objectives

- 4.1. Project objectives provide a detailed description of what the procurement process seeks to achieve in terms of outputs and outcomes. They provide the framework for ensuring that the process delivers the Council vision for the site. The most appropriate delivery option and procurement route will be one that achieves the optimal balance across the Council and WMCA's objectives.
- 4.2. The proposed themes of the objectives are set out below. Precise wording of each objective will need to be refined and developed ahead of the procurement process but are identified as:
1. **Design Quality** – To set new standards of design quality for residential within Wednesbury, which align with the Garden city principles.
  2. **Residential Neighbourhood** – To provide a mix of good quality private and affordable residential units to form a new neighbourhood and community, with at least 25% affordable housing to be delivered on-site.
  3. **Transport, Linkages & Connectivity** – To connect the site to the wider area, with a focus on encouraging permeability and pedestrian flows throughout and across the site.
  4. **Green and Sustainable** - The provision of an environmentally sustainable development with high-quality spatial design, which aligns with the WMCA Carbon zero standards.
  5. **Partnering Approach** – To create a partnering structure with the Council that: aligns the parties' goals; plays to their strengths; appropriately apportions risks and provides sufficient control for each party to determine those aspects of the development that are core to their respective organisations.
  6. **Delivery & Resources** – The timely delivery of the scheme, with appropriate and sufficient resources, to ensure that all dwellings are delivered by 2030.
  7. **Long Term Structure** – The provision of a long-term management and maintenance structure over the completed scheme in order to maintain the environment as an attractive place to live, where people feel safe and secure, at minimal cost and risk to the Council.
  8. **Viability & Funding** – To deliver a viable and fundable scheme and secure sufficient private sector funding on reasonable and appropriate terms to deliver the scheme and unlock public sector funding where gap funding is required.
  9. **Social Value** – Typically involves requirements around local employment, community organisations, sustainability.

## 5. Delivery Mechanisms

5.1. Set out below, at a high level, are a number of potential delivery mechanisms and their suitability when related to the context of the site and WMCA's and SMBC's delivery objectives. This section will provide an analysis of each option, informed by C&W experience on similar projects and broader knowledge of the market. Options considered includes:

- Disposal following planning
- Development management (Direct Delivery)
- Development Agreement (DA)
- Contractual Joint Venture Partnership (DA+)
- Joint venture partnership (JVCo)
- Investment Partner (InvestCo)

Delivery Route	Description	Pros	Cons
<b>Disposal Following Planning</b>	<p>WMCA and SMBC dispose of their land following securing appropriate planning permission(s), therefore leaving delivery to a subsequent purchaser(s) to bring forward proposals within the framework set by the planning consent.</p> <p>A variant of this model is to give WMCA/SMBC a measure of protection against non-delivery of development by including a <b>land buyback right</b> for WMCA/SMBC if development in accordance with planning is not delivered within a certain period of time. However,</p>	<ul style="list-style-type: none"> <li>• Relatively cheap implementation costs.</li> <li>• Sale &amp; capital receipt could be achieved quickly.</li> <li>• Disposal may not require an FTS/OJEU process.</li> <li>• Land buyback provisions will ensure that inappropriate development is not brought forward.</li> <li>• Development risk apportioned to developer.</li> </ul>	<ul style="list-style-type: none"> <li>• Disposal at present may not maximise value.</li> <li>• WMCA/SMBC would need to bear cost of planning.</li> <li>• Risk that WMCA/SMBC may not achieve planning consent that maximises market appeal.</li> <li>• Risk of non-delivery and lack of control over performance and quality – in the absence of a procurement process, it will be challenging to include enforceable obligations, whilst any public sector facilities will need to be procured separately.</li> <li>• WMCA/SMBC loses control at point of sale, no ability to manage change as the site progresses, outside of the normal planning process.</li> </ul>

Delivery Route	Description	Pros	Cons
	<p>buyback rights are difficult to apply in practice, as it is usually commercially necessary to at least repay the land price and any costs, and it may be difficult for WMCA/SMBC to secure/re-secure the necessary funds for this.</p>		<p><b>Comments</b></p> <p>The planning process does not give the Council the control that it desires/ requires to have a high level of confidence in the delivery of the scheme, both in absolute terms (risk of non-delivery) and in terms of achievement of objectives around housing typologies and tenure. This option does not give the Council control over delivery timescales.</p> <p><b>This is not considered a suitable option.</b></p>
<p><b>Development Management (Direct Delivery)</b></p>	<p>WMCA/SMBC fund the development which is delivered on their behalf by a development manager. WMCA/SMBC would contract directly with the professional team and the building contractor(s), whilst the development manager would manage the contracts on WMCA/SMBC's behalf. WMCA/SMBC could retain the freehold of the land and retain ownership of completed properties which could then be leased or sold at a later date.</p>	<ul style="list-style-type: none"> <li>• High level of control for WMCA/SMBC to manage change as development progresses.</li> <li>• Development profit (but also risk) would sit with WMCA/SMBC.</li> <li>• Assets could be retained by WMCA/SMBC (potential benefit from revenue streams and capital growth).</li> <li>• WMCA/SMBC has access to cheap borrowing through PWLB (or potential other sources such as LEP funding).</li> <li>• Development management fee rather than developer profit.</li> </ul>	<ul style="list-style-type: none"> <li>• Requirement to forward-fund scheme.</li> <li>• WMCA/SMBC exposed to commercial risk, such as contractor risk (prolongation/ disruption claims) rather than passing on to a developer.</li> <li>• Development risk remains with WMCA/SMBC.</li> <li>• Risk that development manager does not maximise value/ regeneration benefits.</li> <li>• Requirement to run procurement process for DM &amp; subsequently for different streams of downstream works &amp; services.</li> </ul> <p><b>Comments</b></p> <p>Whilst this gives the Council ultimate control, the Council takes all development risk and needs to fund development up front.</p> <p><b>This is not considered a suitable option.</b></p>

Delivery Route	Description	Pros	Cons
<p><b>Development Agreement</b></p>	<p>WMCA/SMBC procures a development partner with delivery arrangements governed by a development agreement (DA) between the parties. This contractual mechanism would be the method by which the project objectives are pursued, with no separate entity being created. The legal agreement would set out the project objectives and set out the roles, rights and obligations of the parties including responsibilities for carrying out development, land transfer, achieving appropriate planning consents, funding, financial arrangements, delivery programme and so on.</p>	<ul style="list-style-type: none"> <li>• Tried and tested approach, well understood by the market.</li> <li>• Contractual structure is familiar to local authorities.</li> <li>• No separate entity created.</li> <li>• Straightforward approach where the structure of the delivery arrangement is set by the terms in the contract negotiated by the parties.</li> <li>• Clear delineation of objectives, roles, risks and responsibilities.</li> <li>• Development risk primarily with the developer.</li> </ul>	<ul style="list-style-type: none"> <li>• Potential lack of flexibility and ability to manage change requiring careful drafting to ensure durability through changing market conditions.</li> <li>• Lack of a distinct/separate identity, which can dilute focus should appropriate governance and resourcing structures not be designed.</li> <li>• Typically, pure contractual arrangements do not naturally promote commonality of interests and parties rely more on the contract to govern joint working, potentially leading to disputes which will require resolution mechanisms to be included.</li> <li>• A contractual partnership such as this does not itself create an entity that can hold assets/enter into contracts - one of the parties must do this.</li> </ul> <p><b>Comments</b></p> <p>This is a tried and tested approach and is well understood by the market. This could be the most attractive route for the market and could be considered less onerous. Development risk is transferred to the developer.</p> <p><b>This could work well for Friar Park as a single-site, residential opportunity. This is considered a potential option for Friar Park.</b></p>
<p><b>Contractual Joint Venture Partnership (DA+)</b></p>	<p>WMCA/SMBC procures a development partner with delivery arrangements governed by a contractual joint venture between the parties. This contractual mechanism would be the method by</p>	<ul style="list-style-type: none"> <li>• Contractual structure is familiar to local authorities and the market.</li> <li>• No separate entity created.</li> </ul>	<ul style="list-style-type: none"> <li>• Potential lack of flexibility and ability to manage change requiring careful drafting to ensure durability through changing market conditions.</li> </ul>

Delivery Route	Description	Pros	Cons
	<p>which the project objectives are pursued, with no separate entity being created. Whilst an DA+ would include obligations for both parties, unlike a traditional DA, it would set out mechanisms for certain aspects, such as phase drawdown and establishing the extent of financial return for phases to come forward. The DA+ would also provide for a joint working governance structure whereby decisions are taken through a project board comprised of both parties.</p>	<ul style="list-style-type: none"> <li>• Project board / governance arrangements should promote shared objectives.</li> <li>• Clear delineation of objectives, roles, risks and responsibilities.</li> <li>• Development risk primarily with the developer, although greater potential to share in risk and reward.</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of a distinct/separate identity, which can dilute focus should appropriate governance and resourcing structures not be designed.</li> <li>• A contractual partnership such as this does not itself create an entity that can hold assets/enter into contracts - one of the parties must do this.</li> </ul> <p><b>Comments</b></p> <p>This option offers slightly more flexibility and governance than the traditional DA route through the creation of a Project Board, so this option gives more room for partnership working. Additionally, the objectives of the board are governed through a Business Plan that is reviewed on a regular basis, which will enable shared objectives to be brought forward at the site.</p> <p><b>This is also considered as a potential option for Friar Park, with the extra flexibility being the main difference between this and a traditional DA approach.</b></p>
<p><b>Joint Venture Partnership (JVCo)</b></p>	<p>WMCA/SMBC procures a development partner and together establish a common enterprise (JVCo) in which they participate together and share the same approach, aims, risks and rewards. JVs therefore embed partnership working and genuine risk sharing. There are many structures that can be adopted for JVs, each with distinct advantages and</p>	<ul style="list-style-type: none"> <li>• Establishment of distinct entity encourages focus on shared business plan and objectives.</li> <li>• Easier branding and marketing.</li> <li>• JV Co can enter into contracts in own right if required.</li> <li>• Flexibility and durability to address changing market circumstances.</li> </ul>	<ul style="list-style-type: none"> <li>• Relatively complex and costly to establish.</li> <li>• Potentially exposes WMCA/SMBC to different types and levels of (commercial) risk.</li> <li>• Complexity of aligning shared objectives and agreeing respective risks and returns.</li> <li>• Potential concern of insufficient accountability to parent organisations.</li> <li>• Potential to impact market appetite, particularly where the local authority cannot demonstrate</li> </ul>

Delivery Route	Description	Pros	Cons
	<p>disadvantages which require careful consideration (covering issues such as tax considerations and any need to limit liability, for example).</p> <p>Operation of the JVCo would be governed by a Memorandum and Articles of Association which would be written to allow all activity required to deliver the development.</p>	<ul style="list-style-type: none"> <li>• Could cover investor partner as well as developer partner scenario.</li> </ul>	<p>successful track record of participating in JVCo structures. A requirement for this type of structure could also limit market competition as there are relatively fewer operators with genuine experience of forming such vehicles with a local authority.</p> <ul style="list-style-type: none"> <li>• Risk of deadlock affecting delivery.</li> <li>• WMCA/SMBC’s exemption from corporation tax will not apply to a JVCo (unless JVCo can be established as e.g. a Limited Liability Partnership, but this might involve vires issues) and the entity will prima facie be subject to corporation tax. Stamp Duty Land Tax may also arise on a transfer of chargeable assets, although reliefs may be available.</li> <li>• Corporate structure creates a requirement for a Council officer to sit on the board of the new JV. This can cause a potential conflict of interest in future disputes between the Council and the JV. This adds complexity, particularly if the Board member leaves the Council.</li> </ul> <p><b>Comments</b></p> <p>The scale of the opportunity is not sufficient to warrant the complexity associated with the creation of a JVCo. It also most often requires the council to put in equity and share risk and that is not something that we believe is required here.</p> <p><b>This is not considered a suitable option.</b></p>
<p><b>Investment Partner</b></p>	<p>WMCA/SMBC procures an investment partner to co-invest in the development. There are a number of different</p>	<ul style="list-style-type: none"> <li>• Procurement process can potentially avoid FTS/ OJEU, assuming Investment Partner</li> </ul>	<ul style="list-style-type: none"> <li>• Initial procurement does not bring a developer to the table.</li> </ul>

Delivery Route	Description	Pros	Cons
<b>(InvestCo)</b>	<p>approaches, one of which would be for the Council to invest their land holdings alongside an investment partner investing funds for enabling / infrastructure works. As a JV this would embed partnership working and genuine risk sharing. The partnership would deliver all of the enabling work and procure developers and or contractors as required to deliver infrastructure, buildings or plots. Operation of the InvestCo would be governed by a Memorandum and Articles of Association.</p>	<p>does not contract to provide any works or services in excess of the EU financial threshold/ UK thresholds when published<sup>2</sup>.</p> <ul style="list-style-type: none"> <li>• Establishment of distinct entity encourages focus on shared business plan and objectives.</li> <li>• JV Co can enter into contracts in own right if required.</li> <li>• Flexibility and durability to address changing market circumstances.</li> </ul>	<ul style="list-style-type: none"> <li>• Risk that InvestCo may not achieve planning consent that maximises market appeal / level of return.</li> <li>• A number of FTS/ OJEU procurements might need to be undertaken for downstream development.</li> <li>• WMCA/SMBC's exemption from corporation tax will not apply to an InvestCo (unless InvestCo can be established as e.g. a Limited Liability Partnership, but this might involve vires issues) and the entity will prima facie be subject to corporation tax. Stamp Duty Land Tax may also arise on a transfer of chargeable assets, although reliefs may be available.</li> <li>• Corporate structure creates a requirement for a Council officer to sit on the board of the new JV. This can cause a potential conflict of interest in future disputes between the Council and the JV. This adds complexity, particularly if the Board member leaves the Council.</li> </ul> <p><b>Comments</b></p> <p>The scale of the opportunity is not sufficient to warrant the complexity associated with the creation of a JVCo. <b>This is not considered a suitable option.</b></p>

<sup>2</sup> Please note Section 7 of this report for discussion of UK procurement regulations following the UK's decision to leave the EU.

## 6. Delivery Mechanisms – Options Analysis

- 6.1. This section will include a high-level analysis of each delivery option against each of the delivery objectives. The table below considers the delivery options against the delivery objectives in the form of a ‘traffic light’ analysis, using the following descriptions:

	Green - Good fit against the objective, minimal issues		Amber - Medium fit against the objective – some issues and or risks		Red - Poor fit against the objective, significant issues and or risks
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	Delivery Objective	Disposal following planning	Development Management (Direct Delivery)	Contractual Agreement (DA)	Contractual Joint Venture Partnership	Joint Venture Partnership (JVCo)	Investment Partner (InvestCo)
1	Procure the most appropriate development partner, including maximising and maintaining competition						
2	Provide for an efficient, effective and timely procurement programme with an aspiration to achieve preferred bidder status (exclusivity) as soon as reasonably practical						
3	Allow for meaningful engagement and negotiation with the market during the procurement						
4	Allow for WMCA/SMBC to have a high level of control / influence over the development (throughout the process or certain stages),						
5	Allow for WMCA/SMBC to engage with the market to determine the most appropriate apportionment of risks and rewards and incorporation of a funding agreement within the delivery structure						
6	Adhere to relevant procurement regulations and minimise the risk of procurement or any other challenges.						

## Recommendation

- 6.2. It should be acknowledged that the above is at a high-level and relatively subjective, but it provides a useful visual representation of the key risk areas and appropriateness of each of the potential delivery models.
- 6.3. On the basis of the above, it is considered that WMCA/SMBC's delivery objectives are likely to be more achievable through the development agreement (DA) approach, or potentially a contractual joint venture partnership (DA+) approach. Both offer a 'tried and tested' approach, in essence both being based on a traditional development agreement.
- 6.4. In our view the market does typically prefer a contracting authority to definitively set out its preference for a delivery route rather than allowing Bidders to develop proposals on their preferred route. A stated route would also potentially simplify the ongoing legal process, whereby avoiding the situation where some bidders progress on the basis of heads of terms for an DA whilst other bidders progress under the basis of heads of terms for a contractual JV structure.
- 6.5. C&W recommends that the market view of this recommended delivery route is tested with the potential market in due course, in order to better understand whether the market has a strong preference for the development agreement route.
- 6.6. The remainder of this paper focuses on the procurement strategy on the basis of a DA and DA+ approach and can be refined following market testing.

## 7. Procurement / Marketing Options

- 7.1. Section 6 of this report has identified that the most appropriate delivery mechanism will be a form of development agreement route, either a DA or Contractual JV. This will give the Council the ability to include provisions that provide the control it requires over development, at the same time as maximising market attractiveness through it being familiar and ‘tried and tested’ approach.
- 7.2. Given the nature of control that the Council requires to deliver its project objectives, it is considered that a “new OJEU” compliant process is required to provide opportunity to include positive obligations in the development agreement.
- 7.3. This provides two options that we discuss in further detail below, namely a new OJEU compliant procurement procedure, or use of the Pagabo framework, a framework that has already been procured via a compliant process.

### Changes to Procurement Regulations Following UK Departure from EU

#### TRANSFORMING PUBLIC PROCUREMENT, GREEN PAPER<sup>3</sup>

- 7.4. The Cabinet published the Green Paper ‘*Transforming public procurement*’ in December 2020, launching a consultation period on proposals for changes to public procurement that ran until 10 March 2021. The Government’s goal is to speed up and simplify UK procurement processes. The key changes can be summarised as follows:
  - The Government proposes to enshrine principles of value for money, the public good, transparency, integrity, efficiency, fair treatment and non-discrimination into a new National Procurement Policy Statement;
  - The Government proposes to rationalise the current rules in the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulation 2011, into a single, uniform set of rules for contract awards;
  - The existing procurement procedures will be rationalised into three simple, modern procedures:
    - A new flexible procedure that gives buyers freedom to negotiate and innovate to get the best from the price, charity and social enterprise sectors;
    - An open procedure that buyers can use for simple, ‘off the shelf’ competitions;
    - A limited tendering procedure that buyers can use in certain circumstances, such as in crisis or extreme urgency.
  - A single digital platform for supplier registration to ensure bidders only have to enter their data once and a new Dynamic Purchasing System to be used for all types of procurement;
  - Publication of a new National Procurement Policy Statement;

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/943946/Transforming\\_public\\_procurement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf)

- Application of exclusion rules to tackle unacceptable behaviour in procurement and to enable buyers the ability to take account of a bidder's past performance and to exclude them if they do not have the capability to deliver;
- Reform to the system for challenging procurement decisions.

#### AMENDMENTS TO PROCUREMENT REGULATIONS

- 7.5. 'Procurement Policy Note 10/20: Public Procurement after the Transition Period ends on 31 December 2020'<sup>4</sup> sets out how the public procurement regulations will be affected following expiry of the Transition Period on 31 December 2020.
- 7.6. For the time being, the main change to the existing public procurement regulations is that UK public procurement opportunities will need to be published on the new UK Find a Tender Service, detailed below.
- 7.7. **Finder a Tender (FTS)** is the new UK e-notification service that has been created in place of the Official Journal of the European Union (OJEU), following the UK's departure from the European Union and the end of the Transition Period on 31 December 2020.
- 7.8. The framework and principles underlying the public procurement regime will not substantially change, but contracting authorities are now required to publish public procurement notices for new procurements to FTS: <https://www.find-tender.service.gov.uk>
- 7.9. The provisions of FTS will apply to all contracting authorities from the end of the Transition Period (23:00 on 31 December 2020).
- 7.10. Notices must be published to FTS first, ahead of publications to any other portal, e.g. Contracts Finder. The requirement to publish to Contracts Finder remains a requirement.
- 7.11. Until such a time that the new UK regulations come into law, for the purpose of this procurement strategy all references to OJEU compliance and OJEU procurement procedures have been retained.

#### UK SUBSIDY CONTROL (FORMERLY STATE AID)

- 7.12. As of 1 January 2021, new UK procurement will no longer be subject to the EU's State Aid regime, rather it will come under provisions within the UK-EU Trade and Co-operation Agreement (TCA) on UK Subsidy Control, which is to become part of UK law. UK Subsidy Control provisions require public authorities to check a proposal against commitments in a number of trade agreements, the most relevant being the TCA. The UK is due to undertake consultation on a new UK subsidy framework later this year, and in the meantime, in the absence of a new UK regime, Subsidy Control is defined under the TCA. There are 6 common principles that subsidies must respect, and Cabinet Office technical guidance states that the grantor must demonstrate how it considers the subsidy is compliant:
1. *Pursue specific public policy objectives to remedy an identified market failure/ social difficulty/ distributional concerns (the objective)*
  2. *Proportionate and limited to what is necessary to achieve the objective*
  3. *Bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objectives and that would not be achieved in absence of the subsidy –*
  4. *Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy –*

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<sup>4</sup> Cabinet Office Procurement Policy Note (December 2020) – Public Procurement after the Transition Period ends on 31 December 2020, Information Note PPN 10/20 (<https://www.gov.uk/government/publications/procurement-policy-note-1020-public-procurement-after-the-transition-period-ends-on-31-december-2020>)

5. *Subsidies are an appropriate policy instrument, cannot be achieved through other means*
6. *Positive contributions outweigh any negative effects*

7.13. There is no guidance on how to demonstrate that UK Subsidies respect these principles, and so for the time being it is considered reasonable to assume compliance if the provision would be considered acceptable under previous EU State Aid rules and guidance on block exemptions. Please note footnotes below for further information<sup>5 6 7 8</sup>.

## Application of Procurement Regulations

7.14. The provisions of the Regulations will apply to this contract if certain criteria are satisfied as listed below:

- On the basis that the proposed contract has the characteristics of a “works” contract, the anticipated value of the works being above the value threshold of £4,733,252;
- The contracting authority in question is not excluded from the Regulations (which they are not);
- The works and/ or services in question are not excluded from the Regulations (i.e. the unencumbered disposal of land by a contracting authority is excluded).

7.15. In addition to the above relatively objective criteria within the Regulations, there is relevant case law and guidance:

- Most recently, the Court of Appeal in *Faraday Development Ltd v West Berkshire Council (2018)* concluded that the contract did comprise a ‘Public Works Contract’, and the authority was therefore in breach of procurement regulations. The Court of Appeal determined that the VEAT was also ineffective as it did not provide adequate justification and did not describe the specific nature of the contract.
- In *Auroux and others v. Commune de Roanne (2007)* it was found that the works did comprise a ‘Public Works Contract’, that the full value of the contract should be taken into account when determining value thresholds, and the applicability of French law.
- The former OGC’s Procurement Policy Note – Public Procurement Rules, Development Agreements and s106 “Planning Agreements”; Updated and Additional Guidance, Information Note 12/10 30 June 2010.
- The Public Contracts Regulations 2015 (PCR15); The Utilities Contracts Regulations 2016 (UCR16); The Concession Contracts Regulations 2016 (CCR16); The Public Procurement (Amendment, Repeals and Revocations) Regulations 2016.

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<sup>5</sup> Cabinet Office, “[Summary guide to awarding subsidies](https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/summary-guide-to-awarding-subsidies)” December 2020:

<https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/summary-guide-to-awarding-subsidies>

<sup>6</sup> Cabinet Office, “[Technical guidance on the UK’s international subsidy control commitments](https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments)”, December 2020:

<https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments>

<sup>7</sup> Cabinet Office, “[Technical guidance Annex 1: Examples of continuity and other Free Trade Agreement commitments](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948733/subsidy-control-technical-guidance-annex-1.pdf)”, December 2020:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948733/subsidy-control-technical-guidance-annex-1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948733/subsidy-control-technical-guidance-annex-1.pdf)

<sup>8</sup> Cabinet Office, “[Technical guidance Annex 2: Public authorities’ assessment of how individual subsidies comply with UK-EU Trade and Cooperation Agreement principles](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948391/public_authorities_assessment_of_how_individual_subsidies_comply_with_uk-eu_trade_and_cooperation_agreement_principles.odt)”, December 2020:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948391/public\\_authorities\\_assessment\\_of\\_how\\_individual\\_subsidies\\_comply\\_with\\_uk-eu\\_trade\\_and\\_cooperation\\_agreement\\_principles.odt](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948391/public_authorities_assessment_of_how_individual_subsidies_comply_with_uk-eu_trade_and_cooperation_agreement_principles.odt)

- 7.16. These consider issues such as whether a land transaction is a straight disposal or whether it comprises the contracting authority procuring the carrying out of works.
- 7.17. Having considered the above in relation to this particular contract and the delivery objectives in the previous section, C&W are of the opinion that the Regulations will apply to this proposed contract and that it will need to be procured through an OJEU compliant process.
- 7.18. From our understanding of the opportunity we are of the opinion that it will be defined as a ‘public works contract’ (rather than a service or supplies contract), which means a public contract which have as their object any of the following:
- a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2 of the Regulations;
  - b) the execution, or both the design and execution, of a work;
  - c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

## Lots

- 7.19. The Regulations require a contracting authority to consider awarding a contract in separate lots. In the event that it is determined that a contract will not be awarded in lots, the contracting authority must provide an indication of the main reasons for their decision and include this within a ‘Project Report’.
- 7.20. Having considered the potential to sub-divide the opportunity into Lots, SMBC/WMCA has determined that the contract will not be sub-divided into lots for the following reason:
- Scale of the site – the site and is not of sufficient scale nor is the proposed scheme option suitable to be parcelled into lots.

## Procurement Processes

- 7.21. The Regulations provide a number of procurement procedures as listed below, that can in theory be utilised for a public works contract of this nature<sup>9</sup>:
- Open Procedure
  - Restricted Procedure
  - Competitive Procedure with Negotiation; and
  - Competitive Dialogue
- 7.22. A brief description and summary of the characteristics of the options listed above are detailed below, including where the use of these processes needs to be justified. (Where such justification is required to use the recommended approach, this will be set out in the latter part of this report and referenced in the ‘Project Report’)

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<sup>9</sup> Other OJEU procedures such as ‘Innovation Partnership’ and ‘Negotiated Procedure without Prior Publication’ have not been considered as C&W do not consider that they are either appropriate for this opportunity or capable of being justified. Likewise, a Works Concession procedure under the Concession Contracts Regulations 2016 has not been considered as it is unusual for that procedure to be used for a development partner procurement and, in C&W’s opinion does not offer any tangible benefits.

## OPEN

- 7.23. The Open procedure is one of the default OJEU procedures that may be used by a contracting authority without any specific justification. It is a single stage procurement procedure and as such does not include an initial Selection stage. The opportunity is open to any organisation who may submit a tender within prescribed timescales. Tender documents will need to set out the exact requirements of WMCA/SMBC, including the legal form of contract and pricing structure. The procedure does not allow for negotiations with any of the bidders.
- 7.24. This procedure is appropriate for contracts where it is determined that a separate SQ (selection) stage is not required; where the requirements are understood and known; and elements, such as the contract, will not require negotiation, such as: facility management service contracts, simpler construction projects, etc.

## RESTRICTED

- 7.25. The Restricted procedure is the other default OJEU procedure that may be used by a contracting authority without any specific justification. This is a two-stage procurement procedure comprising a selection stage followed by a tender stage. At the tender stage, bidders will be issued with tender documents that set out the exact requirements of the contracting authority, including the legal form of contract and pricing structure. As with the Open procedure, the Restricted procedure does not allow for negotiation with bidders.
- 7.26. This procedure is appropriate for contracts where it is determined that a separate selection stage is required, so as to be able to limit the number of tenderers, and the requirements are understood and known and elements, such as the contract, will not require negotiation, such as: facility management service contracts, construction projects, etc.

## COMPETITIVE PROCEDURE WITH NEGOTIATION

- 7.27. This procedure came into effect in respect of procurement processes started on or after the 26 February 2015 within the Public Contracts Regulations 2015. It allows for an initial selection stage at which the number of bidders to be invited to participate can be limited. This is then followed by one or more successive stages to develop proposals and reduce the number of tenders by applying the award criteria. Towards the end of the process, the remaining bidders must submit final tenders for evaluation and award of contract. Whilst this process allows for market engagement and negotiation following the selection stage to refine proposals, it does not allow for any negotiation after the submission of the final tender. Use of this procedure requires justification by the contracting authority, such justification may include: where the *“contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of risks attaching to them”*. For a project of this nature, this is typically simple to justify.

## COMPETITIVE DIALOGUE

- 7.28. This procedure was introduced in 2006. It was the de-facto default procurement procedure for complex procurements under the previously applicable Public Contracts Regulations 2006 (as amended) for contracts of this nature, when the Open and Restricted Procedures were not appropriate. Since that time it has been used for numerous development agreement procurements. The procedure has been amended under the new Regulations. Two key amendments being:
- For tenders to be “optimised” following the final tender stage which appears to provide for a greater level of adjustments to the final tenders than the previously used term of “fine-tuned”; and
  - Negotiations are now permitted with the preferred bidder to *“confirm financial commitments or other terms contained in the tender by finalising the terms of the contract”*. This is subject to

the proviso that such negotiation does not materially modify the essential aspects of the tender or the procurement and does not risk distorting competition or cause discrimination.

- 7.29. Use of this procedure also requires the same level of justification by the contracting authority as for the Competitive Procedure with Negotiation, i.e. such justification may include: where the “contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of risks attaching to them”. For a project of this nature, this is typically simple to justify.
- 7.30. This is a three-stage procedure comprising a selection stage followed by a dialogue stage and finally a tender stage. Following the selection stage, short-listed bidders will participate in the dialogue stage where they work with the contracting authority to develop their solutions. The dialogue stage may be undertaken in a single or multiple phases, depending on a number of factors. The dialogue stage may also be used to reduce the number of solutions / bidders by applying the award criteria. Dialogue will continue until a solution or solutions capable of meeting the contracting authority’s needs is identified. In the context of a development, the solution will typically include agreement on the technical, financial and contractual position. Following close of dialogue, bidders are invited to submit final tenders on the basis of the solution or solutions presented and specified in the dialogue and which must contain all of the elements required and necessary for the performance of the contract. Following submission of final tenders, the contracting authority may request tenders to be clarified, specified or optimised in accordance with rules set out in the Regulations. Once a preferred bidder is identified, the contracting authority may undertake negotiations with that preferred bidder to confirm financial commitments or other terms contained in the contract with such negotiations undertaken in accordance with the rules set out in the Regulations.
- 7.31. The approach to undertaking competitive dialogue under the previous regulations has historically been quite varied, and in quite a few cases, very resource intensive to the extent that the experience of developers from having undertaken competitive dialogue has created reservations about committing to one of these procedures. Of particular concern to developers has been the funding of legal costs for the drafting of the detailed contract documentation whilst still in a competitive position (at the dialogue stage). In relation to this particular issue, we are aware of a large number of developer procurement procedures where the contracting authority has taken a more principled based approach to the production of the legal documents – in effect developing draft heads of terms through to detailed heads of terms in dialogue with each bidder and then converting the detailed heads of terms to a development agreement with the preferred bidder, whilst maintaining the integrity of the principles that were tendered.
- 7.32. It should also be noted that in C&W’s experience it is possible to undertake competitive dialogue relatively efficiently, with good preparation and a clear strategy to efficiently execute the process.

## Other Procurement Frameworks

- 7.33. In addition to an OJEU compliant route there are other frameworks available which are also deemed compliant which include Homes England Dynamic Purchasing System and Pagabo Framework.

### HOMES ENGLAND DYNAMIC PURCHASING SYSTEM (DPS)

- 7.34. We have identified this as a potential delivery and procurement route, along with use of the Pagabo Framework.
- 7.35. This is a compliant framework, providing WMCA/SMBC with a large pool of developers to approach, and specifically designed to procure development partners. This can be a time saving option, as background checks have already been carried out, and standardised documents already agreed by the contractors and developers. The framework has recently been renewed, with the next iteration “going live” as of 1 September 2021. The DPS has a lifetime of 10 years, and will offer two categories of membership for small (20 – 70 dwellings) and large (over 70 dwellings) sized sites.

This option offers the ability to impart positive obligations on a development partner, which is relevant to the subject site.

- 7.36. This is a DPS procurement regulations compliant process to identify a preferred Delivery Partner that will deliver homes on a (unique) site, with specific requirements.
- 7.37. The Call for Competition process comprises of two stages:  
Stage 1: Expression of Interest (EOI)  
Stage 2: Tender Stage. This can be either Stage 2b or Stage 2a/2b tender process dependent upon the number of Bidders who positively responded to the EOI.
- 7.38. The EOI represents the first formal stage of the DPS 'Call for Competition' Process (in the DPS Agreement it is referenced as Stage 1 of the Call for Competition). The EOI exercise involves the local authority providing some high level information about the site opportunity to every DPS Member selected from the relevant category, geographical area and sub category. Developers then respond confirming whether they would be interested in bidding for this opportunity and answer a handful of Yes/No Questions. If they are not interested then we're also asking them to explain their reasons.
- 7.39. Whether the tender process involves a Stage 2b or a Stage 2a and Stage 2b process will be determined by the number of bidders who respond to the EOI. If you receive six (6) or fewer positive responses to the EOI, then you can use the Stage 2b process and undertake tender evaluation and clarification as a single process. If you receive more than 6 positive responses to the EOI, then you can use the Stage 2a and stage 2b process where bidders respond to the Initial Tender set of questions, which you evaluate/score. You must notify unsuccessful bidders and provide them with feedback. Once you have completed scoring then you invite the top 5 or 6 scoring bidders to complete the remainder of the ITT process.

#### PAGABO FRAMEWORK

- 7.40. Established in 2013, Pagabo is a framework provider that provides a range of EU compliant framework agreements that have been procured in line with the latest Public Contracts Regulations (2015) and Public Contracts Regulations (2006).
- 7.41. The majority of the frameworks run for a fixed term, and all frameworks are created following an OJEU compliant procurement procedure. This means that all suppliers are pre procured, and the framework can be accessed without the requirement for a further OJEU procurement process.
- 7.42. Pagabo provides 8 national frameworks that have been developed to meet public sector requirements. These include the following that are relevant in a development and construction context:
- Medium Works - Running until December 2022, can be used to commission a full range of building works, valued between £250k to £10m
  - Major Works - Running until April 2026, it is suitable for projects from £5m - £1bn or more
  - Dynamic Purchasing System - for a wide range of small works up to £1,000,000
  - Developer Led - Running until April 2026, the unique framework has nine lots covering various contract structures
  - Refit and Refurbishment - for all refurb and refit projects with budgets over £250k covering five value bands and 12 regions, and is operating until February 2023
- 7.43. The most appropriate framework to this opportunity would be the **Developer Led framework**. This runs until April 2026 and has 9 lots covering three different contract structures:

- Property Development via Joint Venture and Special Purpose Vehicle
- Long Income Lease and Lease Back
- Property Development Single Site/ Multi Site by Development Agreement

- 7.44. As stated above, the preferred option for Friar Park is a development agreement or contractual joint venture, and as such the latter option is the most relevant.
- 7.45. Suppliers can be appointed via a further competition or direct award, subject to the Council's internal business case.
- 7.46. For the further competition route, the ITT will be issued to all providers on the framework (there is no option to select bidders from the framework). Each framework has 9 suppliers, 6 of which are referred to as 'core' suppliers, and 3 are 'reserve' suppliers. A new further competition will be available to the first 6 suppliers, if one or more of the core suppliers do not participate, then the opportunity is opened up to the 'reserve' supplier list. This is to ensure healthy competition and to maintain a competitive edge to the procurement, without inviting too many bidders to make it less market attractive.
- 7.47. The frameworks are divided into 3 lots based on delivery mechanisms, development type and contract value (GDV). The following diagram illustrates the lots that include residential development as relevant to Friar Park (Source: Pagabo Developer Led Supplier Guide):

<b>Framework Lots</b>	
<b>Lot 1 Specials Purpose Vehicles</b>	
Lot 1a	– £0-£40m
Lot 1b	– £40m-£100m
Lot 1c	– £100m+
<b>Lot 2 Long Term Lease and Lease Back</b>	
Lot 2a	– £0-£40m
Lot 2b	– £40m-£100m
Lot 2c	– £100m+
<b>Lot 3 Single Site / Multi Site Programme Developments</b>	
Lot 3a	– £0-£20m
Lot 3b	– £20m-£40m
Lot 3c	– £40m+
<b>Lot 3 Developer Management Services (DMS)</b>	
Lot 3a DMS	– £0-£20m
Lot 3b DMS	– £20m-£40m
Lot 3c DMS	– £40m+

- 7.48. Lot 3 Single Site/ Multi Site Programme Developments is the relevant lot for Friar Park. The full list of suppliers is listed at Appendix A. The suppliers for the West Midlands Development Agreement contracts over a value of £40 million, which at this point we deem to be the appropriate lot, include:

**Core:**

1. Engie Regeneration
2. GRAHAM Cityheart
3. Henry Boot Developments
4. Morgan Sindell Consortium (includes Muse Developments)

5. Sir Robert McAlpine Capital Ventures
6. Wilmott Dixon

**Reserve:**

1. Bruntwood
2. VINCI UK Developments
3. Yondr Group

7.49. The Council can appoint a developer by Direct Award or via a Further Competition (Two Stage or Single Stage). The Further Competition includes the following key steps:

1. Council signs Client Access Agreement
2. Preparation of Expression of Interest – allows early engagement with the suppliers and can be used as a market testing step to test procurement route, project scope, form of contract, timescales, etc.
3. Further Competition – An FC will be issued to all interested developers within the relevant Lot, Region and Development Use. The Council will be able to access template contract forms, prepared by Freeths, or can use their own standard form of contract.
  - a. Single Stage – FC documents prepared and can include quality questions, a pre-construction programme, method statements, funding mechanisms, agreed fees, and fees for PCSA. These are then evaluated and the contract awarded on this basis without a further stage.
  - b. Two Stage – As per the single stage, FC documents are prepared. Following evaluation there is a second stage where the preferred developer is taken into the PCSA stage. This allows further negotiation and for the developer to further progress the design of the project, formulate a project cost, funding rates, and agree form of contract.

## 8. Procurement Options Analysis

- 8.1. This section provides an analysis of the available procurement options against the delivery objectives.

### OPEN

- 8.2. The Open procedure does not allow for an initial evaluation and potential short-listing of bidders, as part of a selection stage. Given the strategic importance of the project to WMCA/SMBC it is considered that a selection stage is required to ensure that short-listed bidders, who will potentially be required to undertake an extensive amount of work, will have demonstrated that they are appropriate from the outset. **Accordingly, we have not considered the Open procedure any further.**

### RESTRICTED

- 8.3. This, in theory, is one of the simplest and less resource intensive OJEU procurement procedures and consequently should also be attractive to the market. However, this procedure is not designed for complex projects that require negotiation and meaningful engagement during the procurement process. Given the attributes of a typical developer procurement process for a development project such as this, whereby developer engagement during the process is essential along with negotiation of issues such as the form of contract, it would be hard to envisage how this process could be used without creating a significant procurement challenge risk.
- 8.4. C&W are aware of examples where this process has been used for developments, but these have typically been for significantly less complex projects and it is the opinion of C&W that some of these projects may have included for a level of negotiation contrary to the procurement rules. **We have not considered the Restricted procedure any further.**

### COMPETITIVE PROCEDURE WITH NEGOTIATION

- 8.5. The Competitive procedure with negotiation provides the flexibility to structure the procurement process around the needs of complex procurement projects and in particular engagement with bidders to structure acceptable proposals around the requirements of the contracting authority.
- 8.6. On the basis that the subject site comprises predominantly a residential scheme and given that this process tends to be resource intensive for bidding parties, **we are not of the view that such a process is required, which is more suited to larger, more complex mixed-use schemes.**

### COMPETITIVE DIALOGUE

- 8.7. Competitive dialogue provides the flexibility to structure the procurement process around the needs of development procurement projects and in particular engagement with bidders to structure acceptable solutions around the requirements of the contracting authority.
- 8.8. Again, on the basis that the subject site comprises predominantly a residential scheme, and given that this process also tends to be resource intensive for bidding parties, **we are not of the view that such a process is required, which is more suited to larger, more complex mixed use schemes.**

### HOMES ENGLAND DYNAMIC PURCHASING SYSTEM (DPS)

- 8.9. We have identified this as a potential delivery and procurement route, along with use of the Pagabo Framework.
- 8.10. This is a compliant framework, providing WMCA/SMBC with a large pool of developers to approach, and specifically designed to procure development partners. This can be a time saving option, as background checks have already been carried out, and standardised documents already agreed by

the contractors and developers. The framework has recently been renewed, with the next iteration “going live” as of 1 September 2021. The DPS has a lifetime of 10 years, and will offer two categories of membership for small (20 – 70 dwellings) and large (over 70 dwellings) sized sites. This option offers the ability to impart positive obligations on a development partner, which is relevant to the subject site.

**8.11. It is considered that use of the Homes England DPS could be a suitable procurement route for Friar Park, given the nature and scale of the proposed scheme.**

**PAGABO**

8.12. Pagabo provides a pre-procured framework that is compliant with EU procurement regulations. There is no requirement for a further compliant procurement process. This has advantages in terms of timescales and cost of awarding a contract.

8.13. The key advantages of using the Pagabo framework include:

- **Speed** – The panel is already pre-procured, avoiding the need for a pre-qualifying ‘sifting’ stage, known as the Selection Questionnaire in a competitive dialogue process. Pagabo also advises that using the route outlined above, a developer can be secured within 8-10 weeks which is significantly sooner than a “new OJEU” process.
- **Cost** – There are cost savings associated with the shorter timescales, but there is a reduced level of detail and governance around using the Pagabo framework when compared with a “new OJEU” process. This will be more attractive to the market. However please note our comment below regarding being able to structure the FC stage to ensure an appropriate level of detail is obtained before preferred bidder stage.
- **Competition** – Through the Expression of Interest stage, the Council will be able to engage with suppliers to understand in advance whether they will be pursuing the opportunity. Pagabo state that they have a good relationship with the suppliers at the appropriate level. This reduces the risk of bidders de-selecting themselves partway through the process and promotes healthy competition.
- **Market attractiveness** – Suppliers have already been through a “new OJEU” compliant procedure to secure a place on the framework. A new process is considered by the market to be risky both in terms of cost and time. A route that avoids this will therefore be considered more attractive by the market.

8.14. The main disadvantage of the Pagabo framework is the limitation on the number of parties that are available to treat with. The FC will only be available to 6 core (and possibly 3 reserve) framework suppliers, that have been pre-procured and will be in place on the framework until the framework expires in April 2026. There will be no opportunity between now and then for new suppliers to join the list, which possibly restricts competition and the ability of new entrants.

8.15. It is worth noting that Homes England reorganised its developer panels, and now has implemented a ‘Dynamic Purchasing System’ that allows suppliers to join or leave at any point. Previously the Delivery Partner Panel (DPP3) provided one opportunity for suppliers when the panel was reviewed every four years. The new DPS will all opportunities to be marketed more widely to the whole market and be more flexible to accommodate market changes.

8.16. There appears to be a dominance of contractors on the framework, most likely due to the fact that the developer led framework is relatively new, and existing suppliers on other construction focused frameworks have an existing relationship with Pagabo and therefore found the process of securing a position as a supplier more straightforward than possibly a developer who is new to the process.

**8.17. However, having reviewed the nature of developers and contractors on the supplier list, it is the opinion of C&W that the developers listed for the West Midlands Lot 3c they are more**

**contractor based, suited to mixed-use developments, rather than solely residential developers.**

- 8.18. We would point out that the structure of the Further Competition stage needs to be such that an appropriate level of detail can be sought from suppliers whilst they are still in competition. Following a clarification meeting with Pagabo, we are generally satisfied that this will be possible.

## Conclusion

- 8.19. Following the above considerations, C&W is of the view that the use of the Homes England DPS, is most likely to provide an optimal and acceptable solution for this opportunity.
- 8.20. Of particular significance to the Homes England DPS framework is the number of developers which the opportunity will be available to. Furthermore, the nature of the Homes England DPS Framework allows suppliers to join or leave at any point, enabling developers who are not yet listed on the framework to still take part in the tendering process.
- 8.21. It is our view that the Council and WMCA can secure a developer with the right expertise, track record and financial strength through the Homes England DPS framework.
- 8.22. We recommend that WMCA/SMBC pursue the use of the Homes England DPS framework.**

## 9. Conclusion and Recommendation

### Delivery Mechanism

- 9.1. This report initially considered the most appropriate delivery mechanism against the delivery objectives for the Friar Park development opportunity.
- 9.2. Based on the analysis undertaken, in Sections 5 and 6 of this report, it concluded that WMCA/SMBC's delivery objectives are more likely to be achievable through the development agreement or corporate joint venture partnership route.
- 9.3. This approach means that WMCA/SMBC will procure a development partner with delivery arrangements governed by a development agreement (DA) between the parties. This contractual mechanism would be the method by which the project objectives are pursued, with no separate entity being created. The legal agreement would set out the project objectives and set out the roles, rights and obligations of the parties including responsibilities for carrying out development, land transfer, achieving appropriate planning consents, funding, financial arrangements, delivery programme and so on.
- 9.4. C&W recommends that this aspect is tested with the potential market under the market testing exercise in to either confirm or revise this market opinion.

### Procurement Procedure

- 9.5. Based on the above recommendation for the delivery mechanism, potential procurement procedures were also considered in Sections 7 and 8 of this report.
- 9.6. Based on the considerations and the likely delivery mechanism to be adopted, C&W is of the view that the use of the Homes England DPS, is most likely to provide an optimal and acceptable solution for this opportunity.
- 9.7. As the Delivery Partner DPS framework is to be used to procure housing-led development, it will include all activities necessary to construct housing and associated infrastructure, marketing and sales and transfer of freehold to eventual owners.

## 10. Next Steps

- 10.1. As far as next steps are concerned, within this document we have set out Delivery Objectives and Client Objectives, the precise wording of which will need to be refined and developed ahead of the procurement process.
- 10.2. This report has recommended a preferred delivery mechanism, and two recommended procurement procedures, which are also for discussion.
- 10.3. Subject to the above discussions, the approach to the procurement needs to be determined, particularly in terms of the project objectives; procurement stages; the requirements for each stage (from WMCA/SMBC and the Bidders); the programme; and the award criteria.
- 10.4. There are a number of risks inherent in the use of a competitive dialogue procedure, a key one being a lack of engagement by the market. This is mitigated through the use of the Homes England DPS framework that has an agreed list of suppliers, and engagement at the EOI stage will give early comfort as to their willingness to pursue the opportunity.
- 10.5. Cabinet approval will be required to obtain funding to move to the next stages of preparing the procurement documentation and starting the procurement process.

## Appendix A – Supplier List for Lot 3 Single/ Multi Site Programme Developments, West Midlands, Contract value £40 million plus

### Lot 3c Core - Contracts from £40m +

West Midlands

Core Supplier	Residential Single Unit	Student Accommodation / Multi Occupancy	Commercial Development, Shops, Offices etc	Transport Infrastructure, Car Parks etc.	Prisons, High Secure Buildings etc.	Education Buildings	Health Care Buildings	Care Homes, Extra Care etc	Mixed Use
ENGIE Regeneration	✓								
GRAHAM Cityheart	✓	✓	✓	✓	✓	✓	✓	✓	
HBD	✓	✓	✓	✓	✓	✓	✓	✓	✓
Kajima Gen&B			✓						
Morgan Sindall Consortium	✓	✓	✓	✓	✓	✓	✓	✓	✓
Prime									✓
Sr Robert McAlpine Capital Ventures	✓	✓	✓	✓	✓	✓	✓	✓	✓
VINCI UK Developments		✓		✓	✓	✓		✓	✓
Willmott Dixon	✓	✓	✓	✓	✓	✓	✓	✓	✓
Yandri Group							✓		

### Lot 3c Reserves - Contracts from £40m +

West Midlands

Reserve Supplier	Residential Single Unit	Student Accommodation / Multi Occupancy	Commercial Development, Shops, Offices etc	Transport Infrastructure, Car Parks etc.	Prisons, High Secure Buildings etc.	Education Buildings	Health Care Buildings	Care Homes, Extra Care etc	Mixed Use
Brunnwood	✓	✓	✓	✓		✓	✓	✓	
Capital & Centric Developments Ltd									✓
ENGIE Regeneration						✓		✓	✓
GRAHAM Cityheart									✓
Isis Property Developments		✓							
Kajima Gen&B				✓					
Kier Property Developments					✓		✓		
Prime				✓			✓		
VINCI UK Developments	✓		✓						
Yandri Group	✓	✓	✓			✓		✓	

