



**Executive**  
16<sup>th</sup> June 2008

**Report from the Director of  
Finance and Corporate Resources**

Wards Affected:  
None

**Authority to tender contract for insurance for Public  
Liability and Property Insurance**

Forward Plan Ref: F&CR-08/09-4

**1.0 Summary**

1.1 This report provides Members with an update on the case of *Risk Management Partners Ltd v London Borough of Brent* concerning participation in the London Authorities Mutual Ltd (LAML). It then explains the need for new Insurance arrangements for public liability and property, post 1 October 2008 and requests approval to invite tenders in respect of Insurance Services as required by Contract Standing Orders 88 and 89.

**2.0 Recommendations**

- 2.1 The Executive note the two judgments given in the case of *Risk Management Partners v London Borough of Brent* and the need for new insurance arrangements from 1<sup>st</sup> October 2008
- 2.2 The Executive to give approval to the pre - tender considerations and the criteria to be used to evaluate tenders for public liability and property insurance as set out in paragraph 5.1 of the report.
- 2.3 The Executive to give approval to officers to invite tenders for public liability and property insurance and evaluate them in accordance with the approved evaluation criteria referred to in 2.2 above.
- 2.4 The Executive to note the actions of officers in relation to the procurement of motor insurance from 1<sup>st</sup> April 2008, and endorse the decision to award a motor insurance contract for one year until 31 March 2009 to Zurich Municipal without following a tender process, for the reasons set out in paragraph 4.2 of the report.

### **3.0 Detail of case of Risk Management Partners v London Borough of Brent**

- 3.1 Members will recall that in the autumn of 2006, they received reports concerning a proposal to participate in the London Authorities Mutual Ltd (LAML), a mutual insurance company to be set up by a number of London boroughs. Local authority insurance premiums were perceived as high, with little competition in the market, and the mutual was proposed as able to offer insurance with lower premiums. The proposed mutual would be wholly owned by the participating local authorities, with a majority of directors drawn from the participants.
- 3.2 The issue of whether to participate in LAML came before the Executive on 11 October 2006 and 13 November 2006. At the October 2006 meeting, no final decision to participate in LAML was taken pending external legal advice. However it was agreed that a tender process would take place in respect of the insurance contracts in the event that Brent was not able to sign up to LAML. This tender process was duly commenced.
- 3.3 By the time of the November 2006, external legal advice had been taken from Leading Counsel. His advice addressed two main issues, firstly the Council's legal powers or *vires* to participate in LAML, and secondly the application of the EU public procurement regime to LAML and whether an exception to the usual European tendering rules was available to allow direct award of insurance contracts to LAML.
- 3.4 Counsel advised that the Council could rely on the well-being power under section 2 of the Local Government Act 2000, and also on section 111 of the Local Government Act 1972 (the power to do any thing which is calculated to facilitate or is conducive or is incidental to the discharge of other functions) to authorise participation in LAML.
- 3.5 Counsel also advised that the Council could award insurance contracts direct to LAML without LAML having participated in an EU-compliant tender exercise, due to the availability of the so-called *Teckal* derogation. This is an extension of the idea that no contract comes into existence if an authority carries out work in-house. The *Teckal* case decided that an authority cannot be awarding a contract (which would require tendering under the EU rules) where it is awarding a contract to a company so closely connected to itself that it is like an in-house department.
- 3.6 This legal advice was included in a report to Members for the November 2006 Executive. The Executive then agreed Brent's participation in LAML and agreed that the Council should purchase its liability, motor and property insurance through LAML from 1<sup>st</sup> April 2007 (assuming that LAML was ready to issue cover at that time).
- 3.6 In March 2007 it became clear that LAML would be ready to issue cover and the Council duly signed the requisite guarantees. In order to allow the

company to be capitalised to the levels required by the Financial Services Authority, the Council was also required to make a capitalisation payment, which was approved by the Chief Executive acting under his urgency powers. The Council duly took motor, liability and property insurance cover through LAML from 1<sup>st</sup> April 2007, having already discontinued the tender process described in paragraph 3.2 above.

- 3.7 Following the discontinuance of the tender process, one of the tenderers in that process, Risk Management Partners Ltd (“RMP”), brought two court claims:
- A claim for judicial review seeking an order that Brent’s participation in LAML was *ultra vires* or beyond its legal powers
  - A claim that, in abandoning the procurement process and awarding the insurance contracts to LAML (which did not participate in any procurement process) the Council was in breach of the EU public procurement legislation and that the *Teckal* derogation did not apply.
- 3.8 Following two court hearings, judgment was given on the *vires* claim on 22<sup>nd</sup> April 2008 and on the procurement claim on 16<sup>th</sup> May 2008. Both judgments were adverse to the Council.
- 3.9 On *vires*, the Judge ruled that Brent Council did not have the requisite power to participate in the establishment of LAML nor to become a Member or Participating Member of LAML nor to make a capital contribution to LAML nor to give a financial guarantee to LAML. The Judge ruled that the Council did not have power under section 111 of the Local Government Act 1972 to participate in LAML because it was stretching section 111 too far and that the establishment of the company was ‘incidental to the incidental’ and thus not permitted by section 111. Further, in relation to the section 2 power, then the Council had not in this case sufficiently made out its case to justify use of the section 2 powers ie it did not sufficiently satisfy itself that participating in LAML would promote or improve the economic well-being of the Council’s area. The Judge also said that the mere fact that joining in LAML would reduce insurance premiums did not necessarily mean that this would promote the economic well-being of the area.
- 3.10 On procurement, the *Teckal* derogation requires that a test is fulfilled, consisting of two parts, namely:
- (i) the public authority must exercise over the other contracting party a control which is similar to that which it exercises over its own departments; and
  - (ii) the other contracting party must carry out the essential part of its activity with the local authority or authorities which control it.

The Judge found that the arrangement between Brent and LAML did not satisfy the first condition of the *Teckal* exemption because he considered that the Council does not exercise sufficient control over LAML. The Court did not

make any ruling on whether this arrangement with LAML satisfied the second condition of the *Teckal* exemption.

- 3.12 Although leave to appeal has been granted, the adverse judgment on the *vires* claim has immediate effect. If the Council's participation in LAML is unlawful, then it cannot participate and is then not entitled under LAML's constitution to take insurance from it.

#### **4.0 Emergency Insurance Arrangements**

- 4.1 The Council's initial insurance arrangements with LAML expired on 31<sup>st</sup> March 2008, at which point judgment in the two RMP claims was still awaited.

- 4.2 In view of the fact that motor insurance is a legal requirement, a decision was taken in March by the Director of Finance and Corporate Resources to place motor insurance with Zurich. Zurich had in fact been the insurer for motor insurance for the previous year, as LAML had procured cover for Brent and others with Zurich through a tender process. Due to the urgency of ensuring cover, there was insufficient time to carry out a tender process. A one year contract was arranged as this is the standard for motor insurance. The value of this contract is £194,000. Although a contract of this value does not require Executive approval for award, Contract Standing Orders do require that a contract of this value is tendered. The Executive can grant an exemption to the requirement to tender (Standing Order 84(a)) where there are good operational and / or financial reasons for doing so, however there was insufficient time to do this for the motor insurance. Accordingly the Executive is now being requested to ratify the action taken and the decision not to follow a tender process, on the basis of there being good operational reasons for this action. This action was required because of the urgency of ensuring that the Council had motor insurance in place as required by the Road Traffic Acts.

- 4.3 For property insurance and liability insurance, this was arranged on a retrospective basis in April to commence on 1<sup>st</sup> April. In the exercise of his extreme urgency powers (under Part 4 of the London Borough of Brent Constitution, paragraph 2.3) the Chief Executive approved that a tender process need not be followed. Unlike the motor insurance, contracts of less than one year are more widely available for property and liability insurance and in order to justify relying on the urgency of the situation, 6 months cover was arranged with Zurich at a cost of £222,448.

- 4.4 As the insurance referred to in paragraph 4.3 will expire on 30<sup>th</sup> September 2008, the remainder of this report addresses the need for a tender exercise for new insurance arrangements from 1<sup>st</sup> October 2008. A tender exercise for motor insurance will follow later in the year for award from 1<sup>st</sup> April 2009.

#### **5 Proposed tender process for Public Liability and Property Insurance**

- 5.1 In accordance with Contract Standing Orders 89 and 90, pre-tender considerations have been set out below for the approval of the Executive.

Ref.	Requirement	Response																								
(i)	The nature of the service.	Insurance for Public Liability and Property Insurance Services																								
(ii)	The estimated value.	£ 600k for the initial 1 year period of the contract rising to £1.8m including the extension periods.																								
(iii)	The contract term.	1 year commencing 1 October 2008 with an option to extend up to a further 2 years on an annual basis.																								
(iv)	The tender procedure to be adopted.	Restricted (two-stage) Accelerated.																								
(v)	The procurement timetable.	<table border="1"> <thead> <tr> <th colspan="2"><b>Indicative dates are:</b></th> </tr> </thead> <tbody> <tr> <td>Adverts placed</td> <td>20 June 2008</td> </tr> <tr> <td>Expressions of interest returned</td> <td>4 July 2008</td> </tr> <tr> <td>Shortlist drawn up in accordance with the Council's approved criteria</td> <td>11 July 2008</td> </tr> <tr> <td>Invite to tender</td> <td>14 July 2008</td> </tr> <tr> <td>Deadline for tender submissions</td> <td>25 July 2008</td> </tr> <tr> <td>Panel evaluation and shortlist for interview</td> <td>1 August 2008</td> </tr> <tr> <td>Interviews and contract decision</td> <td>8 August 2008</td> </tr> <tr> <td>Report recommending Contract award circulated internally for comment</td> <td>12 August 2008</td> </tr> <tr> <td>Executive approval</td> <td>9 September 2008</td> </tr> <tr> <td>Expiry of Mandatory minimum 10 calendar day standstill period – notification issued to all tenderers and additional debriefing of unsuccessful tenderers</td> <td>22 September 2008</td> </tr> <tr> <td>Contract start date</td> <td>1 October 2008</td> </tr> </tbody> </table>	<b>Indicative dates are:</b>		Adverts placed	20 June 2008	Expressions of interest returned	4 July 2008	Shortlist drawn up in accordance with the Council's approved criteria	11 July 2008	Invite to tender	14 July 2008	Deadline for tender submissions	25 July 2008	Panel evaluation and shortlist for interview	1 August 2008	Interviews and contract decision	8 August 2008	Report recommending Contract award circulated internally for comment	12 August 2008	Executive approval	9 September 2008	Expiry of Mandatory minimum 10 calendar day standstill period – notification issued to all tenderers and additional debriefing of unsuccessful tenderers	22 September 2008	Contract start date	1 October 2008
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(vi)	The evaluation criteria and process.	Shortlists are to be drawn up in accordance with the Council's Contract Procurement and Management Guidelines namely the pre qualification questionnaire and thereby meeting the Council's financial standing requirements,																								

Ref.	Requirement	Response
		<p>technical capacity and technical expertise. The panel will evaluate the tenders against the following criteria:</p> <p>Price 50%</p> <p>Quality 50% (consisting of):</p> <ul style="list-style-type: none"> <li>• Ability to meet the specification</li> <li>• Customer Care</li> <li>• Breadth of Cover</li> <li>• Service Levels</li> </ul>
(vii)	Any business risks associated with entering the contract.	The council have by necessity had to exercise the urgency powers under the Public Contracts Regulations to accelerate the standard timetable for an EU tender following the restricted (two-stage) procedure.
(viii)	The Council's Best Value duties.	<p>To ensure that the Council obtains best value it is anticipated that the service will be split into 2 lots:</p> <p>Lot 1: Public Liability Lot 2: Property Insurance (including terrorism)</p> <p>This will allow more suppliers to apply for the opportunities thus ensuring that the council attains the best value for this service.</p>
(ix)	Any staffing implications, including TUPE and pensions.	None
(x)	The relevant financial, legal and other considerations.	See sections 6 and 7 below.

5.2 The Executive is asked to give its approval to these proposals as set out in the recommendations and in accordance with Standing Order 89.

## 6.0 Financial Implications

6.1 The Council's Contract Standing Orders state that contracts for supplies and services exceeding £500k or works contracts exceeding £1million shall be referred to the Executive for approval to invite tenders and in respect of other matters identified in Standing Order 90.

6.2 The estimated value of this service proposed to be tendered for one year is £600K rising to £1.8M for 3 years insurance cover.

- 6.3 It is anticipated that the cost of this contract will be funded from the internal Insurance Fund.
- 6.4 The cost of the motor insurance for 1 year for 2007/08 is £194,000. This rate is considered to be best value, as the rate is the same premium that was charged last year. Last year our insurance costs through LAML were reduced through the power of aggregation of requirements. Historically, the approach from the market place has been to substantially increase insurance premiums year on year.

## **7.0 Staffing Implications**

- 7.1 None

## **8.0 Legal Implications**

- 8.1 The comments of the Borough Solicitor in relation to the LAML case have been incorporated into the body of the report in section 3.
- 8.2 Section 5 of the report is recommending the approval of pre-tender considerations and the inviting of tenders for insurance cover for liability and property insurances. Once the tendering process is undertaken Officers will report back to the Executive in accordance with Contract Standing Orders, explaining the process undertaken in tendering the contracts and recommending award.
- 8.3 Such contracts are classified as services contracts under the Public Contracts Regulations 2006 ("the 2006 Regulations") which implement the EU public procurement regime into UK law. These contracts therefore need to be tendered in accordance with the full requirements of the 2006 Regulations.
- 8.4 However as the current contracts will expire on 30<sup>th</sup> September 2008, the Council needs to reduce the usual time periods set out in the 2006 Regulations both for inviting tenders and for the expression of interest stage. In circumstances of urgency, both these periods can be reduced to 10 days. The Council needs to use the accelerated timetable for the following reasons:
- The Council cannot be without insurance because the financial risk would be too great
  - The Council has a responsibility for public safety and having inadequate insurance provision could jeopardise that
  - There is only a short amount of time to go through the legal process
- 8.5 As this procurement is subject to the full application of the 2006 Regulations, the Council must observe the requirements of the mandatory minimum 10 calendar standstill period at the conclusion of the procurement process imposed by the 2006 Regulations before the contract can be awarded.
- 8.6 This report is also requesting that the Executive ratify action taken by officers in awarding a motor insurance contract, so ensuring that the Council had

cover pending judgment in the RMP case. Under Contract Standing Orders there is a requirement to follow a tender process for any contract exceeding £139,893 in value. Under paragraph 84(a) of Contract Standing Orders, the Executive can grant an exemption for good operational and/or financial reasons. Here the Council had to ensure that motor insurance was in place to fulfil its legal obligations, and so there was insufficient time to run a tender process. However there was also insufficient time to request that the Executive grant an exemption from tendering. The effect of the ratification (if approved) is that the action of officers is authorised from the date of the Executive decision to ratify.

- 8.7 In relation to both sets of interim/emergency arrangements described in section 4 of the report, the values of both these contracts would normally require the following of an EU tender process under the 2006 Regulations. However in circumstances of extreme urgency, it is permitted to award by negotiation, without following an EU-compliant tender process. The 2006 Regulations state that it is only possible to rely on this where the urgency is brought about by events not foreseeable by the local authority. There is therefore a slight risk of challenge here because it could be argued that it was foreseeable that the Council would not be able to continue to insure through LAML, depending upon the outcome of the court proceedings with RMP. However having no insurance cover, especially for the motor insurance and employer's liability insurance which the Council is legally required to have, is not an option and so it is considered that reliance on the extreme urgency provisions is justified.

## **9.0 Diversity Implications**

- 9.1 The proposals in this report have been subject to screening and officers believe that there are no diversity implications.

## **10.0 Staffing/Accommodation Implications (if appropriate)**

- 10.1 This service is currently provided by an external contractor and there are no implications for Council staff arising from retendering the contract.

## **11.0 Background Papers**

- 11.1 Two judgments in the case of RMP v London Borough of Brent

## **12.0 Contact Officer(s)**

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