



## Department for Communities and Local Government

### WEST MIDLANDS ERDF LOCAL MANAGEMENT COMMITTEE 2007-13

27 September 2012

#### Item 4: Consideration of Options for the West Midlands JESSICA (written procedure)

##### Objective(s)

- i To provide members with an update on the West Midlands JESSICA proposal and seek opinions on options going forward.

##### 1. Background

- 1.1 In July 2011 the LMC agreed to support a JESSICA proposal following confirmation that Birmingham City Council (BCC) had received cabinet approval to contribute £20m cash match, although this was on the understanding that the scheme would need to have secured full approval of ERDF and have a fund manager in place by the end of the calendar year.
- 1.2 At the September 2011 LMC it was agreed that an ERDF application could proceed, but at a reduced amount (c. £10m) as the schedule for the fund manager and full approval timetable had slipped into early 2012, thus it was felt that this amount represented a more realistic figure in view of the level of investment that could be made by the end of the Operational Programme.
- 1.3 BCC proposed to set up a special purpose vehicle for the JESSICA, which would be established as a limited partnership and run by a Fund Manager, with BCC being a General Partner.
- 1.4 BCC secured Outline endorsement from DCLG at the end of November and (at risk) launched an OJEU open tender process to select a Fund Manager
- 1.5 The Full application was approved by a cross department group (consisting of DCLG, BIS and Treasury) on 19 January 2012, and a draft funding agreement was subsequently issued to Birmingham City Council on 13 February 2012.
- 1.6 It was originally intended that Birmingham City Council would secure Cabinet approval of the funding agreement and partnership arrangements by the end of March 2012. However, approval was delayed until May, due in part to the Purdah period for local elections. Cabinet approval was secured, but it included some concerns over contract conditions relating to the legacy fund.
- 1.7 During June and July DCLG worked with BCC to finalise the main funding agreement document and subsequently agreed to a number of revisions to help address some of the concerns raised by their Cabinet
- 1.8 At the start of August, BCC circulated drafts of some of the key supporting documents for the funding agreement (General Partner Articles of Association, Limited Partnership Agreement and Fund Manager Agreement). Following an initial review of these documents by DCLG, concerns were raised that they did not reflect key Financial Engineering Instrument (FEI) requirements as set out in Chapter 15 of the ERDF User Manual and COCOF guidance. In particular, key conditions from the DCLG funding agreement had not been cascaded to the fund manager





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agreement and it appeared as if the winning consortium was attempting to renegotiate, which is outside the parameters of the open tender procedure.

- 1.9 In view of this, DCLG asked BCC to provide copies of the original tender pack and tender submissions from the winning consortium. A meeting was subsequently arranged with BCC and their legal team on 24 August to discuss these draft documents and the procurement process in more detail. BCC has sought legal advice and submitted a written response which they believe addresses DCLG's concerns over the procurement process. However, there are risks with accepting that view and the following options are presented for the Committee to consider:

## 2. Options for Consideration

### 2.1 **Option 1: Withdraw support for the project on the basis that the applicant has failed to provide sufficient evidence to meet audit concerns in respect of the procurement process.**

- 2.1.1 This option would leave the West Midlands as one of the only regions in England that did not have a JESSICA programme. This could have an impact on its ability to attract speculative developments, particularly outside Birmingham's CBD. However, it is acknowledged that the LEPs have launched initiatives such as the Growing Places Fund in the last year which operate across the West Midlands on a similar loan/equity basis as the JESSICA and are enabling stalled or speculative developments to proceed.

- 2.1.2 It would impact on N+2 spend targets and commitments as £10m is currently allocated to a JESSICA scheme. £5m was originally due to be drawn down in this calendar year and failure to do so could be the difference between the spend target being realised for 2012 year. Even if it was accepted that draw down would not be achieved in 2012 it still creates an issue of having to reallocate and commit £10m of funds before the end of 2013 – the deadline for new commitments

### 2.2 **Option 2: Agree to allow Birmingham City Council to undertake a full re-tender of the project using an OJEU Open Procedure.**

- 2.2.1 The minimum requirements for Open Procedure are 52 days for the tender plus 10 days stand still. Taken on the basis of working days, if launched on the 28<sup>th</sup> September, the tender would close on the 10<sup>th</sup> December and the standstill period would end on the 26<sup>th</sup> December. Provided that the Funding Agreement was entered into and all ancillary documents by the end of December, this would be similar to timescales that DCLG has agreed for the Yorkshire and Humberside JESSICA scheme, which has a longstop date of 31<sup>st</sup> December 2012 for the fund management agreement.

- 2.2.2 The main risk associated with this option is the very tight timescales which would not allow any opportunity for 'fine tuning'. The selected consortium would have to enter into a legally complete agreement with the Fund General Partner within 5 days of the end of the process. Birmingham City Council may also have to secure further approvals from their Cabinet.

- 2.2.3 However, there are no changes proposed to the scheme so all the key documents i.e. the funding agreement, the draft Limited Partnership Agreement, draft fund manager's agreement, investment guidelines and General partner structures could all form part of the tender notice with clear instructions given that no negotiation would be allowed.





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- 2.2.4 This option would remove any audit concerns and by placing an end of calendar year deadline would still provide an adequate timeframe to enable the reallocation of the £10m to other projects by the end of 2013.
- 2.3 **Option 3: Based on the legal advice that Birmingham City Council has received, allow the current open procedure to be discontinued and move to a negotiated procedure without issue of a new OJEU notice.**
- 2.3.1 West Midlands PDT's legal advisor believes that there is a significant risk in moving to a negotiated procedure as it could be found that BCC has negotiated the proposed agreement (issued in the Open Procedure) on substantially different terms. A DCLG review of existing documents indicates that the winning consortium has already tried to re-scope some key parts of the agreements.
- 2.3.2 The European Commission has previously raised concerns with UK authorities about the use of negotiated procedure in general. Article 16 auditors have also tended to take a strict view of procurement breaches
- 2.3.3 Birmingham City Council would have to proceed at their risk, but there would also be a risk to the WM Programme in terms of the error rates and subsequent suspension of the programme, should this approach be deemed by auditors to be non-compliant.

### 2.4 Views of the LMC sub-committee

- 2.4.1 There was general consensus that the JESSICA scheme was important to the region, and that Birmingham should be given an opportunity to move to a new open tender process (Option 2) albeit that it is made clear that there would be a longstop date of the end of December for procuring a fund manager and the sign off of the legal agreement, as it was felt any longer timeframe could jeopardise the ability of the West Midlands PDT to reallocate and commit these funds to other projects by the end of 2013.

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**Date:** 13 September 2012

