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Brighton & Hove City Council

Options Report for the delivery of responsive repairs services, planned maintenance and improvement programmes and large capital projects

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1 **Introduction**

1.1 This document has been produced by Trowers & Hamlins LLP and Savills (UK) Limited and has been prepared for use by Brighton & Hove City Council (**BHCC**) with the aim of providing further detail on each appraised option and supporting information.

1.2 This document seeks to be an overall guide to each Option detailed below, and seeks to explore the key elements of each option.

2 **Executive Summary**

In compiling this Report, we have explored all of the delivery options current in the market-place. No option has been discounted at this stage and we have endeavoured to set out all of the advantages and risks of each option.

It is recognised in this Report that it is unlikely that one option will provide a perfect "fit" with all of BHCC's re-procurement priorities and it is more likely that, going forward, BHCC will need to explore a mixed-market approach: adopting two, or maybe three, of the Options discussed below across its responsive and planned works programmes. The key element of success will be the implementation by BHCC of a strong clienting-function, enabling it to manage, monitor and direct whichever delivery Option(s) it selects.

Value for money is a key priority for BHCC and we have indicated the advantages and risks of each of the Options discussed below in this respect. The report is based on the assumption that the splitting of responsive from planned works into two discrete programmes of works will not undermine the achievement of value for money; this is due to the approach taken by bidders to the pricing and delivery of such works: responsive being undertaken primarily through direct labour, versus planned works being delivered through sub-contracts and supply-chain arrangements.

3 **Terms of Reference**

3.1 BHCC requires an options appraisal of potential suitable delivery models which best align with its aspirations for its mid- to long-term requirement for the delivery of its repairs and maintenance programme to its current and future homes.

3.2 The delivery of an efficient maintenance service to its stock is an essential part of BHCC's overall objectives. Our approach to this options appraisal is with the key aim of maintaining and building on the benefits BHCC has achieved through its current relationship with its outsourced contractor, whilst addressing the identified areas of concern and improving contract performance.

3.3 In compiling this options appraisal, we have had the benefit of a wide-ranging discussion held at BHCC's housing office on 20th February 2018, attended by Sharon Davies and Glyn Huelin of BHCC and a further discussion on 29th March 2018 at Hove Town Hall, attended by Sharon Davies, Glyn Huelin, Martin Reid and Monica Brooks of BHCC. As discussed at those sessions, we have considered the options against a consistent set of requirements, including:

(a) Increased contract/budget management;

(b) Increased control and oversight of the works instructed (via control of the call-centre and quality-control audit checks); and

(c) Attraction and commitment of the market-place; and

(d) Integration of a wide variety of work types that form part of the overall maintenance package, broadly those comprising a series of planned projects (planned works) and those comprising tasks ordered cyclically or responsively (responsive works).

3.4 Throughout this options appraisal, we have assumed the following as givens for any options considered:

(a) State Aid compliance (funding covenants etc); and

(b) Governance compliance (vires and regulation); and

(c) Legislative compliance (EU procurement, leaseholder consultation, tax, TUPE and pensions, etc); and

(d) Policy and regulatory compliance (efficiency drivers).

3.5 Each Option will need to be considered further in light of BHCC's aspirations concerning IT and communication systems required to manage resident and officer information, stock archetypes, location and future potential growth. We note on this point that BHCC is currently undertaking a significant IT procurement which will result in an updating of all its current IT systems and packages. This will mean that its current housing management IT package will change. The IT procurement is scheduled to finish in September 2019, with any identified solutions being put in place during 2020 and beyond.

3.6 Primary Options (each an **Option**) addressed are as follows:

1 Direct delivery of the services (**Option 1**); and

2 Outsourcing (**Option 2**); and

3 Wholly-Owned Subsidiary/Managed Service model (**Option 3**); and

4 Joint Venture company (**Option 4**)

3.7 Each Option needs to provide BHCC with flexibility and choice in its re-procurement Options in the long-run and be deliverable (eg procured and mobilised) by April 2020. We also note that, while the current contract covers both responsive and planned/major capital works, it is possible that the future delivery could split the responsive from the planned/major works.

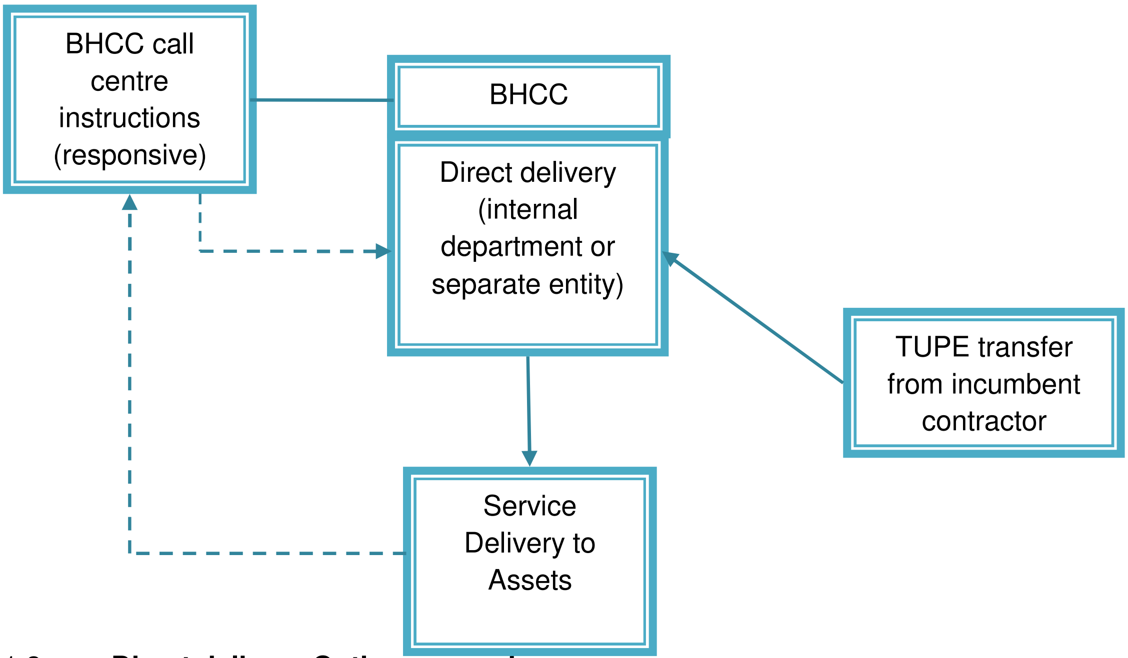
4 Option Appraisal

Noted below is each of the Options explored in this Report. We have set out a diagram showing the corporate/contractual/delivery structure of each Option and noted beneath each diagram the perceived advantages/concerns/issues for each Option.

4.1 Option 1: Direct delivery of services

Establishment of an entirely new direct works department or organisation (referred to as a **DLO**) to serve all of the responsive repairs needs of BHCC, or a significant part of those needs, through self-delivery, engaging second-tier supply-chain members (subcontractors/suppliers/sub-consultants) as required. For clarity we have assumed that this model will not involve the creation of a new legal entity.

4.1.1 Diagram



4.1.2 Direct delivery Option – overview

4.1.3 Key advantages

- Establishes DLO as a dedicated resource.
- Values of the DLO mirror those of BHCC.
- Mitigates risk of contractor default/insolvency through greater use of in-house resources.
- Saves contractor profit margin.

4.1.4 Variant Options

- DLO undertakes only limited work types (eg., responsive repairs only).
- Support DLO with EU procurement of insourced private sector expertise.

4.1.5 **Key concerns**

- Expense of setting up the DLO from scratch (see Section 12 for further information on current gaps and costs for establishing direct delivery service).

- Absence of contractor warranty of work.

- EU procurement of subcontractors/suppliers limits flexibility and supply-chain savings.

- Limited efficiency savings without commercial motivation of contractors.

- Limited commercial incentives/remedies of improved performance/ productivity.

4.1.6 **Additional Considerations**

- **Administration** – Opportunity for simple administration of ordering/payment, but complex administration of DLO itself.

- **Client controls over cost/time** - limited contractual controls at first tier level, so efficient cost/time management is wholly dependent on DLO management, including integration of multiple second-tier supply-chain members.

- **Financial/managerial commitments** – Significant direct investment required, particularly if establishing new "from scratch" (ie BHCC has not had an internal workforce before in relation to the wider repairs and maintenance works) and in resourcing this with appropriate management.

- **Budget management -** Significant demands on BHCC as regards all aspects of contract and budget management subject to obtaining external consultancy support, either permanently or during transitional process.

- **Flexibility –** Flexible redeployment of employees according to needs of BHCC, subject to employee rights and agreement of needs/priorities, but no flexibility to award work according to performance.

- **Improved Sustainability** - Limited opportunities to improve sustainability through re-engineering of contracts awarded, as subcontractors/suppliers/sub-consultants will need to be engaged direct by DLO under EU-compliant processes.

- **Opportunities to drive improved sustainability** dependent on internal management and through establishment of long-term relationships with second-tier supply-chain members.

- **Innovative/tried and tested** – Varied client experience of DLOs, heavily dependent on strength of DLO management. Potential for innovation in the structure of the DLO to integrate provision with any external contractors appointed for planned works. Potential for further innovation in the DLO second-tier supply constrained by need for series of EU procurement exercises.

- **Integration and consistency** – Requires integration of new management structure that will be required by BHCC and workforce inherited from current contractors, plus procurement of current DLO supply-chains.

- **Market response** – DLO Option means no engagement of first tier contractors. Second tier subcontractors/suppliers/sub-consultants will be accustomed to dealing with DLOs and should respond positively to appropriately packaged works and services. Potential for improved engagement with/increased responsiveness from some second-tier subcontractors/suppliers/sub-consultants to opportunities under long-term contracts.

- **Number of contractors** – No first tier contractors. Significant number of second-tier subcontractors/suppliers/sub-consultants.

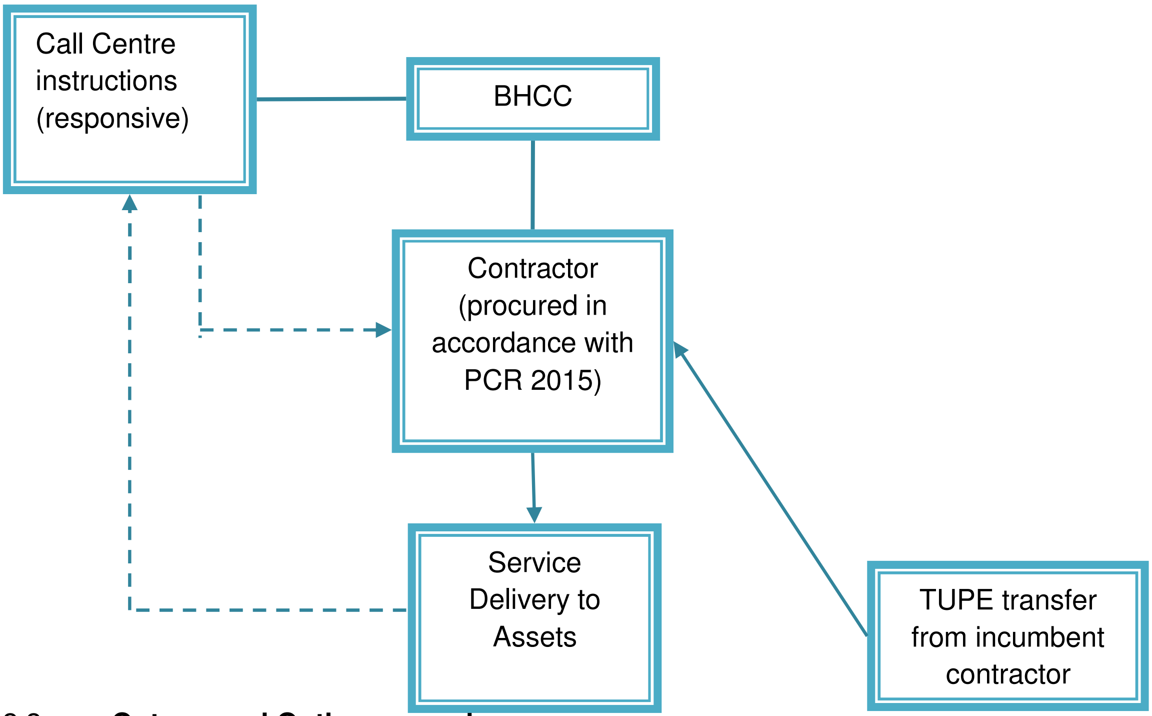
- **Responsibility for employees** – Full client responsibility for employees including those inherited from current contractors.

- **Warranty of work** – Partial warranty available only from second-tier supply-chain members, and therefore fragmented.

4.2 **Option 2: Outsourcing**

This Option involves the appointment of external contractors for the works under arms-length contracts, according to agreed scope as successors to the current contract. Variants on a theme would comprise a form of partnering contract or an amended form of standard contract to include partnering provisions or a more "traditional" form of standard term contract. The key differences between the partnering and traditional approaches are explained and discussed below and are highlighted in **Annex 3** (Comparison of standard forms of Term Contract).

4.2.1 **Diagram**



4.2.2 **Outsourced Option - overview**

- EU procurement of one, two or more contractors, divided on basis of scope (to be confirmed).
- All planned/cyclical/responsive works undertaken by contractors.
- Subcontractors/suppliers procured by contractors (non-EU) and reviewed/shared as appropriate.
- Current contractor staff TUPE transferred to new contractors.
- Potential co-operation of contractors through alliance with ability to award more/less work according to capacity/performance.
- Performance-based extension of contract.

4.2.3 **Key Advantages**

- Full contractor warranty of work ("single point responsibility").
- Commercial incentives for contractor to improve performance/ productivity.
- Commercial motivation and potential for supply-chain savings/ efficiencies – compatible with open-book pricing approach.
- Investment/commitment of contractors to large-scale contracts.

4.2.4 **Variant Options**

- Different contractors appointed for planned works and for cyclical/ responsive works.

- Potential later evolution to establish Joint Venture or to bring workforces into Wholly-Owned Subsidiary.

4.2.5 **Key Concerns**

- Alignment of contractor values with those of BHCC (eg profit versus performance).

- Capacity/capability of contractors to undertake large-scale contracts and deliver promises.

- Less direct influence over resident opportunities/achievement of added value.

4.2.6 **Additional Considerations:**

- **Administration** – Contract management will be required in respect of each external provider. The larger the numbers of contractors appointed, the greater the challenges for integrating management of their performance.

  Extent of contract administration will also depend on the cost model adopted. Administration of a schedule of rates or a full open-book approach is much more intensive than, for example, a price per property or annual price approach.

- **Client controls over cost/time** – The extent of the controls available to BHCC will depend on the contract type and duration. If contractors have invested in a long-term contract in line with BHCC's delivery model, then controls can be created through regular performance reviews and measurement of performance against clear targets. Thereby, there is a contractual incentive for contractors to improve performance and deliver agreed goals.

  Additional controls can be exercised through choice of particular types of contract and these are particularly prevalent in "partnering" type contracts (such as BHCC's current contract with Mears), for example those that require:

    - Programmed processes that BHCC can monitor over the duration of the contract.

    - Early warning of problems and reference to a core group of client attendance.

    - Advance evaluation of change.

    - Advance evaluation of risk management.
    - Transparency of prices.
    - Client access to second-tier supply-chain arrangements.
    - Alternative dispute resolution.

- **Financial/managerial commitments by BHCC** – There is no capital investment required in contracts with external contractors or delivery partners, nor any client management input to a vehicle through which the works are delivered. BHCC's commitment will be linked directly to the extent of contract management and the coordination and integration of the contracts awarded to different contractors according to work type.

- **Flexibility** – Flexibility can be achieved through capacity and performance-based reallocation of work and other contractual processes, for example under an alliance agreement signed by all contractors (eg planned and responsive).

- **Innovative/tried and tested** - Appointment of external contractors is a tried and tested approach with opportunities for innovation. The marketplace will expect to respond to this model, although it is arguable that contractors have become complacent as to their obligation to deliver promises made at tender stage.

- **Integration and consistency** – Whatever the number and range of contractors appointed, BHCC will have the opportunity to develop its own standard as the basis for procurement and to seek consistent specifications across new-build and existing homes. The extent to which there are variations from this standard to reflect the requirements of particular stock or other variable requirements will be a function of contract management. Management of these variables will be important so as to maintain the benefits of a common supply-chain across the appointed contractors and the economies that will come with the increased buying power that this creates.

- **Market response** – Contractors are familiar with mid- to long-term contracts and the responsibility they will assume on a long-term basis. They are sometimes not familiar with the requirement for programmed improvements over the life of a long-term contract, and the machinery necessary to drive this and maintain motivation will need to be carefully considered and communicated during the procurement exercise and the formulation of the relevant contracts.

- **Number of contractors** –The optimum number of contractors will attract maximum investment in/commitment to the Programme, while maintaining some element of ongoing competition to incentivise improved performance.

- **Responsibility for employees** – Under external delivery, the contractor will be wholly responsible for its employees, including those inherited from the outgoing contractors.

- **Tax**– we would expect that the VAT currently charged by the contractor is fully recoverable by BHCC if it falls within the following HMRC guidance: "providing domestic accommodation to people seeking housing (normally on a list maintained by the authority) or dispose of properties under the 'right to buy' legislation.... This is regardless of circumstances and whether they are acting under any special legal regime applicable to them".

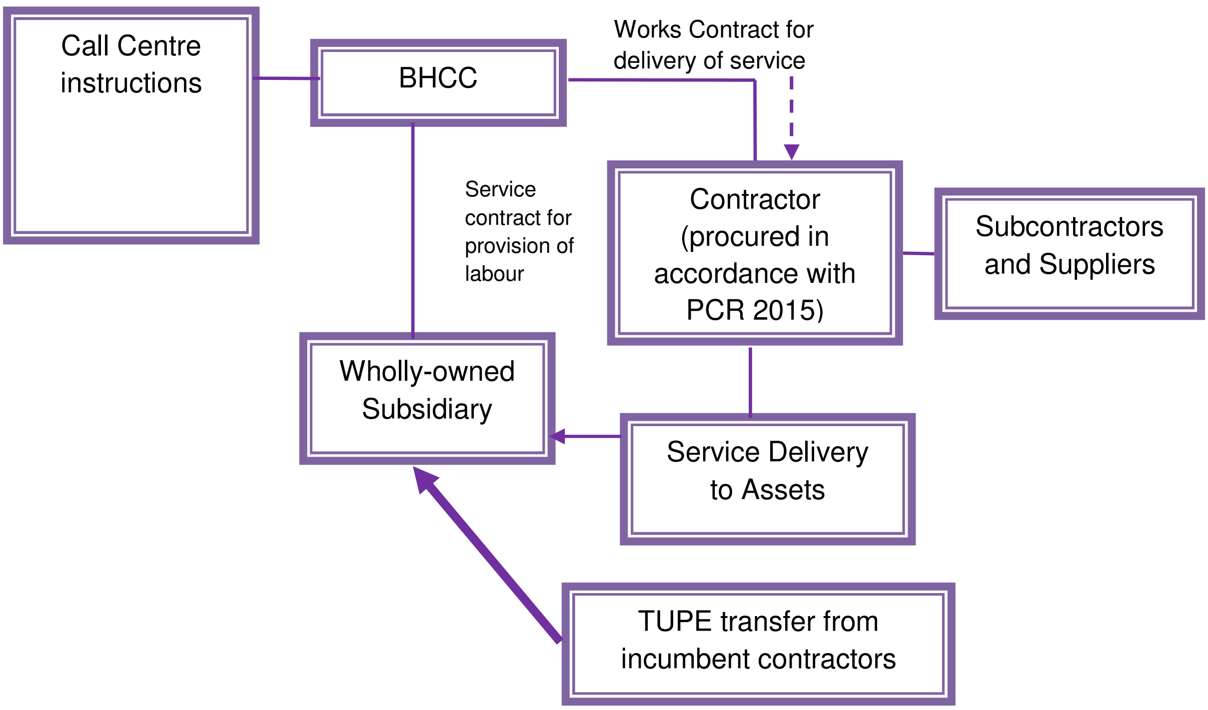
- **Warranty of work** – The strength of the contractor warranty will be dependent on the terms of the relevant contracts. This model does not involve any dilution of that warranty.

4.3 Option 3: Wholly-Owned Subsidiary (and Managed Service)

This is an innovative option where employees are engaged by BHCC but treated as part of contractor's supply-chain and managed by the contractor. This Option is established in the competitive market as a means to improve employee loyalty and client controls, to minimise impact of contractor insolvency and to preserve the contractor's warranty of the workforce (which is more limited under the Managed Service Option).

The key difference between the Wholly-Owned Subsidiary Model and the Managed Service model tends to be the limited contractor warranty and liability under the latter model: under the Managed Service Option, the contractor will not assume "single point responsibility" and will generally not be responsible for the productivity levels of the Subsidiary employees/cost overruns etc.

4.3.1 Diagram



4.3.2 Wholly-owned Subsidiary Option - overview

- Creation of Wholly-owned BHCC Subsidiary to provide workforce for all planned/cyclical/responsive works.
- Current contractor staff TUPE transferred to Wholly-owned Subsidiary.
- EU procurement of external contractor(s) to undertake all planned/cyclical/responsive works using Subsidiary workforce.
- Subcontractors/suppliers procured by contractors (non-EU) and reviewed/shared as appropriate.
- Performance-based award/extension of contracts.

4.3.3 Key Advantages

- Maintains full contractor warranty of work (NB: this would be diluted under the managed service model).
- Commercial incentive for contractors to improve performance/ productivity (again, this would be diluted under the managed service model).
- Mitigates risk of contractor default/insolvency by bringing workforce "into" BHCC.
- Commercial motivation and potential for supply-chain savings and efficiency savings (more limited under the managed service model).
- Investment/commitment of contractors to a large-scale contract.
- Scope to create resident opportunities through subcontractors/suppliers and direct influence over the same.

4.3.4 Variant Options

- More than one Wholly-owned Subsidiary for workforces of different work types (eg one for responsive repairs one for planned works).
- Wholly-owned Subsidiary only for cyclical/responsive workforce.

4.3.5 Key Concerns

- Alignment of contractor values with those of BHCC.
- HR responsibility for Subsidiary employees will require robust management and incentivisation.
- Capacity/capability of contractors to undertake large-scale contracts and deliver promises.

4.3.6 Additional Considerations

- **Client controls over cost/time** – Offers cost transparency as to employee costs, but need for clear contractor incentive to ensure productivity of Subsidiary employees.

- **Financial/managerial commitments** – Capital investment in Subsidiary should not be significant as it can share existing systems of BHCC (although note above regarding direct delivery and IT requirements). Need to align with BHCC's financial structure. Managerial commitment should also be relatively limited as Subsidiary does not involve shared management with private sector partner (as with the JV Model).

  Most significant BHCC resource will be from HR in managing the interface between Subsidiary responsibilities as "employer" and contractor responsibilities for operational management.

- **Flexibility** – Potential flexibility in redeployment of BHCC Subsidiary employees if contractor agrees to supplement workforce as required and/or take secondments for other purposes, subject to employee rights.

  Greater flexibility in event of contractor breach/insolvency as workforce remains within BHCC group.

- **Improved Sustainability** - Access via contractor to re-engineering of second-tier supply-chain to drive further savings/efficiencies and to address improvements in sustainability beyond those established at tender stage.

- **Innovative/tried and tested** - Previously seen as an innovative model but now accepted as a bona fide delivery Option in the current marketplace (although reduced number of contractors with demonstrated experience of this model). It addresses the risk of contractor insolvency, creates transparent structures that enable cost savings and preserves strong contractor warranty.

- **Integration and consistency** – Requires coordinated approach to integrate the workforces engaged by current contractors. More than one Subsidiary (eg one for planned and one for responsive) would impact on consistency (see below for "number of contractors").

- **Market response** – Will not be familiar to all contractors, but significant number of medium and major players are willing to adopt this approach. Extent of contractor commitment can be tested through procurement under Competitive Dialogue (NB. The Restricted Procedure is unlikely to be appropriate).

- **Number of contractors** – Subsidiary can serve more than one contractor, but would create tensions as to priorities in deployment of workforce and would need careful management.

Not advisable to create multiple Subsidiaries unless justified on delivery grounds (eg due to work splits).

- **Responsibility for employees** – Employees are engaged and paid by Subsidiary, but contractual arrangements can establish operational responsibilities of contractor that include a wide range of employee matters.

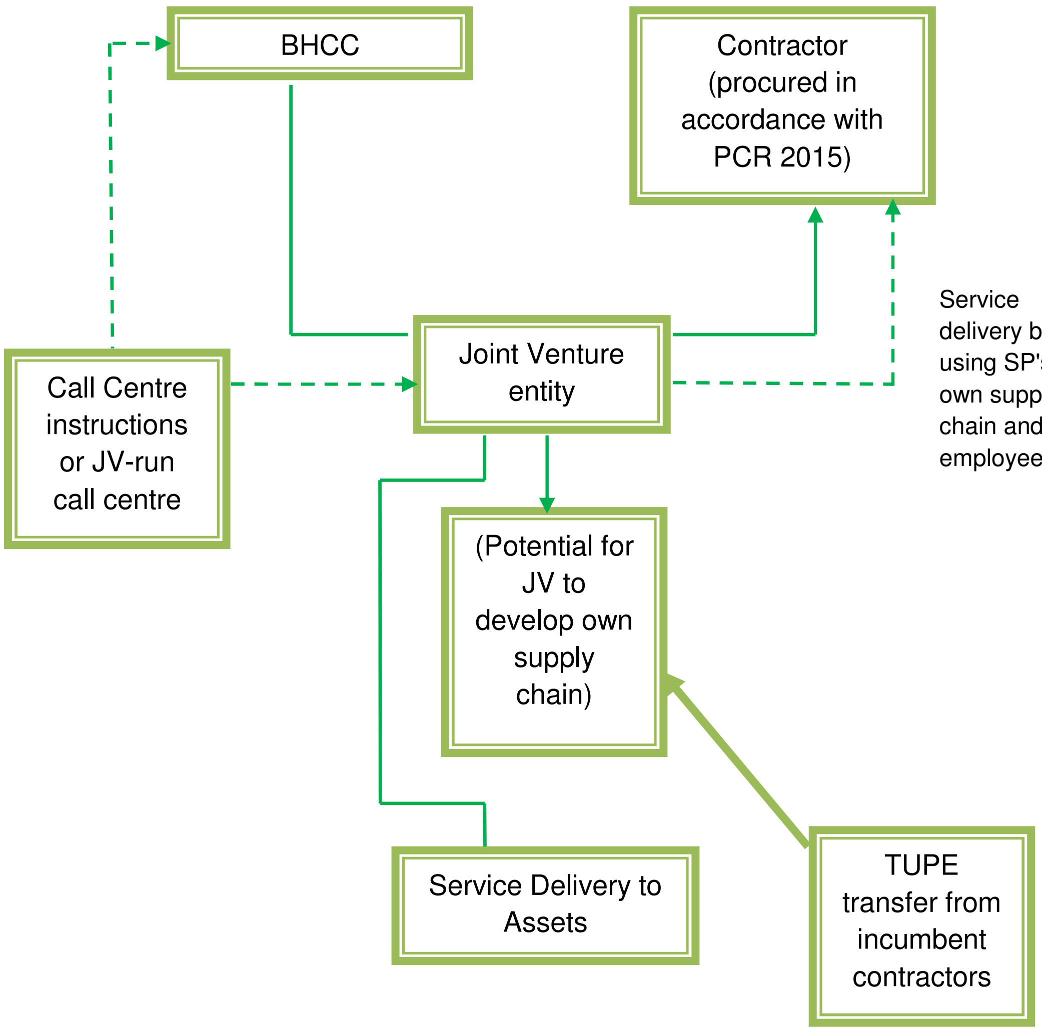
- **Tax** – the overall VAT position would be the same as under Option 2. There is the likelihood of some corporation tax payable as the Subsidiary would be deemed to receive an arm's length price for its services which would be subject to corporation tax. The Subsidiary may be able to claim mutual trading status which would mean no corporation tax is payable. If BHCC was leasing office space to the Subsidiary then we would expect that the Subsidiary would be able to claim SDLT group relief if it is a company limited by shares.

- **Warranty of work** – Contractor's administration of separate contracts between BHCC/Subsidiary would enable BHCC to expect contractor to preserve full warranty of work as if employees were part of its own supply-chain.

4.4 **Option 4: Joint Venture Option**

This is an innovative option whereby BHCC and its appointed contractor would jointly deliver works or certain resources through a jointly-owned entity. This Option is effective as a means to improve employee loyalty and client controls, to minimise impact of contractor insolvency and to preserve the contractor warranty of the workforce.

4.4.1 **Diagram**



4.4.2 **Option 4: Joint Venture Option - overview**

- EU procurement of private sector Joint Venture partner.
- All planned/cyclical/responsive works undertaken by Joint Venture.
- Current contractor staff TUPE transferred to Joint Venture.
- Performance-based award/extension of Joint Venture contract.

4.4.3 **Key Advantages**

- Aligns contractor values with those of BHCC.
- Commercial incentive for Joint Venture to improve performance/ productivity.
- Mitigates risk of contractor default/insolvency by bringing workforce and supply-chain into BHCC control (depending on shareholding of JV).
- Investment/commitment of contractor to Joint Venture.

- Opportunities for third party business.

4.4.4 **Variant Options**

- More than one Joint Venture reflecting different types of work awarded.

4.4.5 **Key Concerns**

- Mixed Joint Venture (BHCC and contractor) warranty of work.

- Management expertise/resource required for Joint Venture (by both BHCC and contractor).

- EU procurement of subcontractors/suppliers limits flexibility and supply-chain savings.

- Capacity/capability of contractor to undertake Joint Venture and deliver promises.

4.4.6 **Additional Considerations**

- **Administration** – Increased administration of the Joint venture entity, given BHCC's involvement in the ownership and management of the Joint Venture. In terms of contract administration: reduced client administration depends on the cost model. For example, price per property or maximum price per annum models significantly reduce client administration and can be integrated with the Joint Venture model, if contractor is willing to take responsibility for cost of Joint Venture employees.

- **Client controls over cost/time** – Cost transparency as to employee costs, but need for clear incentives as to employee productivity.

- **Financial/managerial commitments** – Capital investment in Joint Venture could be significant dependent on range of business to be undertaken. Managerial commitment could also be significant in view of shared management with private sector partner. Significant resource will be from HR in managing the interface between Joint Venture responsibilities as employer and contractor responsibilities for operational management.

- **Flexibility** – Potential flexibility in redeployment of Joint Venture employees if contractor agrees to supplement workforce as required and/or take secondments for other purposes, subject to employee rights. Greater flexibility in event of contractor breach/insolvency as workforce remains within the direction of BHCC (assuming a BHCC-led Joint Venture).

- **Improved Sustainability** - Access via contractor to re-engineering of second-tier supply-chain to drive further savings/efficiencies and to address improvements in sustainability beyond those established at tender stage (flexible over lifetime of contract).

- **Innovative/tried and tested** – An innovative model that is being refined to reflect offers emerging in the marketplace, addresses client concerns as to risk of contractor insolvency, creates transparent structures that enable cost savings and shared contractor warranty (in support of Joint Venture). Also enhances the opportunities for third party business.

- **Integration and consistency** – Joint Venture structure would operate across BHCC's stock to support consistent integrated approach.

- **Market response** – Will not be familiar to all contractors, but significant number of major players will be willing to adopt this approach. Extent of contractor commitment can be tested through procurement under Competitive Dialogue (NB: the Restricted Procedure would not be appropriate here).

- **Number of contractors** – Due to initial cost and investment, not advisable to create multiple Joint Ventures unless justified on commercial grounds, but is possible, if desired (eg if BHCC wanted separate JVs to cover .

- **Responsibility for employees** – Employees are engaged and paid by Joint Venture, but contractual arrangements can establish operational responsibilities of contractor that include a wide-range of employee matters.

- **Tax** – the tax position is the same as under Option 3 although there is no possibility of claiming mutual trader status and no possibility of claiming SDLT group relief if BHCC owns less than 75% of the shares of the Joint Venture.

- **Warranty of work** – Shared warranty of work by BHCC/contractor through Joint Venture.

4.5 Mixed-market economy

Given the mix of work to be procured by BHCC, it may be that it seeks to adopt a mixed-market economy and seeks to (for example) use a direct-delivery solution for the client function for the planned works (eg. strengthen the current client capability in-house so that BHCC can survey homes, scope planned works programme, compile a programme budget, consult tenants and leaseholders, establish and monitor value for money etc.) and/or for a portion of the repairs and maintenance works to be undertaken (eg on particular estates or in well-defined areas of the City), alongside an outsourced solution (either via Options 2, 3 or 4) for the remainder of the repairs and maintenance works and planned works. It should also be noted that framework agreements can be set up with one or many contractors, with the latter bringing the benefit of BHCC being able to move work around its framework contractors in the case of non-performance.

A mixed-market economy would allow BHCC to implement works-specific procurement solutions. It is unlikely that the achievement of an overall value for money solution would be undermined by adopting a mixed-market approach. Potentially, splitting out repairs and maintenance works from planned works could improve VFM if the planned work is properly programmed over a longer term, allowing economies of scale and efficiencies of delivery to be achieved. The relevant contractor marketplace will deliver and price those works accordingly and will not cross-subsidise (eg) the repairs and maintenance works (delivered via TUPE'd and directly employed staff) through the planned works (usually delivered via sub-contractors and arms-length supply-chains) at the point of tender.

5 Vires issues

This section of the report explores vires considerations for each of Options 3 (Wholly Owned Subsidiary/Managed Service models) and 4 (Joint Venture model), where either a company limited by guarantee or limited by shares will need to be considered. A full analysis of vires issues in relation to Options 3 and 4 is set out in **Annex 1** of this Report.

6 Tax position

6.1 As a general comment, the tax position is broadly comparable across all of the Options and therefore we would not expect tax to heavily influence which Option is chosen.

6.2 In relation to VAT, the VAT should be fully recoverable if it relates to the provision of domestic accommodation to people seeking housing (normally on a list maintained by the authority). Therefore, if that is the case, BHCC should be able to recover VAT charged by the contractor under Option 2, by the Subsidiary under Option 3 and by the joint venture company under Option 4. Under Option 3, the Subsidiary should be in a full VAT recovery position as should the joint venture company under Option 4 and so we would not expect VAT to be an absolute cost under any of the Options. If VAT is not fully recoverable by BHCC then the VAT cost will be broadly the same under each of the Options.

6.3 In relation to corporation tax under Option 3, we would not expect this to be a material cost which would prevent this Option from being implemented, but advise that some modelling should be undertaken. The Subsidiary would be deemed to receive an arm's length price for the services it provides to BHCC and this would form part of its taxable profit for corporation tax purposes. The Subsidiary would be able to deduct various costs in calculating its taxable profit (e.g. staff costs, any rent). The corporation tax rate is currently 19% (reducing to 17% from 1 April 2020). It may be possible to claim mutual trader status which means no corporation tax would be payable although this can be commercially restrictive and is unusual. It would be difficult if the Subsidiary was a company limited by shares. Therefore, we would advise that clearance from HMRC is sought before relying on mutual trader status being available.

6.4 In relation to corporation tax under Option 4 (Joint Venture), the position is the same as under Option 3 (WOS and Managed Service) although there would not be any possibility of claiming mutual trader status.

6.5 In relation to stamp duty land tax (**SDLT**) under Option 3, we would expect SDLT group relief to be available on any land transactions between BHCC and the Subsidiary (e.g. leasing warehouse space) if the Subsidiary was a company limited by shares (but not if it was a company limited by guarantee). It would also not be available under Option 4 if the joint venture company was less than 75% owned by BHCC.

6.6 Under Options 3 and 4, the Subsidiary (in the case of Option 3) and the joint venture company (in the case of Option 4) would have various tax compliance obligations. This would include filing corporation tax returns, VAT returns and PAYE returns.

7 HR/Employment issues arising

7.1 The existing repairs and maintenance service is delivered by one contractor. Whichever of the proposed Options is adopted, it is likely that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) will apply to those employees of the existing contractor where there is an organised team delivering those services and the employee are assigned to that group of employees whose principal purpose is the delivery of the services to BHCC.

7.2 Those employees who are subject to TUPE, and who do not object to transferring, will transfer to any BHCC direct labour entity (DLO), newly appointed contractor, wholly owned subsidiary or joint venture vehicle. The employees will transfer on their existing terms and conditions of employment, and with the benefit of all rights and obligations associated with their employment, other than in connection with an occupational pension scheme, except in certain circumstances where employees have membership of a public sector pension scheme. Changes to transferring employment terms will only be permissible in limited circumstances. The cost of transferring employment costs will be critical to the contract price that BHCC will need to pay to the new contractor. That new contractor will inherit all liabilities under the contract, whether known or not, and this risk will be priced for. In addition a tender may be predicated on changes being made to transferring terms, but if so it is likely that the associated risks of legal challenge would be factored into the price. For this reason although a private sector partner will be able to offer more competitive labour costs than BHCC itself could offer if it required to accept significant legal risk the savings may be less than expected. It is worth considering if there are indemnities from the existing contractors which could be relied upon by the new contractor which could help mitigate these risks and reduce costs. This may influence tender prices submitted during any tender process, or negotiated afterwards.

7.3 Depending upon the manner in which the current services are delivered, there may be circumstances in which TUPE does not strictly apply by operation of law, even though the employees of the existing contractors are engaged in delivering services for BHCC. This may arise if employees have been deployed over several contracts and this may also be relevant if more than one new contractor is appointed, when it may be possible to show that a service has fragmented so that it is impossible to map where any one employee's role has transferred to. This is unlikely to be relevant here however, unless within the leisure procurement a decision is taken to individually contract elements of the service.

7.4 There are restrictions imposed by TUPE on the ability of any new contractor, whether an outsourced third party or a wholly owned subsidiary/joint venture entity, to make changes to employees' terms and conditions or to dismiss employees by reason of a TUPE transfer. There is an exception in circumstances where there is an economic, technical or organisational (**ETO**) reason entailing a change in the numbers of function of the workforce. In the absence of such a reason, changes are likely to be unenforceable, and dismissals will be automatically unfair. Significantly the fact that current pay and benefits are not competitive in terms of the local market is not an ETO reason in most cases because there is no change to the numbers or functions of the workforce. A new contractor may be able to take on new staff on different terms and conditions but it is important to be wary of the savings which may be readily achievable in terms of transferring employees.

7.5 It should be noted that a new employer will also inherit trade union recognition and where there is both a recognised trade union and collective agreed terms incorporated into employees contracts, for example green/red book terms, there can be further hurdles to achieving any change of contract terms in light of the protection for collective agreements found in trade union legislation. Accordingly if a new contractor bases a tender on achieving significant employment cost savings it is appropriate to assess the feasibility of the legal and HR assumptions underpinning that tender, especially if it is the tender is based on risk sharing with BHCC.

7.6 If there is an ETO reason entailing a workforce change, or if changes are not by reason of the transfer, they may be implemented under normal principles. This would require employees either to have agreed to the new terms (but note comments above), or to have been dismissed and re-engaged. In the latter case, employees may be able to advance claims of unfair dismissal. (However, such a dismissal may trigger pension strain if the employee is over 55 and pensions costs must be considered). Any such claims may be capable of being defended if there is a legitimate business reason for the changes, and employees have been fully consulted with.

7.7 Furthermore, the full and fair consultation process which must be undertaken may include statutory obligations in relation to timing. If the proposals affect 20 or more employees within one establishment, collective consultation must begin at least 30 days before the first dismissal is to take effect; 45 days before if there are more than 100 affected employees. Consultation can now commence before transfer if certain conditions are met, but notice of dismissal must not be served until after transfer.

7.8 If employees transfer to a wholly owned subsidiary or joint venture entity (rather than an independent third party contractor), BHCC must be mindful of the potential for equal pay comparisons to be drawn between employees of BHCC and the new entity.

7.9 The law on equal pay is set out in the Equality Act 2010. A cross employer comparison is possible under the Equality Act if services are to be delivered by a wholly owned subsidiary if the employees are to be employed on the same terms and conditions (in a broad sense) to BHCC employees employed, quite likely if the employees transferred out of BHCC and terms and conditions have been preserved. In any event running in parallel to the UK Equal Pay Legal Framework is Article 157 of the Treaty on the Functioning of the European Union (formerly Article 141 of the EC Treaty) which has direct effect and which sets out the principle of equal pay for male and female workers if there is a single body is responsible for the inequality which can restore equal treatment. This is complex area and more detailed legal advice may be required but at this stage it is important to stress that there can be hurdles to achieving more market based terms and conditions of employment beyond simply TUPE. The law on equal pay is designed to prohibit differences in pay and benefits because of sex. If employees identify appropriate comparators, who are treated differently, it will necessary for the employer to advance a "genuine material factor" defence to an equal pay claim. Such a defence will need to demonstrate that the difference in pay is not by reason of the difference of sex, or, if the reason is tainted by discrimination, that it is objectively justified. Where differences in terms arise because of protection under TUPE, such a defence can ordinarily be advanced.

7.10 BHCC can manage the risk of an equal pay comparison arising out of the differences in terms and conditions between BHCC and any subsidiary by giving the subsidiary or JV vehicle complete authority (subject to complying with TUPE) to make decisions about its respective terms and conditions for their employees so that BHCC does not have the power to "rectify" any differences in terms should one arise. This will provide the basis for a defence to any claim arising out of a "single source" argument and ensure that any changes to terms and conditions are supported by a fully developed business case with reasons which are not gender or gender-related.

8 Pensions issues arising

Each of the Options will require BHCC to consider any pensions liability in relation to the employees engaged in providing the services. A full analysis of the pensions implications for each Option is set out in **Annex 2** of this Report.

9 Form of Delivery Contract

9.1 To deliver the proposed programme via an external contractor, BHCC has two main options in terms of the type of contract:

9.1.1 Term Contract: This would involve BHCC and the selected service provider entering into a form of term contract, probably based on one of the industry standard forms. Term Contracts can be entered into for an unlimited period of time, subject to BHCC being able to demonstrate best value and any other requirements of its standing orders or internal procurement policy; or

9.1.2 Framework Agreement: This would comprise BHCC and one or more selected service providers entering into a framework agreement, which would establish the terms and conditions and prices under which BHCC could award individual works contracts to a selected service provider during a 4 period. Framework Agreements need to contain details of how contracts could be awarded: this is usually by direct selection of the service provider who ranked 1st in the tender exercise to set up the Framework Agreement, or via re-opening competition to all service providers who are capable of performing the works. It would also need to contain the terms and conditions of any delivery contract entered into, and the service provider's tendered prices for delivering the works. Framework Agreements are limited under the Public Contracts Regulations 2015 to 4 years' duration, though it is possible to award contracts that extend beyond the four year term.

9.2 If BHCC chose to select a Framework Agreement for the repairs and maintenance works too, this would mean that Options 3 (Wholly Owned Subsidiary/Managed Service) and 4 (Joint Venture) would be difficult to achieve.

9.3 Regardless of the choice of Term Contract or Framework Agreement, it will be important for BHCC to ensure that the specifications and prices governing the responsive repairs can be called off by BHCC by way of a "*menu*" of specific works (i.e. that BHCC can instruct both the responsive and planned works by reference to quoted and agreed prices) rather than by a further iterative process necessary to develop the brief and price for each project/task/element of work. Where a term contract is used, if there is insufficient clarity in that contract as to the nature of the works and their prices, then the new contracts would be treated legally as framework agreements and potentially subject to a 4 year limit and/or a challenge in respect of any attempt to create a longer term contract.

9.4 Under outsourcing (Option 2) or in a Joint Venture (Option 4) or Wholly-owned Subsidiary (Option 3), the contractor will invest significantly in its relationship with BHCC. In Option 4, the contractor is likely to forego a significant proportion of its profit so as to satisfy the structural requirements. It will therefore be fundamental to the contractor to have a long-term relationship with BHCC and the duration of the contract and related break clauses should reflect this. Clearly, once the maximum duration of that contract has expired, BHCC will need to undertake a further regulated procurement exercise and the contractor/Joint Venture partner will be put back into competition.

9.5 To facilitate effective contract management and control, the contracts used to implement the responsive and planned works under any Option should include the features set out below. It should be noted that these features are primarily associated with a "partnered" approach to contracting, although all or any of these features could be added to more traditional approach or form of term contract. The suggested features are:

9.5.1 a mobilisation period under which the contract is awarded on a conditional basis while the selected contractor prepares its workforce and equipment so as to be ready to take over on a designated date from the outgoing contractor (this assists in TUPE/IT and other practical arrangements);

9.5.2 an open communication system with a "*core group*" of key individuals monitoring performance and troubleshooting problems, linked to an early warning system bringing issues to the notice of BHCC at the earliest opportunity;

9.5.3 clear and simple KPIs with systems for measuring/reviewing performance linked to incentivisation so as to reward improved performance such as cost savings, reduced time on site, reducing accidents, reduced defects and improved resident satisfaction (whether by extension of the contract term and/or by additional payment);

9.5.4 provisions for advance evaluation of change and exclusion of profit and overhead from any change claims so as to avoid misunderstandings and disputes;

9.5.5 provisions governing development of improved working practices so as to minimise BHCC's need to commit its own resources to the programme;

9.5.6 systems for non-adversarial problem-solving and dispute avoidance; and

9.5.7 A contractually binding timetable governing deadlines for both mobilisation activities and ongoing implementation of the Programme including measures to achieve improved processes.

9.6 Prior to any procurement process proceeding, we would recommend that BHCC identifies its preferred form of contract(s) for both the responsive and planned works. The selected form of contract will need to be set out to bidders as part of the procurement procedure and will need to be aligned with both the agreed specifications and the chosen cost model.

9.7 In **Annex 3** of this Report, we have enclosed a comparison of forms of contracts to provide BHCC with an overview of the features of the different suites of standard form contracts (adopting both a partnered and a traditional approach).

9.8 Once any form(s) of Term Contract have been adopted, BHCC staff will need to be fully trained in the selected forms in order to achieve a single approach to contract management, in-depth awareness of all the client controls provided by the contract and all of the processes set out in the documents, even if they are familiar with the selected form(s) in order to achieve a standardised approach to the relevant works. If Option 1 (Direct Delivery) is selected, we would recommend that the service level agreement also adopts the key features of the selected form(s) of contract (or the SLA is in the form of the contract itself) so that the client-side asset management team is dealing with all contractors on an identical basis.

10 ICT, call centres and data governance issues

10.1 General comments

10.1.1 ICT can broadly be split into a requirement to support three functions:

i Works ordering and completion: The systems to support the diagnosis and logging repairs, reporting of works, logging of work completions and processing of payments; and

ii Stock information: The systems to hold stock records and identify future work requirements and completions; and

iii Works management: The systems to support the logging of repair details, dynamic work scheduling, resource allocation, mobile working and progress updates, capture pricing information and invoicing.

10.1.2 In addition there is a requirement for systems to support HR and Finance needs. These are likely to be present within the existing client operation so we do not focus on these requirements in this Report.

10.1.3 Under Option 1 there will be a requirement for BHCC to have the ICT systems to support all three functions listed above. This is likely to result in a significant ICT investment if Option 1 is selected. We are aware that there is a project underway to replace the core housing ICT systems but it seems unlikely that this would cover the works management function at this stage. Consideration would need to be given to the extent to which the procurement of the new housing ICT system could provide the necessary works management functionality. Whilst such functionality is available in some core housing systems it does not always meet the full requirements of maintaining an efficient DLO.

10.1.4 In outsourced models the works management systems will be contractor-owned and typically the data and works ordering systems will be client owned. That said, there are a number of outsourced models where contractor systems are utilised, either in full or in part, to support these requirements. We understand that this is the case for the current BHCC contract.

10.1.5 For Option 3 (Wholly Owned Subsidiary/Managed Service) and 4 (Joint Venture) there is no typical approach and the use of ICT systems should be dependent upon finding the solution that best meets objectives. In any model where there is the involvement of an external contractor it is likely that that contractor will have ICT to support some or all of the functions identified above. The use of existing contractor systems can help to reduce mobilisation and overhead costs. However, care needs to be taken to ensure that the systems are fit for purpose and that BHCC has appropriate access. There also needs to be appropriate mitigation of the risks associated with losing access to the systems at the end of the term. There are a number of issues around data in third party systems and some of these are discussed further below.

10.1.6 In our experience, while contractors often have strong works management systems, the quality of systems for works ordering and stock data is more varied. Where stock data, and particularly stock condition data, is held externally the risks associated with a single party identifying work requirements and subsequently undertaking them are amplified. Where external works ordering systems are utilised there is a risk that social objectives, including digital inclusion and the ability to access services electronically, become more difficult to achieve.

10.1.7 Whatever the ownership of the ICT systems it is essential that BHCC maintains the ability to interrogate and extract appropriate data from them. This is discussed further in the data section below.

10.2 **Call Centres**

10.2.1 There are a number of options for the handling of calls. These include a client hosted generic call centre, a client-hosted repairs specific call centre, a contractor hosted call centre or a third party call centre. We understand that under BHCC's current arrangement the call centre function is managed by the contractor.

10.2.2 There are a number of advantages to such an arrangement. These include:

(a) Greater repairs specific skills and experience;

(b) Co-location with works planning and trades teams; and

(c) Better understanding of the contract requirements.

10.2.3 However, there are also a number of risks including:

(a) Focus on the contractor's commercial objectives;

(b) Resource conflict between multiple contracts;

(c) Failure to embrace the clients service ethos; and

(d) Inability to deal with wider customer requests.

In our experience, clients need to work very closely where there is an external contact centre in place in order to ensure that service meets the required standard. It therefore should not be assumed that an externalised call centre function is free from client involvement or management.

10.2.4 The use of a generic call centre to handle repair requests is common in the sector. The key advantages of such an approach are around cost and efficiency. Smaller providers in particular may find that a repairs specific call centre could not achieve critical mass. The risks associated with generic call centres centre around lack of specialist knowledge resulting in unnecessary or inaccurate repair requests. The impact of this can be additional cost or poor customer service. In our experience, generic call centres that successfully handle repairs requests are usually backed up by strong technical support. This can be delivered through a combination of access to skilled technical resource and appropriate ICT systems.

10.2.5 In our experience it is important that, regardless of which party takes responsibility for the contact centre, there is an element of co-location between the works planning functions and the call centre. Where there are no or ineffective relationships between call centre and works planning functions, the risk of misdiagnosis and missed appointments are increased. This can result in increased costs and reduced customer satisfaction.

10.3 **Data**

10.3.1 The data impact of ICT and call centre decisions need to be carefully evaluated. Whilst not the topic of this Report, it is also essential that BHCC meets its requirements in respect of data protection.

10.3.2 Where ICT or call centres are provided externally, the risk of clients losing visibility of key data is increased. In terms of repairs, information around work value, volume, content and type are important to enable the client to understand cost and service drivers and challenge efficiency. In addition it may be difficult for a client to competitively retender the service at the end of the term as they will not be able to give the market insight into the requirements.

10.3.3 In respect of planned works, information on work completions, warranties and certification is also vital. Where stock condition data is held externally it is critical that BHCC maintains access to this and can export the data to incorporate into an alternative system at the end of the term. In a scenario where stock condition data is held externally, it is particularly important that the risks associated with a single party identifying requirements and subsequently undertaking works are very carefully managed. We have seen examples where providers have effectively lost control of work requirements/programmes as a result of outsourcing without maintaining effective governance.

10.3.4 Wherever the data is held, BHCC needs to be able to validate and interrogate it. In our experience this is a common problem where data is held externally. There is a particular risk where data used to calculate performance indicators that measure contractor performance against the contract is held by the contractor. The risk is perhaps greatest where there are incentives linked to those performance indicators.

11 Section 20 (leaseholder consultation) issues

11.1 Leaseholder consultation is an area of risk for BHCC in assessing Options insofar as any Option neglects such consultation or risks leaseholder challenge, for example by reason of insufficient cost information at the point of contractor selection.

11.2 Section 20 of the Landlord & Tenant Act and the provisions of the Service Charges (Consultation Requirements) (England) Regulations (the **Service Charges Regulations**) relate to consultation of any tenant whose variable service charges are affected by the costs incurred under the proposed agreements. BHCC is already aware that if it wishes to recover variable service charges from those affected residents it will need to issue appropriate notices to leaseholders, any assured tenants whose variable service charges are affected by the works or services and any recognised tenants' association that represents any of those leaseholders or assured tenants.

11.3 Moving forward, if BHCC decides to split the responsive repairs and planned works between two different contracts, it may decide that it does not need to consult on the former contract, if it is not seeking to recover costs for those works via the variable service charge.

11.4 Given that any procurement undertaken by BHCC will likely:

i be procured by BHCC; and

ii be procured pursuant to the Regulations; and

iii be for an agreement for more than 12 months; and

iv have a value over the OJEU thresholds,

We expect that the form of consultation will be that prescribed by Schedule 2 of the Service Charges Regulations.

11.5 Schedule 2 avoids nominations of contractors by tenants (because the OJEU notice invites bids from any EU contractor) and allows the creation of a long term agreement ("Qualifying Long Term Agreements" (**QLTA**s)). The advantage of a QLTA is that the landlord does not have to provide more than one estimate for the costs of the works each time a new piece of work is carried out, because the price has been consulted upon at the time the agreement was entered into.

11.6 The Service Charges Regulations require that the initial service charges notice (the notice of intention to enter into a qualifying long term agreement) must be issued before the OJEU notice and this will need to be taken into account in the procurement programme.

12 Market Research and Peer Review

12.1 General comments

12.1.1 In this section we have considered how each of the Options identified at section 4 is being adopted in the sector. We have also provided some observations on the key opportunities and challenges facing organisations under each delivery model.

12.1.2 Based on our experience across the sector we would highlight a number of factors that are common to successful delivery regardless of the chosen delivery method:

(a) A strong client- in particular clearly defining and articulating requirements and performance management.

(b) Detailed understanding of future works requirements derived from up to date stock information.

(c) Effective packaging of works for efficient delivery.

(d) A forum for regular communication between key players who are empowered to make decisions to meet objectives.

12.1.3 Innovative work has been done in recent years to establish systems for clients and their contractors to work more closely with second-tier supply-chain members comprising suppliers, subcontractors and sub-consultants. Although the client has no direct contractual relationship with these organisations (unless, in practice, it has an "in-house" DLO performing its Programme rather than a DLO that is a subsidiary of the client), they are responsible for a great deal of the works delivered and related supplies/services and have direct contact with residents and a significant impact on resident satisfaction.

12.1.4 Second tier supply-chain members also have the capacity to develop more sustainable products and solutions, as well as to generate employment and training opportunities for residents and others in the local area of the client.

12.1.5 Accordingly, systems have been developed through engaging with contractors so as to "*re-engineer*" supply-chain relationships under open-book systems whereby the main contractor/subcontractor relationships are reviewed after the main contractor has been appointed so as to seek savings or additional efficiencies or other added value.

12.1.6 Opportunities for working more closely with the supply-chain can generate not only savings and improved efficiencies, but also significant community benefits by way of employment and training and also the nurturing and encouragement of SME businesses in the relevant region and this links in directly to increasing the social value outcomes for BHCC's residents, staff and stakeholders alike.

12.1.7 In our view social value objectives can be met effectively under any of the delivery models. In terms of adding social value we would note that clarity around aims and objectives and effectively targeting and monitoring outcomes are more important than the delivery model. That said, there is an argument that contractors in outsourced models have often failed to evidence delivery against social value commitments made at tender stage. Clearly the models where there is most direct control will allow the client the most control over meeting social value goals.

12.1.8 It is common to see different delivery models adopted for different work streams, particularly where the volume of work can support a split without impacting on operational delivery. A number of providers of a similar size to

BHCC are effectively delivering services through a range of approaches and can effectively demonstrate the value from each approach. Those considering a move away from an outsourced model are predominantly doing so for repairs and maintenance works. Outsourcing remains the predominant model for the delivery of planned/capital works.

12.1.9 The service could be procured on a basis that would allow the option to progress between delivery models. Typically the contract would commence under Option 2 (Outsourced) with the option to move to Options 3 (Wholly Owned Subsidiary/Managed Service) or 4 (Joint Venture) during the term.

12.1.10 The table below shows the high level cost centres associated with works procurement, mobilisation and delivery. While BHCC will ultimately bear all of the cost it is useful to note how the individual responsibilities vary between the delivery options. Also included is a range of typical set up costs for each model. In our experience set up costs vary greatly. The variation is primarily driven by the extent to which existing infrastructure can be utilised or adapted and the need to restructure the transferring workforce. The examples below are indicative and should be treated with caution at this early stage.

Activity/Cost centre	**1) Direct**	**2) Outsourced**	**3) Wholly Owned Subsidiary/ Managed Service**	**4) JV**
Restructuring	Client	Contractor	Client	JV
Premises Fit Out	Client	Contractor	Contractor/ Either	Either
Premises Rent	Client	Contractor	Contractor/ Either	Either
ICT	Client	Contractor	Contractor/ Either	Either
Vehicles	Client	Contractor	Either/Client	JV
Supply Chain Procurement and Management	Client	Contractor	Contractor/ Client	Either
Procurement and Mobilisation Consultancy (Legal, Technical, Marketing)	Client	Client	Client	Client/JV
Branding	Client	Contractor	Client	JV
Uniform	Client	Contractor	Either/Client	JV
Materials (van stock) & Plant	Client	Contractor	Contractor/ Client	JV
Insurance	Client	Contractor	Both/Client	JV

Staff- Direct	Client	Contractor	Client	JV
Staff- Management	Client	Contractor	Client/Contractor	JV
Staff/Services-Overhead	Client	Contractor	Both	JV
Typical Client Set Up Cost	£1m-1.5m	£100k-£200k	£250k-£500k	£500k-£1m

12.2 **Option 1**

12.2.1 The use of DLOs has grown within the sector over recent years, particularly amongst larger housing providers. Among housing associations, the potential VAT saving available on labour has been a key factor in decisions to establish a DLO. For BHCC this is unlikely to be a consideration as VAT should be largely or fully recoverable.

12.2.2 There are a number of other reasons supporting the establishment of a DLO and a number of our clients highlight the value from having directly employed staff (who consider themselves part of the organisation delivering the service) as the primary benefit. In addition mitigation of the risk of contractor default/insolvency is another common driver.

12.2.3 In our experience the DLOs that have mobilised efficiently in recent years have made appropriate investment in staff and infrastructure at the outset and have often adopted a phased approach to mobilisation.

12.2.4 Operating a DLO requires different skills than those typically found in many public sector contract management teams. Where these commercial management skills do not exist, it is common to see ineffective productivity and time management. This is one of the key risks associated with this model. In our experience it is not uncommon to see examples of delivery costs inflated by 20% to 30% in organisations that fail to manage cost and productivity appropriately. Maintaining effective productivity management is therefore a fundamental requirement for successful delivery under this model. Although staff transferring via TUPE should ensure that the new DLO is adequately resourced, the lack of infrastructure and experience places this option in a high risk category as far as performance is concerned.

12.2.5 Generally speaking only the most efficient and commercial of DLOs will deliver works at or below current market rates. Amongst the DLOs that do, it is not unusual to see a conflict develop between delivery of service benefits and managing productivity and cost. It is therefore essential that realistic priorities and targets are agreed at the outset.

12.2.6 Generally in-house teams incur higher overhead costs than an equivalent private sector contractor as they do not have the same opportunity to spread those costs over a number of contracts.

12.2.7 Establishing a supply chain for materials and sub-contractors will require a parallel procurement at the same time as establishing the new DLO and this can prove quite challenging.

12.2.8 Responsive repairs remain the most common work stream for delivery via a DLO. It is less common, although not unusual, to see capital works delivered through this route. A clear understanding of requirements is necessary in order to ensure that workflow is adequate to keep the workforce productive. Where there is limited understanding and no regular workflow the result is often increased non-productive time and cost.

12.2.9 If BHCC chose to establish a DLO to deliver repairs work then the delivery of the capital programme would still need to be procured. In our experience a concurrent mobilisation can place a strain on resources and increase the likelihood of the risks associated with poor mobilisation materialising.

12.2.10 A summary of the gaps that we typically see when a provider moves to a direct delivery model are below:

(a) Management staff - typically there is little or no experience of direct delivery management amongst existing teams and management staff do not always transfer.

(b) Delivery staff - again not all of the required resource may transfer. In addition the resource that does transfer may not fit future delivery plans.

(c) ICT - existing ICT systems rarely support direct works management effectively. In the case of BHCC this gap may be bigger as a result of some of the existing ICT being outsourced to the contractor.

(d) Supply chain - supplier and subcontractor arrangements are required and will need to be procured. An OJEU compliant process will likely be required.

(e) Premises - existing Council premises are unlikely to be able to support the direct works delivery.

(f) Vehicles and plant - these are unlikely to be in place and will need to be procured. An OJEU compliant process will likely be required.

(g) Processes and procedures - delivery processes and procedures (including risk assessments) will need to be developed. Whilst some may already be in place (for example lone working procedures) the majority are likely to need to be developed.

12.2.11 Owing to the extent of the existing infrastructure that could be used, it is difficult to establish the likely investment in mobilising a DLO with great accuracy at this stage. In our experience investment of between £1m and £1.5m are typical to effectively support the establishment of a medium size DLO. ICT investment is typically the largest cost item followed by external support (technical, procurement, legal, financial, marketing). Restructuring costs incurred following any transfer of staff from the incumbent Service Provider can also be a major cost item but is commonly the most variable.

12.3 **Option 2**

12.3.1 Outsourcing, through either partnering or traditional approaches, remains a very common and well understood approach. We continue to see a large volume of works procured and delivered in this way.

12.3.2 In our experience the client organisations that provide greatest clarity around requirements/objectives, and have clear and simple performance monitoring systems continue to get the best out of outsourced arrangements. In addition clear pricing frameworks and appropriate incentivisation are common ingredients of approaches that deliver value of money.

12.3.3 Where an ongoing element of competition is maintained in an outsourced agreement, this is typically a strength, and can effectively support the delivery of performance improvements and value for money. However care needs to be taken that any mechanism for ongoing competition does not adversely impact the contractor's ability to invest in the relationship and mobilisation.

12.3.4 We see a number of outsourced arrangements which suffer as a result of failure to adequately resource mobilisation. In our experience this risk is particularly acute in relation to responsive repairs delivery and the provision of appropriate ICT. It is therefore essential that there is clarity around requirements at tender stage and that the duration of the contract reflects the need for the initial investment. We often observe operations suffering as a result of underdeveloped infrastructure leading to strained relationships.

12.3.5 There remains a split in the sector over the extent to which opportunities are divided in to lots. Single service provider models are not uncommon and we have recently worked with a number of providers who have procured works and services on this basis. However, in recent years our experience is that medium to large providers have more often split responsive and planned works under the outsourced delivery model. The expenditure forecasts and size and geography of BHCC's housing stock indicates that a split into Lots would be viable.

12.3.6 Whilst not the only option (and we understand in the past BHCC has engaged more than one contractor to deliver responsive works across the city), typically a single contractor model would be quite appropriate for a responsive works contract of this size/geography. The volumes of work orders and scale of work naturally fit into a bracket that would appeal to both national and larger regional contractors, all of whom would be expected to have the right infrastructure to manage such a contract.

12.3.7 At an estimated £88.9 million over the first 5 years it appears that the volume of planned works would support a multi contractor approach. The opportunity could be split in to lots (by work type) and, where appropriate, more than one contractor could be appointed a lot. Multi contractor frameworks remain a common mechanism in the sector and have been used effectively to maintain competition and contractor performance whilst providing the Client with more flexibility than a term contract. Under this model, BHCC would need to ensure that the successful contractor(s) have an appropriate volume/term of work to invest appropriately in delivering the opportunity. Additionally, splitting works into specific lots that reflect the tenant/leaseholder mix can help ease leasehold consultation and aide recovery of costs.

12.4 **Option 3 (Wholly Owned Subsidiary/Managed Service)**

12.4.1 The Wholly Owned Subsidiary/Managed Service model is perhaps the least common of the approaches outlined in this Report. There is, however, a growing interest amongst providers. This is driven primarily by the potential tax benefits and mitigation of the risks associated with contractor default/insolvency. Whilst the tax benefits are unlikely to be a key issue for BHCC (given the likely ability to largely or fully recover VAT) the potential to achieve some of the benefits of having a DLO, without all of the infrastructure and commercial management requirements, can be particularly attractive. As a result of recent high profile contractor failures the potential to mitigate the risks associated with contractor insolvency is regularly cited as a key consideration.

12.4.2 The Managed Service model has been considered by a number of providers- typically either to strengthen the management of or expand an existing DLO or as part of ensuring that a newly established DLO has the appropriate commercial management skills. Its application in the sector has been limited which, in our view, is primarily due to concerns over fragmented ownership/responsibilities. The contractor managing the service will have more limited responsibility than they would have in an outsourced model and this may create additional risk for the client. However, the contractor managing the service can be incentivised to help manage risks around service delivery, quality and productivity/cost control.

12.4.3 There is a growing interest in the Wholly Owned Subsidiary model on the basis that it has the potential to mitigate some of the risks of the managed service model. This is because the contractor warranty can be more akin to the outsourced model and the contractor has more of an incentive to effectively manage productivity. A key concern includes the potential for conflict between the HR role in managing the employees in the subsidiary and the contractor role in operational management. Additionally, it is difficult for contractors to retain existing management teams for their own projects with considerable movement of staff between contractors in recent years, let alone employ good teams to manage these types of model that offer only a limited return from the contractor's perspective.

12.4.4 Whilst a lack of familiarity may limit market response there are no obvious barriers to suggest that contractors would be unwilling to adopt the approach. There are however, only a limited number of contractors experienced in these models which in itself creates a risk for any provider and potentially reduces the scope of any procurement exercise. We are only aware of only one contractor currently marketing/operating under the Managed Service model.

12.5 **Option 4 (Joint Venture)**

12.5.1 The establishment of joint ventures to deliver day to day maintenance and major repairs has become more common since BHCC last procured the service. Notwithstanding this, there have been numerous instances in the last 2 years of relatively long standing JV's being disbanded and services brought in house (as per Option 1 above).

12.5.2 The primary drivers for housing providers choosing this approach is the potential VAT saving and increased control. The JV option can allow these to be achieved whilst retaining the commercial management strengths of a contractor. That said we have seen a number of JVs where the RP has failed to achieve the control, cost or service benefits they desired. The challenges of partner selection and maintaining appropriate management of the partnership should not be underestimated.

12.5.3 JVs with contractors can be an effective way to achieve many of the benefits of establishing an in-house function. Key advantages over the establishment of a DLO include lower setup costs as a result of being able to leverage the partner's delivery infrastructure, and the commercial and operational management skills that come from the contractor. That said, it is our experience that initial investment will be required to mobilise an effective service. Failure to invest at the outset, or reliance on contractor infrastructure that is not suitable, presents a risk to successful operation.

12.5.4 In our experience, a key success factor is a client that is active in the management of the JV. It is too easy to play a relatively 'hands-off' role thus effectively giving control to the contractor partner. In addition, clarity about objectives, the agreeing of commercial incentives for the partners, and an appropriate governance structure are all critical to JV successful models.

12.5.5 There may be a smaller number of potential JV partners than there would be bidders for a traditional outsourced arrangement. This is often as result of perceived complexity and resource issues. It is therefore typical for larger contractors to be the primary players in this space.

13 **Procurement and mobilisation recommendations**

13.1 The successful re-procurement of the contract will depend upon many factors, one of the most important being the comprehensive scoping and packaging of the works such that the market is clear about BHCC's requirements and is able to accommodate these within the tender submissions.

13.2 Our understanding of the current contract is that the response, void and cyclical aspects are delivered to high levels of customer satisfaction and are cost effective when analysed through the latest Housemark 2017 benchmark report. This side of the contract is delivered via the Nat Fed Schedule of rates and overall, costs are very competitive when compared against current tender levels. Notwithstanding this, the number of repairs per property is less than benchmark yet the expenditure proposed on capital planned works is higher than our expectations when compared to other social landlords (bearing in mind the extensive investment over the last 10 years). There is a possibility that the revenue pricing does not fully reflect the cost of service delivery and is partly subsidised by planned works.

13.3 The planned works are split between planned preventative maintenance and large scale major capital works. The former operates under bespoke composite rates for specific work items whilst the latter operates under a 'cost +' arrangement whereby Mears invite tenders from selected sub-contractors for all packages of the programme and subsequently manage the delivery, charging their agreed overhead and profit levy. This cost is then established as an Agreed Maximum Price. The capital works programme does not appear to operate as effectively as the revenue works and struggles to demonstrate value for money. There are high charges levied on leaseholders, which in some cases are as much as £30-40,000 with some cases at tribunal. Consideration of the type of cost model for the new contracts is vital to ensure that appropriate leaseholder cost recovery can be achieved.

13.4 Whilst a number of Local Authorities (LB Hammersmith and Fulham, Slough Borough Council) have recently procured all inclusive 'asset management' type contracts covering revenue and capital work similar to the current contract, we believe that this type of contract structure is unlikely to be suitable for BHCC going forward. The most common arrangement within the social housing sector splits revenue and capital work (as discussed in paragraph 4.5 and Section 12 above) and due to the respective volumes of work in these 2 categories, this is likely to deliver best value for BHCC whilst reducing its risk exposure.

13.5 The volume of capital work is extensive at £88.9 million (based on BHCC figures and subject to review) over the next 5 years and by careful packaging to suit market capabilities and capacity, we believe BHCC will be able to satisfy all its social and economic agenda requirements whilst also delivering better value for BHCC and leaseholders. To achieve this however, we recommend that a full investment plan is developed and used to inform construction of a new pricing model rather than a repeat of the existing.

13.6 The R&M (revenue) work would therefore form a separate procurement and there needs to be clarity over whether this would be the same as the current contract or also incorporate gas servicing and other cyclical maintenance works. Additionally, there will be a requirement for much greater digital inclusion in the new contract. Further consideration of this is required.

13.7 This will also be influenced by the delivery route chosen by BHCC. If an outsourced model is preferred, then it is possible to include all work requirements, either in one package (with single service provider) or a small number of providers that are simultaneously put out to tender (depending on specialisms). However, if an in-sourced solution is adopted, the full scope of the service delivered by the new DLO will need to be carefully considered and reflect the capability of the new organisation. Work sitting outside this capability will need to be outsourced through a tender until such time that it is capable of being delivered by the DLO. This applies to whichever DLO model is chosen – fully in-sourced, WOS or Managed Service.

13.8 Clear scoping of the procurement requirement is therefore essential before the actual process can even be determined. Based on our experience, this is likely to take about 3-4 months to achieve for the planned works, although will be dependent on the extent of consultation adopted with tenants, leaseholders, elected members and officers. However, clear scoping in advance requires robust data and will place greater programming responsibility on the client team. In order to achieve this, we believe significant enhancement of current stock condition information is needed . For the R&M works, scoping the level of service delivery is more based on consulting and agreeing with members, residents, officers as to the agreed levels of service and could potentially be achieved in 2 months.

13.9 While it is possible to prepare some tender documentation in parallel, full documentation including pricing model will likely take a further 2 months to develop. The current BHCC Project Plan reflects the embryonic stage that the re-procurement project is at and is hence quite generic and high level. As the procurement model is further developed and refined, the Project Plan will need to be updated to reflect the agreed approach and the fact that there may be multiple and parallel timescales.

13.10 For the R&M contract it is imperative that the start date is 1st April 2020. The current project plan allows for successful contractor notification in late July 2019 which provides 8 months for mobilisation and this ought to be sufficient assuming a more traditional or partnered contract is adopted. This period would even facilitate a short competitive dialogue tender process as described elsewhere in this report as a shorter mobilisation period could form part of the dialogue. We believe that there are some advantages to this procurement route compared to the restricted procedure. This outsourced model would require the new contractor to bring a fully operational IT platform that would be up and running from day one, irrespective of BHCC's IT project, with IT integration between the 2 systems taking place at a time that suits BHCC's new IT platform.

13.11 For the planned/capital works, we consider that the pre tender phase is therefore likely to require an additional 1-2 months with a consequential extension of the tender timetable, assuming the restricted procedure as outlined. Whilst this has a knock-on effect to the actual contractor appointment date and start of the mobilisation phase, we believe BHCC still has sufficient time to plan and implement the contract mobilisation for planned works between September 2019 and contract start in April 2020 (in our experience, 3-4 months is usually adequate). It is also accepted practice that the first years planned capital works is at a reduced volume to allow for new processes and procedures to get established and trialled.

13.12 However, the current project plan does not reflect the alternative procurement solutions. Whilst a managed service/WOS or JV solution could most probably be delivered in a similar timeframe, establishing an in-house DLO would require a different approach. Under this scenario, none of the labour will be available until the TUPE process has been completed and the current contract ends – day 1 of the new contract. In the meantime, BHCC would need to undertake the following headline activities:

13.12.1 Establish a fully operational IT platform for repairs and compliance, including call centre.

13.12.2 Develop all operational processes and procedures

13.12.3 Establish the contract admin regime, HR/employment etc

13.12.4 Establish a performance management regime

13.12.5 Procure all sub contractors and materials suppliers – OJEU compliant

13.12.6 Recruit a management team assuming they do not all transfer from Mears.

13.12.7 Arrange transport and all accommodation – depending on current arrangements

13.13 BHCC has experienced a number of challenges in managing the existing contract. The initial TUPE involved transfer of most of BHCC's in house technical and professional resource to Mears. This was common practice at the time but places extreme reliance and trust on the contractor to deliver without interference by the client. Over time this trust can break and the current situation is that there is mistrust between Mears and BHCC such that BHCC has employed additional staff to check work carried out by Mears, albeit still at a relatively modest level compared to most of our other projects.

13.14 This means that BHCC has a limited technical and professional resource available to have an involvement in the procurement and implementation of these new contracts. The mobilisation phase of any new contract is absolutely vital to its successful operation and it is preferable to be over resourced rather than under-resourced and BHCC will need to engage additional resource to deliver this. An example partnering timetable, including typical mobilisation and ongoing contract management tasks, is included for reference at **Annex 4**.

13.15 Whichever Option is chosen, BHCC will need to establish a fully resourced client team to manage both revenue and capital works. The size of the team will need to reflect the final contractor combination and will also differ between the various procurement models. In the case of setting up a DLO, the staff will TUPE back to BHCC and therefore provide an instant resource, albeit not potentially the right resource to meet BHCC's new requirements. For any of the managed solutions, the additional resource will need to reflect the extent of client engagement in managing the contracts and degree of trust placed in the managing party.

13.16 Option 2 (outsourced model) will require BHCC setting up a full client team to project manage the contracts which will need to again reflect the final contractor combinations and work scope. However, each of these scenarios requires further detailed consideration and development of a resource plan.

13.17 In **Annex 5**, we have set out a summary of the Restricted Procedure and Competitive Dialogue Procedure, which we consider would be the two most suitable procedures under the Public Contracts Regulations 2015 to use in a reprocurement exercise.

14 Disclaimer and contact details

14.1 This options appraisal Report has been prepared by Trowers & Hamlins LLP and Savills (UK) Limited for Brighton and Hove City Council for the purpose of considering procurement options for the delivery of BHCC's responsive repairs services, planned maintenance and improvement programmes and large capital projects. No liability is intended or should be inferred to any third parties or for any other purpose.

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Trowers & Hamlins LLP/Savills (UK) Limited
19th April 2018

Annex 1

Vires considerations

1 **Option 3 - Powers to establish 'NewCo'**

1.1 **Legislative regime**

1.1.1 Section 1 of the Localism Act 2011 (the **2011 Act**) provides local authorities with the power to do anything an individual may do, subject to a number of limitations. This is referred to as the general power of competence. BHCC may exercise the "general power of competence" for its own purpose, for a commercial purpose and/or for the benefit of others.

1.1.2 In exercising this power, BHCC is still subject to its general duties (such as the fiduciary duties it owes to its rate and local tax payers) and to the public law requirements to exercise the general power of competence for a proper purpose.

1.1.3 Section 2 of the 2011 Act limits the exercise of the general power of competence where it "overlaps" with a power which pre-dates it. This includes BHCC's trading powers under Section 95 of the Local Government Act 2003 (the **2003 Act**). When BHCC relies on the general power of competence and/or the power in Section 95 of the 2003 Act to trade, it is prudent for it to comply with the requirements and limitations to which Section 95 is subject. These are set out in Regulation 2 of the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 (the **2009 Order**) which effectively requires a business case to be prepared and approved by BHCC before a company starts trading.

1.1.4 Section 4 of the 2011 Act requires that where BHCC exercises/uses the general power of competence, then if it does so for a commercial purpose it must do this through a company.

1.1.5 It is our view therefore that BHCC can, subject to the matters referred to below rely upon the general power of competence to form a Wholly-owned Subsidiary for the purpose of it operating a business to provide the proposed planned and responsive works and repairs and maintenance services.

1.2 **Powers to trade**

1.2.1 As stated above, Section 95 of the 2003 Act gives BHCC the power to trade, but is subject to restrictions contained within the 2009 Order.

1.2.2 Regulation 2 of the 2009 Order states that a best value authority (such as BHCC) is authorised to do, for any commercial purpose, anything which it is authorised to do for the purpose of carrying out its ordinary functions. The 2009 Order contains two important provisions:

(a) before exercising the power, BHCC is required to prepare a business case in support of the proposed exercise of the power which must be approved by BHCC; and

(b) if BHCC provides the Wholly-owned Subsidiary with assistance in the way of accommodation, supplies, staff, etc., BHCC must recover these costs.

1.2.3 Reviewing both the power in the 2009 Order and the 2011 Act, we would recommend that the general power of competence under Section 1 of 2011 Act is used, establishing a Wholly-owned Subsidiary in accordance with Section 4 of the 2011 Act. Whilst the requirement for BHCC to approve a business case before establishing a trading company is specific to the 2009 Order, it would be prudent for BHCC to prepare this in advance of setting up the Subsidiary to show that BHCC has given due regard to its duties.

1.3 Company structures

1.3.1 Where BHCC exercises its general power for a commercial purpose then it will be required to do so via a company (or alternatively via a community or co-operative benefit society). Although the provision of repairs and maintenance to BHCC properties is arguably not a commercial purpose, if the Subsidiary's business case is (even in part or in the long run) predicated on generating revenue from third parties, such activities would be, without doubt, commercial.

1.3.2 A company could be set up as either a company limited by shares (**CLS**) or a company limited by guarantee (**CLG**). We have discounted the use of a Limited Liability Partnership (**LLP**) or (not for profit) Community Benefit Society for the Wholly-owned Subsidiary as these corporate forms respectively raise additional vires issues or are not suitable for a profit distributing entity.

1.4 A company limited by shares

1.4.1 A company limited by shares (**CLS**) is the type of company which most people (and the private sector) are familiar with. The corporate structure is tried and tested and is underpinned by an established body of law and practice.

1.4.2 In terms of overall control and also financial and tax planning, the structure of a limited company provides considerable flexibility through the creation of different types of share and loan capital. It is also simple to admit new shareholders if BHCC wishes in the future to make the company a joint venture vehicle (for example, to introduce another local authority to create a joint company capable of providing similar services to that second authority or to enter into a joint venture with an outsourced contractor (as per Option 4)).

1.4.3 Key features of CLSs include:

(a) A CLS can have very wide objects (unless these are limited in the company's articles);

(b) A CLS is usually formed for the purpose of making and distributing profits to its shareholders;

(c) As a separate legal entity, a CLS can own and deal in assets, sue and be sued, and contract in its own right;

(d) A CLS has limited liability. The circumstances in which shareholders could be held legally liable for a company's debts (beyond their unpaid capital contribution) are extremely limited. This means that the liability of the shareholders of the CLS would be limited and protected;

(e) Shares can be held by BHCC, employees, the private sector, equity investors and/or service users and the holding of shares is fluid and flexible. Shareholdings can change in order to take account of a change in circumstances and/or in accordance with the parties' requirements;

(f) The shareholders' agreement would set out the relationship between BHCC and the Company in more detail.

(g) In a CLS, the decision-making power of an organisation rests primarily with its board of directors, but some matters may be reserved to the shareholders (BHCC if any owned);

(h) A CLS is intended to generate a commercial profit and distribute profits, and it is the most suitable form of vehicle for this purpose;

(i) The administration process of a CLS is primarily governed by the Companies Act 2006 and the company's articles of association. This will involve holding board and general meetings and preparation and submission of accounts. CLSs are registered at Companies House, but there is no ongoing regulation by Companies House. Tax computations and returns would need to be filed within the required deadlines in addition to any payments of tax;

(j) A CLS is subject to tax on any profits or gains generated from its activities;

(k) For Corporation Tax purposes, all transactions with 'connected parties' would need to be undertaken on an arm's length basis;

(l) Mutual trading status (see the Wholly Owned Subsidiary Option below) would be difficult to achieve therefore all income and gains would likely be taxable where a CLS is used;

(m) To the extent that the CLS has any 75% owned subsidiaries, they would form a group for group relief purposes, allowing the sharing of tax losses between companies in the same accounting period.

1.5 **A company limited by guarantee**

1.5.1 A company limited by guarantee (**CLG**) is a company where the general members do not hold shares, but instead each member undertakes to pay a nominal figure (usually £1) in the event of the company becoming insolvent. If the company is to be a wholly-owned subsidiary, BHCC would initially be the sole member; but a company limited by guarantee can have many members and different categories of members with different voting rights. Changing from a single member company to one with many members is also straightforward.

1.5.2 This form of company is often adopted for charitable or community interest activities. In our experience it is rarely used as a vehicle for undertaking commercial activity.

1.5.3 Key features of CLGs include:

(a) As with a CLS, a CLG may have wide objects unless its member guarantors wish to limit them in the company's constitution. For example, BHCC may wish to limit the objects to certain purposes only;

(b) CLGs are usually not for profit organisations but they do not have to be;

(c) In the same way as a CLS, a CLG is a separate legal entity and has limited liability. However, instead of a capital contribution each member guarantor undertakes to pay a nominal figure (usually £1 (one pound)) in the event of any insolvency on the part of the company;

(d) a CLG is similar in structure to a CLS except that its member guarantors do not hold shares in the company;

(e) in constitutional terms a CLG has the benefit of similar levels of flexibility as a CLS;

(f) if a CLG is established as a "for profit" organisation then it is possible to include a provision in its constitution which will describe how profits will be distributed to its member guarantors;

(g) It is relatively inflexible and cannot be used to attract investment or external equity funding later in its life. This may limit the funding options available for a CLG, particularly in relation to funding working capital;

(h) In the first instance, a CLG would be subject to tax on any profits or gains generated from its activities;

(i) The main benefit over a CLS is that Mutual Trading Status may apply which would exempt from Corporation Tax any trading profits arising from services provided to BHCC;

(j) The benefits of Mutual Trading Status will depend on the nature and role of the Company and, therefore, its level of profitability. It can only apply in relation to profits arising from services provided to BHCC and therefore could be outweighed by the commercial and operational disadvantages of a CLG set out above;

(k) Tax computations and returns would need to be filed within the required deadlines in addition to any payments of tax;

(l) To the extent that the Subsidiary has any 75% owned subsidiaries, we would expect that they would form a group for group relief purposes.

1.6 **Propriety Controls**

There is an extensive legal framework governing local authority companies, currently set out in Part 5 of the Local Government and Housing Act 1989. However it should be noted that section 216(1) of the Local Government and Public Involvement in Health Act 2007 does include a provision that would repeal Part 5 – section 216(1) is not yet in force, and there currently is no date set for when or if this will happen, but BHCC should be aware that the current regime may be subject to change. Any revised regime would be implemented by Statutory Instrument and would require prior consultation by the Secretary of State.

1.7 **Conclusion on the form of corporate body**

Based on the above analysis, we believe a company limited by shares is likely to be the most appropriate vehicle for the Subsidiary Company. A company limited by shares could be established within a week, using an 'off the shelf' articles of association, with BHCC as its sole shareholder. The articles can then be tailored to reflect BHCC's requirements in due course.

2 **Option 4 – Powers to establish a joint venture**

2.1 The vires position in relation to Option 4 is more complicated. And will depend, to a large extent, on BHCC's justification for establishing a joint venture relationship.

2.2 On the face of it, it would seem most likely that BHCC would chose to go down a joint venture route if the primary motivation for the project were to establish a commercial business which would then seek to trade (as a joint venture) with third parties - for example other councils or Registered Providers.

2.3 In this case, it would seem to us that it would be probable that BHCC would again seek to rely on section 1 of the 2011 Act and, as explained above, where BHCC exercises its general power under the 2011 Act for a commercial purpose then it is required to do so through a company.

2.4 As such, the most probable corporate form for a joint venture would be a joint venture company limited by shares.

2.5 However, we are aware that a number of providers in the market for repairs and maintenance services are keen to establish joint venture limited liability partnerships and, were this to be an Option which BHCC and potential contractors wish to pursue, a detailed consideration of BHCC's vires position would need to be considered.

2.6 Broadly, the Options would be to participate in an LLP structure via an intervening Wholly-owned Subsidiary of BHCC (so that BHCC's participation on the LLP was through its own company); in which case the difficulty presented by the restrictions on BHCC's use of the general power of competence under the 2011 Act fall away.

2.7 Alternatively, (and this depends heavily on BHCC's motivations for participating in the joint venture) it may be possible to arrive at a position where BHCC could participate directly in the LLP (with the obvious tax advantages that this brings) but this would require careful consideration; that said the judgement in the recent *Haringey* case sanctioned the direct involvement of Haringey in its JV with Lendlease as an LLP on the basis that Haringey's purpose in entering into the LLP was *not* commercial. It had carefully articulated in various reports leading to the establishment of the JV, the socio-economic and other non-commercial public benefits the JV was established to achieve. As Haringey's participation was not for a commercial purpose it was permissible for it to be a direct participant in the LLP using the general power of competence under the 2011 Act.

Annex 2

Pensions considerations

1 **Option 1: Direct delivery of services**

As employees of a Direct Delivery of services, those staff will be entitled to remain as members of the Local Government Pension Scheme (**LGPS**). The advantages of a Direct Delivery of services are consistent with those applicable to a Wholly-Owned Subsidiary or Managed Service Model (Option 3). The main disadvantage associated with the creation of a Direct Delivery of services is the potential additional cost for BHCC, in that, unlike other models of service delivery, new joiners are also required to be provided with LGPS membership. A further disadvantage of this model, which is also the same as for a Wholly-Owned Subsidiary is that an exit payment could arise in the (albeit highly unlikely) event that the last active LGPS member ceases membership of the LGPS.

2 **Option 2: Outsourcing**

2.1 **Statutory requirements**

BHCC is obliged to follow the Best Value Authorities Staff Transfers (Pensions Direction) 2007 (the **Direction**). Broadly, this requires that staff that were originally local authority staff and are transferred under a contract for services to a service provider retain rights to membership of an arrangement that is the same as or broadly comparable to their pension prior to their TUPE transfer. The obligation would be satisfied by staff remaining as LGPS members.

2.2 **Outsourcing**

Generally, the position is that where a council is the commissioning body and enters into a contract for services with a provider to perform those services, as envisaged under Option 2, the staff transferring to the contractor should be afforded pension protection under the Direction. The terms of the Direction only 'bite' and oblige a 'Best Value Authority' to ensure that protection is enshrined within the contract terms. This protection extends to require BHCC to oblige the contractor to secure pension provision that is the same as or 'broadly comparable' to the pension provision provided by the incumbent contractors in circumstances where the contractor undertakes the services and staff transfer from the incumbent contractors. We have assumed, for the purpose of this report that the incumbent contractors are admitted to the LGPS.

2.3 **Contractor risk-sharing policy**

2.3.1 Where BHCC and the contractor comply with the requirements of the Direction and the contractor seeks admission to the LGPS, BHCC will need to prepare a commercial stance on where pensions risk should sit between the parties.

2.3.2 It is likely that the contractor will want to enter into a form of risk sharing arrangement to manage employer contribution rate volatility under the LGPS.

2.3.3 BHCC will need to be aware of the relevant considerations attributable to a risk sharing approach. Broadly, this is where the contractor will request that BHCC allocates and retains responsibility for certain risk factors considered to be within BHCC's control. This can have a direct impact upon pricing and affordability for contract provision.

2.3.4 There are a number of relevant considerations that would need to be addressed. These would include:

(a) Apportioning responsibility for any historic LGPS underfunding in relation to transferring staff;

(b) Risk sharing of LGPS employer contribution rate variance throughout the term of a contract. This can for example take the form of a 'capped' rate for the contractor or a 'pass through' of increases to the employer contribution rate so that the 'net effect' is for the contractor to pay a consistent employer contribution percentage;

(c) How matters such as ill-health dismissal and redundancy risk should be treated;

(d) Considering the requirement for a pension bond or guarantee from the contractor.

(e) Determining how any funding 'shortfall' under the LGPS should be dealt with and by which party when the contractor's admission agreement comes to an end;

2.3.5 In all of the above matters, it is generally our experience that contractors will initially adopt a risk-averse approach to assuming these responsibilities and liabilities. It is usually the case that detailed negotiation will be required to assert that matters falling within the 'control' of the contractor should be retained by it as part of any risk sharing approach.

2.3.6 The terms of the Direction place the obligation upon BHCC to ensure that pension protection is included within the terms of the contract for services. In circumstances where BHCC takes a decision not to apply the terms of the Direction, there would be a considerable risk that transferring staff (or where represented, their trade union) would seek to review the basis of that decision. Whilst dis-applying the operation of the Direction would allow BHCC to relax the pension provision provided to staff by the contractor (with the associated cost reduction which could flow from that decision), in our experience local authorities have acknowledged the perceived and real risk of adopting that approach and have complied with the terms of the Direction.

3 Option 3: Wholly-Owned Subsidiary/Managed Service models

3.1 Any Wholly-Owned Subsidiary entering into a contract for the provision of services (which could include a management contract arrangement) with BHCC would, applying the Direction, need to provide an arrangement broadly comparable to that provided by the incumbent contractors. As noted in the preceding paragraph, it is open to BHCC to not incorporate the terms of the Direction into any contract arrangement, but there are potential and material risks in not doing so.

3.2 It is likely that an organisation structured as a Wholly-Owned Subsidiary of BHCC could participate in the LGPS as a Designated Body. The qualifying criteria are set out in Part 2 of Schedule 2 of the Local Government Pension Scheme Regulations 2013 (the 2013 Regulations). Broadly, a company that is 'connected with' a body such as a local authority will be a Designated Body. We have set out the 'connected with' test in greater detail below.

3.3 We have explained below in greater detail how the "connected with" test under Part 2 of Schedule 2 of the 2013 Regulations can be met:

3.3.1 An entity is "connected with" a local authority if:

(a) it is an entity other than the local authority; and

(b) according to the proper practices in force at that time, financial information about the entity is included in the local authority's statement of accounts.

3.4 On the assumption that the statement of accounts for BHCC confirms that the "connected with" test is satisfied, the Wholly-Owned Subsidiary will be capable of securing Designated Body status.

3.5 **Wholly-Owned Subsidiary and LGPS participation**

3.5.1 The advantages of the Wholly-Owned Subsidiary being admitted to the LGPS as a Designated Body is that the process is straightforward – it does not require an admission agreement to be entered into and there is no requirement to assess the risk for a pension bond. It also provides security for employees to remain members of the LGPS.

3.5.2 However, when the Wholly-Owned Subsidiary ceases to be a Designated Body for the purposes of the 2013 Regulations, either because it no longer meets the criteria set out above or because it ceases to employ active members of the LGPS, a calculation of the Wholly-Owned Subsidiary's "exit liability" under the LGPS would still need to be carried out in accordance with the LGPS legislation. Where the assets in the fund attributable to the Wholly-Owned Subsidiary are insufficient to meet its liabilities, then it would be obliged to make a payment to the LGPS fund equal to any pension deficit calculated.

3.5.3 An advantage of Designated Body Status arising from the exit liability is that the LGPS funding strategy statement on the calculation of that liability may not be as onerous compared to other admission bodies. This can mean that any liability amount is valued by the actuary to produce a smaller exit amount. By the same token, if any exit liability is ultimately subsumed as part of any funding obligations between BHCC and the Wholly-Owned Subsidiary, then the less conservative actuarial valuation basis would be a beneficial cost consideration for BHCC.

3.5.4 Unlike an admission body, the 2013 Regulations do not require a Designated Body to enter into a pension bond or guarantee. To that degree, the extrinsic documentation and actuarial costings required to facilitate LGPS membership are less onerous.

4 Option 4: Joint Venture Option

4.1 Similar considerations to those set out in the preceding paragraphs for the contractor arise for BHCC where it opts for a Joint Venture partner. Any Joint Venture entity entering into a contract for services with BHCC would, applying the Direction, need to provide an arrangement broadly comparable to that provided by the incumbent contractors.

4.2 In addition, it is likely that the private sector partner to the Joint Venture will wish to introduce 'risk sharing' mechanisms into any contract for services it enters into with BHCC. The relative 'pros and cons' of the risk sharing approach is the same for a Joint Venture Option as it would be for a service provider, with one possible exception.

4.3 Where a pension bond is being considered, BHCC may look more favourably on dispensing with the need for a pension bond. The current 2013 Regulations also provide that an alternative form of security (such as a guarantee or indemnity) can be entered into in place of a pension bond in certain circumstances. The alternative guarantee can be from a person who funds the admission body in whole or in part or who owns or controls the exercise of the functions of the admission body. Depending on how the Joint Venture Option is established and structured, BHCC may be able to act as guarantor so as to alleviate the need for a pension bond. This in turn would help drive a value for money approach as the cost of securing pension bond premiums could be removed from any service provision cost.

4.4 That said, BHCC would need to act very carefully to avoid 'state-aid' issues, particularly where the JV company was bidding against other contracting service providers.

4.5 BHCC would also need to keep in mind the variant LGPS 'exit liability' positions negotiated with its incumbent contracting providers for current services such as street lighting. BHCC would need to consider its commercial strategy in light of any exit liability it has assumed under previous contracts and consider how it wishes to address any historic underfunding.

5 Incumbent Contractor's position

5.1 One issue which is a relevant consideration to all Options is the pensions risk that materialises when staff transfer from the incumbent contractor. On the basis that those staff are members of the LGPS, we would recommend that the current contract for services is reviewed to determine whether a risk-sharing model operates to allocate risk when an admission agreement comes to an end.

5.2 When a contract for services comes to an end or there are no remaining active LGPS members in the contractor's employment, an admission agreement comes to an end. At that point the administering authority instructs the Fund actuary to calculate what is known as a 'termination valuation'. Broadly, if the LGPS fund is underfunded, a capital payment will normally be requested from the provider to the Fund. The 2013 Regulations now afford some flexibility as to how these exit payments are recovered. Staged payments for example are now possible. It may be that BHCC has already entered into a contractual mechanism with the provider to deal with such termination liabilities so that it remains liable to reimburse the contractor for any exit payment falling due.

Annex 3

Comparison of standard forms of Term Contract

1 Introduction

The form of contract to be selected by BHCC will clearly depend on the Option selected for the procurement of repairs and maintenance programme following consideration of the issues raised in this Report and BHCC's own decision-making process.

2 Published forms of contract

We set out below the key features of the following published forms of contract commonly used by local authorities for repairs and maintenance programmes. In our experience, bidders are likely to welcome the use of a standard form contract with which they will be familiar, though is possible to adopt an entirely bespoke form of contract to suit the specific needs of the procurement. Even where standard forms of contract are used, it is likely that BHCC will need to prepare to prepare a set of amendments to address any matters not adequately covered by the published provisions or to establish a more advantageous commercial position. Any amendments should be undertaken with care to ensure that there are no inconsistencies between the contract terms and the specification and technical documents, which may undermine the objective of the procurement or create inconsistencies that bidders may exploit.

The standard form Term Contracts that we have compared are:

2.1 JCT Measured Term Contract 2016 ("JCT")

The JCT is part of the JCT 2016 suite of contracts published by the Joint Contracts Tribunal. The JCT suite comprises a complementary set of main contracts and sub-contracts, and includes a separate Pre-Construction Services Agreement to provide for pre-commencement activity. There is a form of Consultancy Agreement for public sector employers. The JCT Measured Term Contract is the form that is most suitable to instruct responsive repairs and maintenance programmes.

2.2 The New Engineering Contract 4th Edition ("NEC")

The NEC 4th Edition contracts, which include the NEC4 Term Service Contract, are well-established and used by a significant number of local authorities for the procurement of responsive repairs and maintenance programmes. The NEC4 suite comprises a complementary set of main contracts, sub-contracts and professional services appointments.

2.3 The ACA Standard Form of Term Alliance Contract ("TAC")

The TAC-1 was published in 2017, part of a suite of contracts published by the Association of Consultant Architects and based on a partnered approach to construction. TAC-1 replaces and updates the TPC2005 Term Partnering Contract, which was first published in 2005 and is currently used by BHCC for its contract with Mears for the delivery of responsive and planned works. TAC-1 comprises a multi-party form of contract which allows consultants and key sub-contractors to be integrated into the team as parties to the same contract where appropriate. It also provides for the parties to operate a strategic alliance to identify and develop collaborative activities to share best practice and improve the efficiency of programme delivery.

2.4 The National Housing Federation Schedule of Rates Contract Revision 4 (2016) ("NHF")

The NHF Schedule of Rates are widely used in the construction industry to provide a comprehensive schedule of works activities that tenderers can price as part of a construction contract, with variations for responsive repairs and maintenance and planned works programmes. The NHF Contract was first produced by the National Housing Maintenance Forum in 2011 to support the use of the NHF Schedule of Rates and was most recently updated in 2016. The NHF Contract includes a template Invitation to Tender document. The contract documents themselves comprise Articles of Agreement, Contract Conditions, Preliminaries, a Specification, Price Framework and a KPI Framework, in addition to the Schedule of Rates.

3 Criteria for selecting a form of Term Contract

3.1 General comments

It is important to note that the appropriateness of a standard form of contract will depend on the procurement Option selected and BHCC's strategic procurement objectives. It is clearly important that BHCC should select and adopt a form of contract that is most appropriate to its needs and can be effectively integrated to establish continuity and stability in procurement/contracting practices, so as to obtain the maximum benefits in terms of efficiency, economy and streamlined programme implementation.

3.2 Efficiency criteria

Any procurement arrangement designed to lead to increased efficiency should incorporate as core features:

- i Timely engagement of all key players in the works and services programme, particularly in the pre-commencement phase,
- ii Mutual clarity between all parties regarding allocation of roles, responsibilities, risks and rewards,
- iii A collaborative approach to developing and managing the programme,
- iv Open and effective communication between the parties, and
- v Strategies for continuous improvement.

The form of contract used should support these objectives and also provide for BHCC's preferences relating to practical issues of procurement and contract administration, including:

- i The contractor's input into (but not necessarily control of) all key processes;
- ii Flexible pricing arrangements that allow BHCC maximum certainty and clarity as to prices paid;

iii Volume supply arrangements with the supply-chain;

iv Financial sanction;

v Depot facilities and leasing arrangements;

vi Dispute resolution;

vii Storage facilities;

viii Developing efficient processes for resident liaison;

ix Employment issues including TUPE;

x Pensions issues including LGPS;

xi Development of proposals to deal with Health & Safety;

xii Analysing and managing risk including procuring appropriate insurance;

xiii Programming and phasing of the works or services to be undertaken;

xiv Change management;

xv Ability to terminate the contract for sustained poor performance; and

xvi Ability to instruct third parties to undertake uncompleted works.

3.3 **Comparison of standard forms of contract**

In this section, we have indicated why we consider each issue is an important criterion in selecting an appropriate form of contract, and how each of the evaluated standard forms deals with the issue. Specific points that may assist in forming a view on the most suitable contract form for their purposes are listed in the Table below, where each of the 4 standard forms of contract are assessed against each criterion.

The assessment in the table is indicative only, and reference should also be made to the explanatory notes that follow.

Table – Summary of criteria for assessing standard forms of contract

		JCT	NEC	TAC	NHF
1	Contractual pre-commencement/mobilisation process	[✓]	[✓]	✓	[✓]
2	Clear definition of roles of delivery team	[✓]	[✓]	✓	[✓]
3	Involvement of residents and other key stakeholders	**X**	**X**	✓	[✓]
4	Options for allocating design responsibility	**X**	✓	✓	**X**
5	Integration of supply-chain	[✓]	✓	✓	[✓]
6	Collaborative management of risk	**X**	✓	✓	**X**
7	Performance measured against KPIs	[✓]	✓	✓	✓
8	Management group of key players	**X**	✓	✓	✓
9	Incentive Options	[✓]	✓	✓	[✓]
10	Option for 'open book' pricing	[✓]	[✓]	[✓]	**X**
11	Option for fixed price	✓	✓	✓	[✓]
12	Contractual programme for the works/services orders	**X**	✓	✓	**X**
13	Prior evaluation of change	**X**	✓	✓	✓
14	Early warning of problems	✓	✓	✓	✓
15	Exclusion of profit from contractor's claims for delay/disruption	**X**	**X**	✓	**X**
16	Remedies in respect of breach of contract	✓	✓	✓	✓
17	Ability to terminate the contract with notice	✓	✓	[✓]	[✓]
18	Ability to instruct third parties to undertake uncompleted works	✓	[✓]	✓	✓
19	Alternative Dispute Resolution	✓	✓	✓	✓
20	Forms of sub-contract, collateral warranties and guarantees	✓	✓	[✓]	**X**

Key

✓	Specifically provides for this point in the main form of Term Contract
[✓]	Provides for this point in part measure or through use of other compatible forms
X	Does not provide for this point

3.3.1

4 Detailed commentary

4.1 Pre-commencement/Mobilisation process

Contractual provisions covering the mobilisation process are a convenient and effective means of handling any transitional provisions. The client has the advantage of having the contractor committed to the contract and can ensure that any preparatory activities or processes required before the start of the programme can be completed before commencement. In turn, the contractor has the benefit of being "in contract" and not working "at risk" while they undertake the pre-commencement activities. For maintenance or services programmes a pre-commencement phase is particularly important to ensure adequate coverage of TUPE obligations and the appointment of sub-contractors both of which should be completed before commencement.

Provision of a pre-commencement phase allows the client to activate the performance and payment obligations when the pre-commencement activities are complete. In this way, the contract can be used as a management or process tool, to ensure that all parties fulfil their obligations and to avoid delays or problems when the programme commences.

JCT	The JCT Pre-Construction Agreement can be signed as a separate document to cover the pre-commencement/mobilisation period. The Pre-Construction Agreement does not deal with transitional arrangements from mobilisation to commencement phases and would need extensive amendment and integration with the main form of contract used.
NEC	The NEC4 Engineering and Construction Contract (ECC) now includes as a secondary Option the clauses for early contractor involvement (ECI) previously published by NEC in 2015. ECI is a method of appointing a Contractor at an early stage, to participate in the development of designs and proposals. It enables the Contractor's input to the design at a stage when significant improvements and innovation can be introduced.
TAC	Provides for preconditions to implementation of Term Programme, also provides Options as regards treatment of TUPE and pensions and as regards treatment of client assets to assist in transitional provisions.
NHF	Provides for the parties to form a contract by exchanging a Letter of Acceptance, ahead of executing the formal contract documents.

4.2 Clear definition of roles of delivery team

For a maintenance or services delivery team to be set up on a fully integrated basis and to function effectively, it is essential that the roles and responsibilities of each team member are clearly and compatibly defined and mutually recognised. To the extent that all appointments are not made from a fully integrated set of terms and conditions, mutual clarity is achieved only by each party having knowledge of all other parties' contracts and agreeing an integrated set of programmes and responsibilities.

JCT	Two party contract which specifies the roles of the client and the main contractor. Separate agreements required for the appointment of suppliers or sub-contractors.
NEC	Two party contract which specifies the roles of the client and the main contractor. Separate appointment required for Service Manager and sub-contractors. However, NEC4 now provides for separate collateral warranties to be secured in favour of 3rd parties and from the supply-chain in favour of the Client (NEC3 would need Z-Clause).
TAC	Multi-party contract which specifies the role and responsibilities of client, service provider and key sub-contractors with mutual duties of care between team members.
NHF	Two party contract which specifies the roles of the client and the main contractor. Separate appointment required for Client's Representative and Service Provider's Contract Manager and sub-contractors.

4.3 Involvement of residents and other key stakeholders

Effective capture and use of contributions from residents and other stakeholders who are not party to the contract will be an important element of a successful programme. Acknowledging this within a Term Contract lends form and discipline to the process.

JCT	Does not refer to other stakeholders.
NEC	Does not refer to other stakeholders.
TAC	Requires members of the delivery team to establish involvement of Interested Parties (a defined term).
NHF	Refers to postholders listed in the Contract Details who can be members of the Core Group.

4.4 Options for allocating design responsibility

In modern construction practice, responsibility for design and the related risk is frequently assumed by the main contractor and increasingly by suppliers and specialist sub-contractors. It is important that BHCC have the opportunity to allocate any design responsibility, particularly in relation to the selection of surfacing materials and processes for any given task.

JCT	Does not provide for contractor's design.
NEC	Provides for main contractor design and design of its items of equipment.
TAC	Provides flexibility in the allocation of design responsibility
NHF	Does not provide for contractor's design.

4.5 Integration of the supply-chain

It is widely recognised that to achieve best value in delivery of a programme, it is essential that all influential members of the supply-chain, in particular key suppliers and specialist contractors, are effectively integrated into the procurement process. This requires recognition of their potential roles, particularly in relation to any design work and the key processes, and usually implies their early appointment.

In addition, for effective integration, all key members of the supply-chain should be recognised as equal partners in the programme, be included in decision-making processes, and be involved in finalising price.

JCT	No specific provisions for supply-chain partnering. Client able to consent to any sub-contractors.
NEC	Includes compatible forms of subcontract; suppliers and subcontractors can be named as partners in Option X12 and become members of the Core Group. Provides for notification of the Core Group prior to sub-contracting. However, decisions of the Core Group are not required to be implemented under the contract.
TAC	Includes specific provisions for supply-chain partnering and for client approval of subcontractors and suppliers.
NHF	No specific provisions for supply-chain partnering. Client able to suggest and consent to appointments of any sub-contractors.

4.6 **Collaborative risk management**

The systematic identification, assessment, allocation and mitigation of risk is essential for successful programme delivery, and is most effective if all parties are involved in and committed to the process.

JCT	Does not provide for main or sub-contractor or supplier involvement in risk management.
NEC	X12 Partnering Option may assist in collaborative risk management. Provides for development and maintenance of a risk register with risk reduction meetings for cooperative response to risks.
TAC	Provides for joint risk management activities as described in a Risk Register.
NHF	Does not provide for main or sub-contractor or supplier involvement in risk management.

4.7 **Performance measured against KPIs**

Measuring performance is fundamental to improving performance; this applies within a programme but is particularly important for long term maintenance programmes where clients are focusing on continuous improvement. Formalising this requirement within the Term Contract commits members of the delivery team to the process.

JCT	General reference to measuring performance against agreed KPIs.
NEC4	Provides for measuring performance against agreed KPIs.
TAC5	Provides for measuring performance against agreed KPIs.
NHF	Provides for measuring performance against agreed KPIs.

4.8 **Management group of key players**

A management group comprising the key individuals in the delivery team can play a valuable role in a number of areas, as follows:

(a) An information hub at the centre of a communications strategy,

(b) Monitoring and taking forward progress in the pre-commencement/ mobilisation phase,

(c) Evaluating proposed changes notified in advance,

(d) Receiving warnings of potential problems and overseeing the response.

Such a group can function most effectively in relation to the due processes of the contract if it is specifically provided for in the Term Contract. The group's roles and responsibilities must be clearly defined, in particular its scope and authority to take decisions for implementation by the parties.

JCT	Does not provide for a management group.
NEC4	The NEC4 contracts introduce a requirement for the Contractor to prepare and issue a quality management system and plan.
TAC	Provides for a Core Group able to take decisions within the scope of its

	agreed functions as set out in the contract.
NHF	Provides for a Core Group to manage the contract and the delivery of the works.

4.9 **Incentive Options**

Financial incentives are widely recognised as effective in securing commitment to improving performance and achieving best value in programme delivery. For clarity and effective operation they should built into the contract.

JCT	Provides for contractor to receive some of the financial benefit of any cost saving or value improvement it proposes which is implemented.
NEC	Includes provisions for bonuses on early completion and payments relating to KPIs.
TAC	Provides for incentives to be agreed.
NHF	No express contractual provision for incentives to be agreed. Separate KPI Framework in NHF suite has provision to agree incentives.

4.10 **Option for 'open book' pricing**

Genuinely collaborative working implies openness and trust and this should extend through to the financial management of the Term Contract. Accordingly 'open book' pricing, where the contractor declares its profits and overheads and allows the Client access to its financial records to monitor how prices for the services are developed is widely advocated. For successful application, its meaning, scope and operation should be clearly defined in the Term Contract.

JCT	Does not provide for open book pricing.
NEC4	Does not expressly refer to open book pricing but separate identification of profit and overheads is implied in the target cost and cost-reimbursable Options.
TAC	Provides for Open-book pricing with separate identification of profit and overheads but can be used with a variety of pricing Options.
NEC	Does not provide for open book pricing.

4.11 **Option for fixed prices**

BHCC may prefer the discipline and risk allocation delivered by fixed prices from the contractor prior to starting work on site. In many circumstances, seeking fixed prices from the contractor at tender stage will be difficult to reconcile with the principles of collaborative working, including early appointment of the contractor. However, this may be an Option BHCC wish to have available.

Each of the four contract suites compared in this note provides this Option through:

JCT	Reference to a Schedule of Rates.
NEC	Provides for priced contract with Activity Schedule (Option A) and priced contract with bill of quantities (Option B)

TAC	Task Prices calculated in accordance with Price Framework.
NHF	Reference to a Schedule of Rates.

4.12 **Contractual programme for the works/services orders**

A contractually binding programme for issuing and completing of orders or tasks under a Term Contract clarifies and confirms each party's commitment to timely delivery. If used effectively, a contractually binding programme can function as a programme management tool, and provides clear definitions of each party's obligations. The offer of a clear long-term programme by BHCC should secure greater efficiency from the programme.

JCT	Does not provide for a contractually binding programme.
NEC	Provides for an 'Accepted Programme' and new provisions which provide ‘treated acceptance’ of the Contractor’s programme where the Project Manager does not respond to a programme issued by the Contractor for acceptance, or to a reminder. This is to unlock the impasse which otherwise prevails.
TAC	Provides for the Partnering Timetable as a contractually binding programme, including provisions for the timetable to be updated as required.
NHF	Does not provide for a contractually binding programme.

4.13 **Prior evaluation of change**

Effective change management requires that whenever possible proposed changes are notified in advance to allow evaluation of the full time, cost and quality implications and consideration of appropriate responses.

JCT	No provision for advance evaluation of change.
NEC	Provides for advance notice of change in the context of Compensation Events (a defined term).
TAC	Provides for advance evaluation of change.
NHF	Provides for advance evaluation of change.

4.14 **Early warning of problems**

Early recognition of an emerging problem considerably improves the opportunities for the parties to manage the issue before delays are caused to the programme. Inclusion in the contract of a clear duty on the parties to warn of a potential problem will reinforce their commitment to do so.

JCT	Includes a basic early warning system.
NEC4	Includes an early warning system.
TAC	Includes an early warning system.
NHF	Includes an early warning system.

4.15 **Exclusion of profit from contractor's claims for delay/disruption**

BHCC might take the view that in the context of a long-term collaborative relationship it is equitable for the contractor to recover costs in a claim for delay and disruption but not additional profit and overheads. If so, this should be explicit in the contract.

JCT	Does not exclude profit and overheads from delay/disruption claims.
NEC	Does not exclude profit and overheads from delay/disruption claims.
TAC	Excludes profit and overheads from delay/disruption claims.
NHF	Does not exclude profit and overheads from delay/disruption claims.

4.16 **Remedies in respect of breach of contract**

The Term Contract must include effective remedies for default or insolvency of a member of the delivery team. As far as possible these should protect any continuing interests of the client.

JCT	Provides for termination by the client or main contractor in a specified list of circumstances.
NEC	Provides for termination by the client or main contractor in a specified list of circumstances.
TAC	Provides for termination by the client or main contractor or other parties in a specified list of circumstances.
NHF	Provides for termination by the client or main contractor in a specified list of circumstances.

4.17 **Ability to terminate the contract with notice**

Many local authorities require the ability to terminate the contractor's appointment under the Term Contract following a specified period of notice. This has become increasingly important in the current economic climate, to allow clients flexibility to appoint alternative contractors and ensure that there is delay in the provision of key services.

JCT	Provides for either party to terminate the contract with 13 weeks' notice.
NEC	Option X11 provides for the Client to terminate the Service by providing notice to the Service Manager and the Contractor.
TAC	Option for the parties to agree to terminate the contract within a specified notice period.
NHF	Option for the parties to agree to terminate the contract within a specified notice period.

4.18 **Ability to instruct third parties to undertake uncompleted works**

In the event of sustained poor performance in a responsive maintenance programme and/or the termination of a contractor's appointment, clients should have the ability to instruct third parties to undertake any outstanding or uncompleted works. In the event of the contract being terminated due to the contractor's poor performance or breach, the

Term Contract should ideally have the ability recover the costs of appointing third parties from the original contractor.

JCT	Client has the ability to instruct third parties to undertake uncompleted or outstanding works following the Contractor's failure to undertake the works and/or the termination of the Contractor's appointment.
NEC	Option X11 provides that on termination the Client may complete the service itself and use any plant or materials that were provided by the Contractor.
TAC	Client has the ability to instruct third parties to undertake uncompleted or outstanding works following any Alliance Members' failure to undertake the works.
NHF	Client has the ability to instruct third parties to undertake uncompleted or outstanding work following the Service Provider's failure to undertake the works.

4.19 **Alternative Dispute Resolution**

Any party to any Term Contract has a statutory right to adjudication and thereafter to initiate litigation. However, it is likely to be in all parties' interests to agree contractual alternatives that remain within their control in terms of timing, cost and outcome, and that are less likely to undermine long-term working relationships.

JCT	Provides for alternative dispute resolution through nominated individuals and through mediation.
NEC	NEC4 has introduced a four week period for escalation and negotiation of a dispute, which takes place prior to any formal proceedings are commenced. This requires nominated senior representatives of each party to meet and try to reach a negotiated solution. It is a mandatory requirement where dispute resolution Option W1 applies, but is consensual where dispute resolution W2 applies.
TAC	Provides for alternative dispute resolution through a problem solving hierarchy, reference to the Core Group, conciliation, mediation and reference to a Partnering Adviser.
NHF	Provides for alternative dispute resolution through a Dispute Escalation Table, reference to Adjudication, Mediation, Expert Decision and Arbitration.

4.20 **Forms of sub-contract, collateral warranties and guarantees**

Any Term Contract should have corresponding forms of sub-contract so that any supply-chain members are appointed on compatible terms and conditions to the main contract, and so that relevant contractual obligations are passed down to the supply-chain as required. The Term Contracts should ideally have compatible forms of collateral warranty and parent company guarantee.

JCT	Provides compatible forms of sub-contracts. No provisions for collateral warranties or parent company guarantees.
NEC	Provides compatible forms of sub-contracts. No provisions for collateral warranties or parent company guarantees.

TAC	There is no form of sub-contract written expressly for TAC-1, but the STC2005 Specialist Term Contract 2005 (written for the TPC2005) can be used with some amendments. No provisions for collateral warranties or parent company guarantees.
NHF	No compatible forms of sub-contracts, collateral warranties or parent company guarantees.

4.21 **Issues not dealt with in Term Contracts**

It is uncommon for liquidated damages and retention to be included within a Term Contract and these are not found in the standard forms analysed above. BHCC should consider whether the security these provisions offer are relevant to the programme and amend the chosen standard form as appropriate although this might attract "risk pricing" by the contractor.

A copyright licence is not included in the standard forms and this should be considered for a programme with extensive design responsibility.

4.22 **Conclusion**

The selection of the form of Term Contract will set the tone for the procurement and approach the contractor will take to the ensuing relationship. Clearly, all the standard form Term Contracts discussed above can be amended to alter their existing features and overlay additional features required by BHCC.

As noted above at Section 9.8 of the Main Report, the key determining of successful implementation will be the management of the contract (and related amendments) that BHCC adopts. The selected Term Contract can provide all relevant protections and levers of contract BHCC requires, but these will not protect BHCC or provide it with any control if the contract terms are not understood or enforced by BHCC's contract managers. Given this, training in and knowledge of the selected form of Term Contract will be essential for BHCC contract managers and affected staff as part of any procurement exercise.

Annex 4

Example Partnering Timetable

Item	Description of Activity / Requirement	Period / Deadline for Activity	Additional Comments
1	Attend pre-contract meeting	Week 1	Review draft Partnering Timetable, draft KPIs, draft Risk Register, Core Group membership and Contract Start date
2	Issue revised Partnering Timetable	Week 2-4	
3	Issue revised Risk Register	Week 2-4	
4	Issue revised KPIs	Week 2-4	
5	Prepare and engross Framework Agreement and Partnering Contract for issue to all Parties	Week 4-6	
6	Production of agreed contract documents and sign	Week 7	
7	Confirm site addresses and scoping survey information and issue to Service Provider(s)	Week 4-7	Final Scoping Surveys and Property List for the Year 1 internal works programme issued.
8	Prepare draft cash flow based on first year's internals	Week 4-7	Based on agreed programme and phasing
9	Attend Resident Focus Group	Week 4-7	Introduction to the Client Resident Focus Group. Explain approach to works, what to expect and component choices. Reps will form a sub-group to sign off communication protocols and choice sheets.
10	Attend Employment & Skills project initiation meeting	Week 4-7	
11	Agree key components	Week 4-7	To agree material suppliers and confirm key components, etc
12	Hold Commercial Management workshop	Week 4-7	Agree valuations, handover and payment processes, etc

Item	Description of Activity / Requirement	Period / Deadline for Activity	Additional Comments
13	Project Delivery session	Week 4-7	Agree the management processes necessary to deliver the project. To include procedures for asbestos removal, data management, etc.
14	Surveys, investigations and resident profiling	Week 5-9	Service Provider carries out site surveys to confirm design & manufacturing details and consult residents.
15	Issue Task Order, Task Brief and confirmed address list to Service Provider	Week 10	Issued following receipt of the engrossed Partnering Contracts
16	Service Provider issues Construction Phase Plan, Task Proposals, Task Timetable and Task Price	Week 10-12	Deadlines for return of documents agreed as 2 weeks from receipt of the Task Order and will be confirmed in the Order
17	Construction Phase Plan agreed by Principal Designer	Week 13-14	
18	Consideration and agreement of Task Proposals and Task Timetable	Week 13-14	
19	Review and agree Task Price for Year 1	Week 13-14	
20	Place orders and organisation of labour, plant & specialists	Week 15-18	
21	Start on site	Week 19	Start dates subject to satisfactory completion of those pre-conditions
22	Risk Management Actions	Ongoing	
23	Volume Supply Agreements and Value Engineering	Value Engineering will continue throughout the life of the project. Particular innovations for efficiencies to be discussed at the Core Group so benefits can be shared	
24	Business Case Submissions	As required	As required for Specialists or any increases sought to the Task Price

Item	Description of Activity / Requirement	Period / Deadline for Activity	Additional Comments
25	Specialist Tenders	As required	As may be required for any specialist supply and fit works, eg. Major aids & adaptations, damp proofing, floor timber replacements, etc
26	Core Group Meetings	First meeting: Week 23	Thereafter meetings monthly as agreed by the Core Group
27	Partnering Meetings	First Meeting: Week 22	Thereafter meetings monthly (Site meetings to be scheduled in advance of the Core Group)

Annex 5

Procurement obligations and OJEU procedures

1 **Procurement obligations**

1.1 As a local authority, BHCC is regarded as a "contracting authority" for the purposes of the Public Contracts Regulations 2015 (the **Regulations**). Day-to-day asset management, planned works and voids contracts are generally accepted to be public works contracts. The current EU threshold for works contracts, above which value contracts must be publicly advertised is £4,551,413 excluding VAT and contracts of equal or greater value are required to be procured in line with the full procedure(s) set out in the Regulations (the relevant threshold for supplies and services is £181,302 excluding VAT). A procurement procedure which complies with the Regulations requires that the contract is advertised in the Official Journal of the European Union and that tenders are assessed and contracts awarded in line with the timescales and criteria set out in the Regulations. Also, case-law suggests that contracts below the threshold value must still be advertised although not necessarily in the Official Journal and therefore a directly negotiated contract with a single supplier is not allowed.

1.2 Contracts of employment fall outside of the EU procurement regime and are not classed as "public services contracts" for the purposes of the Regulations. However, a "management contract" entered into with a contractor for the management of employees would be classed as a public services contract for the purposes of the Regulations and would therefore have to be advertised in the Official Journal of the European Union in the (likely) event it exceeded the threshold. Any such services should be part of the tendered contracts.

2 **Pre-market engagement**

We would recommend that, before launching the procurement procedure, BHCC undertakes a sufficient amount of soft-market testing and contractor engagement, in order to gauge the state of the market in relation to the Options presented above and to consider how best the market will be able to meet its needs. The results of this pre-procurement engagement can then feed directly into the procurement requirements – as long as BHCC does not use such information in a way that could discriminate against or in favour of any particular bidder or class of bidder.

3 **The Restricted Procedure**

3.1 **Background to Restricted Procedure**

3.1.1 The Restricted Procedure is the most commonly used procurement procedure in the UK. Unlike the Open Procedure which requires contracting authorities to assess all bids received, the Restricted Procedure provides a two-stage process whereby bidders are initially assessed on their past experience, good standing, financial robustness and technical qualifications, from which a shortlist of bidders is selected to submit a tender. If run efficiently and with adequate preparation time, the Restricted Procedure can be completed within 3-4 months. BHCC is also able to shorten tender return timescales with the agreement of the bidders.

3.1.2 The Restricted Procedure is widely understood by the market. The initial pre-qualification stage has been somewhat standardised by the use of a standard Selection Questionnaire document issued by the Crown Commercial Service for use in all procurement exercises in England and Wales, which many bidders in the marketplace will be familiar with.

3.2 Use of the Restricted Procedure

3.2.1 As with the Open Procedure, the Restricted Procedure assumes that the scope and terms of the contract have been well defined in advance, requiring little or no discussion or negotiation with bidders. The Restricted Procedure is largely a paper-based assessment exercise, in which bidders respond to the client's requirements as set out in the procurement documents, and where tenders are assessed with no former negotiation or discussion between the client and the bidders. Following contract award, the expectation is that the client will enter into contract with the selected tenderer using the form of contract as set out in the procurement documents.

3.2.2 Therefore, this procedure requires BHCC to have defined their requirements fully before starting the tender exercise (in terms of preparing the specification and contract documents) and not deviate from those requirements once the tender is underway. However, some clients like to include an interview with shortlisted bidders as part of the tender evaluation process, to enable the client to interrogate the bidders' written submissions.

3.3 Structure of Restricted Dialogue

A timetable setting out our recommended stages involved in the Restricted Procedure is noted at the end of this section.

3.3.1 OJEU Notice and Descriptive Document

The beginning of the Restricted Procedure will require BHCC to publish a Contract Notice in the Official Journal of the European Union (the **OJEU Notice**) signalling its intention to advertise and award the contract. The OJEU Notice must clearly set out BHCC's requirements, and will include at a minimum: a description of the scope of works or services required, with reference to Common Procurement Vocabulary codes; the estimated value and length of the contract, including any Options to extend the contract term; the award criteria for awarding the contract (which will usually be a combination of Quality and Price); any minimum requirements that must be satisfied to be able to bid for the contract; and key dates in the procurement process and information about where bidders can access the procurement documents. BHCC is also required to place a notice on the Contracts Finder website, to advertise the opportunity.

3.3.2 Procurement Documents

The Restricted Procedure requires that all "procurement documents" relevant to the tender exercise are made available in electronic form free of charge to interested bidders from the date that the OJEU Notice is published. "Procurement documents" is defined very widely and includes all specifications of works/services, pricing documents, and the proposed conditions of contract. Therefore to be in full compliance with the Regulations, BHCC would need to have these documents prepared before the OJEU Notice is published, and make these freely available to interested bidders. From April 2018, contracting authorities will be required to run their procurement exercises and make procurement documents via an electronic portal.

3.3.3 **Selection Questionnaire**

Following the issue of the OJEU Notice, BHCC will evaluate the prospective participants against criteria included in a Selection Questionnaire. The Crown Commercial Service, which monitors the use of the Regulations in the UK, has published a standard Selection Questionnaire which should be used by contracting authorities in England and Wales. This document asks a series of basic questions about bidders' past experience and qualifications (which can be supplemented or amended by clients to suit the particular requirements of their project) and questions to determine whether bidders should be disqualified under mandatory exclusion criteria set out in the Regulations (eg where bidders have been guilty of bribery or other offences). Bidders are required to respond to the Selection Questionnaire within a prescribed deadline, and are assessed by the client in accordance with the evaluation criteria set out in the Questionnaire. The Regulations anticipate a minimum of 5 bidders will be shortlisted and invited to submit a tender, unless insufficient bids are received. BHCC is required to write to all bidders, whether successful or unsuccessful, and give them feedback about their scores.

3.3.4 **Tender Stage**

BHCC will then invite the shortlisted tenderers to respond to the Invitation to Tender document (the **ITT**), based on the document made available to bidders when the OJEU Notice was published (supplemented or amended as necessary). The ITT will normally ask bidders to describe their methodology for delivering the contract in accordance with the specification, and provide their prices for delivering the contract including their anticipated profit and overheads. The ITT should set out the Price and Quality award criteria by which the tenders will be evaluated and associated scores and weightings.

3.3.5 **Evaluation and Award**

Evaluation of tenders will be carried out in accordance with the award criteria set out in the ITT to determine which is the most economically advantageous. BHCC is required to write to each tenderer who has submitted a tender notifying them of the award decision and giving unsuccessful bidders feedback on their tender submissions. Following the issue of these letters, BHCC must observe a 10 calendar day standstill period (provided that the letters are issued electronically) before contracts can be finalised.

3.3.6 **Post-Tender Discussions**

Under the Regulations post-tender discussions and negotiations are prohibited. As a result, prospective contractors must ensure that their tenders are the equivalent of a "Best and Final Offer", such that no significant amendments are required and there is no negotiation of the contract terms (other than to correct errors and discrepancies).

3.3.7 **Finalisation of contracts/Contract Award Notice**

Following the completion of the standstill period and assuming that no legal challenges have been received during that period, BHCC can proceed to finalise the terms of contract with the selected tenderer. BHCC is required to publish a Contract Award Notice in the Official Journal, advertising the details of the award, and place a similar notice on the Contracts Finder website.

3.4 **Restricted Procedure Timetable**

	Milestone	**Duration**
1	[Section 20 – Notice of Intention]	[Minimum of 30 calendar days to allow leaseholders to submit observations]
2	OJEU Notice despatched to Official Journal/Contract notice placed on Contracts Finder website	
3	Deadline for receipt of Selection Questionnaire	Minimum of 30 calendar days from date of OJEU Notice
4	Evaluation of SQ responses	Suggest 2 working weeks
5	Issue of Regulation 55 letters to successful and unsuccessful Applicants/Tenderers invited to respond to Invitation to Tender	
6	Submission of ITT responses	Minimum of 30 days (though this can be shortened to as little as 14 calendar days by agreement with tenderers)
7	Evaluation of ITT responses	Suggest 2-3 working weeks
8	Seeking Board/Cabinet decision for conditional award to preferred tenderer	
9	[Section 20 Notice of Landlord's Proposals]	[Minimum of 30 calendar days to allow leaseholders to submit observations]
10	Issue of Regulation 86 letters to successful and unsuccessful	

	Milestone	Duration
	tenderers with feedback	
11	Mandatory standstill period	Minimum of [10] days from date of letters (provided that the letters were issued electronically); must end on a working day.
12	Finalisation of contracts	
13	Contract Award Notice despatched to Official Journal/Award Notice placed on Contracts Finder website.	Within 30 days of award decision

4 Competitive Dialogue Procedure

4.1 Background to Competitive Dialogue Procedure

4.1.1 The Competitive Dialogue can be an advantageous route to take if BHCC is not able to completely specify its requirements or if it is unable to fix either the pricing model or the contract terms at the outset of the procurement. However, the competitive dialogue has a reputation for taking a long time and for being extremely costly. This does not need to be the case and we note below the timetable of a streamlined Competitive Dialogue procedure that BHCC could adopt in order to minimise time spent in procurement.

4.1.2 Generally, bidders in the asset management and maintenance industry like having the opportunity to put forward innovative and alternative ideas to contracting authorities, which it is not possible to do under an Open or Restricted Procedure exercise.

4.2 Use of the Competitive Dialogue Procedure

4.2.1 BHCC may elect to use the Competitive Dialogue procedure when its needs cannot be met without adaptation of a readily available solution or where it cannot objectively define either the technical means of achieving its aims or the legal and/or financial make-up of the project (which may well be the case in respect of Options 3 and 4). In such cases, it is anticipated that the Open Procedure and the Restricted Procedure will not be adequate, since the contract will not be sufficiently well defined to enable the prospective contractors to tender appropriately or for BHCC to properly evaluate such tenders.

4.2.2 The Competitive Dialogue is designed to enable BHCC to explore and develop, with the prospective contractors, solutions which will fulfil its needs and requirements before requiring the submission of final tenders. The prospective contractors then tender against a detailed and worked up solution with minimal prospect for clarification during the post-tender period. Please note that BHCC can limit what it conducts the dialogue in relation to, so that if it has certain minimum requirements or "no go" areas, they can be noted as "non-negotiable" elements of the contract/delivery structure from the outset – this may be particularly useful in respect of Options 3 (Wholly Owned Subsidiary/Managed Service) or 4 (Joint Venture), where a complete dialogue on all of the features of the delivery structures would take a significant amount of time.

4.2.3 In terms of the documentation and the basic steps in the procedure, the Competitive Dialogue gives a contracting authority flexibility during the procurement process to identify the best means of meeting its requirements, but consequently requires more input (both in terms of time and money) from the prospective contractors prior to the submission of their final tenders.

4.3 Structure of Competitive Dialogue

A timetable setting out our recommended stages involved in the Competitive Dialogue is noted at the end of this section.

4.3.1 OJEU Notice and Descriptive Document

The beginning of the Competitive Dialogue Procedure is the same as the Restricted Procedure. The OJEU Notice and/or the Descriptive Document must clearly set out what BHCC requires from the awarded contract to enable the invited participates in the Dialogue to propose their solutions.

4.3.2 Procurement Documents

As with the Restricted Procedure, the Regulations requires all "procurement documents" relevant to the tender exercise to be made available in electronic form free of charge to interested bidders from the date that the OJEU Notice is published. However, the Crown Commercial Service has published a guidance note stating that procurement documents for complex procurement procedures do not need to be made available at the start of the exercise and may be made available to tenderers as the documents become available. This suggests a degree of flexibility particularly to issue the tender documents and forms of contract later in the tender exercise after a shortlist has been selected.

4.3.3 Selection Questionnaire

The pre-qualification stage is the same as for the Restricted Procedure, requiring the use of the Crown Commercial Service's Standard Selection Questionnaire (which can be amended as required) and stating the evaluation criteria. Following the evaluation of the Selection Questionnaires against the evaluation criteria, BHCC are required to shortlist a minimum of three bidders to be invited to submit an Outline Solution. However, if BHCC wishes to skip the Outline Solutions stage, it can shortlist a minimum of 3 bidders to participate in Dialogue (and ignore a mere formal Outline Solution stage – see below).

4.3.4 Outline Solutions stage

(a) It is recommended (but not compulsory) to invite bidders to present their Outline Solutions, in response to the procurement documents. This will give BHCC an opportunity to review the tenderers' proposed methodology for delivering the contract and their approach to the contract documents, which will form the basis of Dialogue discussions.

(b) Following expressions of interest, BHCC will evaluate the prospective participants against criteria included in the Outline Solutions responses and invite the short-listed organisations to participate in Dialogue (each a **Participant**). The short-list must consist of at least three Participants.

(c) Alternatively, BHCC could bypass the Outline Solutions stage and go straight to Dialogue. The downside of this approach is that BHCC will have very little information about the Participants' offerings on which to run structured Dialogue sessions or to engage in the details of the contract. The risk is that a Participant may be invited to Dialogue who may be unable to deliver the contract, which might have been more easily established in an Outline Solutions exercise.

(d) If the Outline Solutions stage is to be skipped, we recommend that BHCC establish key gateways during the Dialogue process, where Participants will be required to review and respond to key documents (especially around pricing and the form of contract) to ensure that, at Best and Final Offer Stage, robust and realistic bids are submitted.

4.3.5 **Dialogue Stage**

(a) The Dialogue phase is designed to enable BHCC to identify the most appropriate means of satisfying its contractual needs and requirements. The Participants will propose their solution(s) (based on the information included in the OJEU Notice and/or Descriptive Document) which will be further developed during the Dialogue. Under the Regulations, contracting authorities can discuss all aspects of the contract with the Participants, provided that the principle of equal treatment is followed. Contracting authorities cannot discriminate between the Participants by providing information which may give some Participants an advantage over others. However, contracting authorities also cannot reveal the solutions proposed by individual Participants to other participants without that particular Participant's agreement. This is likely to lead to some tension between a contracting authority's duty to be fair and open with all Participants and the Participants' understandable desire to keep confidential solutions which it they have spent time and money developing.

(b) There is no set time period for which the Dialogue phase should last, nor do the Regulations provide much detail as to how the Dialogue should be conducted. Previous guidance issued by the Office of Government Commerce (now the Crown Commercial Service) suggests that it is likely that most discussions during this phase will be with each Participant about its own solution(s). The Regulations also identify that it is possible for contracting authorities to reduce the number of solutions and Participants during the dialogue phase, provided that the criteria for doing so are set out in the OJEU Notice and/or the Descriptive Document.

(c) Once BHCC is satisfied that it has identified a solution(s) that will meet all of its requirements, it must declare the Dialogue complete and invite the remaining Participants to submit their Best and Final Offers for the identified solution(s).

4.3.6 **Best and Final Offers and Evaluation**

(a) Evaluation of Best and Final Offers will be carried out in accordance with the award criteria set out in the Descriptive Document and/or the Invitation to Submit Best and Final Offers document. The Regulations prohibit a contract being let under the Competitive Dialogue from being evaluated on a lowest-price basis, so the Final Tender must be assessed on a combination of quality and price.

(b) BHCC is required to write to each Participant who has submitted a Best and Final Offer notifying them of the award decision and giving feedback on their tender submissions, and the name and scores of the winning tender. Following the issue of these letters, BHCC must observe a 10 calendar day standstill period (provided that the letters are issued electronically) before contracts can be finalised.

4.3.7 **Post-Tender Discussions**

(a) Under the Regulations the potential for post-tender discussions and negotiations under the Competitive Dialogue procedure is limited. BHCC is only permitted to ask participants to ″clarify, specify or optimise″ their tenders. However, this cannot involve any changes to the basic features of the tender (e.g. price or risk-allocation). As a result, prospective contractors must ensure that their tenders are the equivalent of a "Best and Final Offer", such that no significant amendments are required.

(b) Having selected its preferred bidder, BHCC can only ask the preferred bidder to clarify aspects of the tender or confirm commitments contained in it. Again, this cannot result in substantial aspects of the tender being altered.

4.3.8 **Finalisation of contracts/Contract Award Notice**

Following the completion of the standstill period and assuming that no legal challenges have been received during that period, BHCC can proceed to finalise the terms of contract with the selected tenderer. BHCC is required to publish a Contract Award Notice in the Official Journal, advertising the details of the award, and place a similar notice in the Contracts Finder site.

4.4 **Competitive Dialogue Timetable**

	Milestone	**Duration**
1	[Section 20 – Notice of Intention]	[Minimum of 30 calendar days to allow leaseholders to submit observations]
2	OJEU Notice despatched to Official Journal/Contract	

	Milestone	Duration
	notice placed on Contracts Finder website	
3	Deadline for receipt of Selection Questionnaire	Minimum of 30 calendar days from date of OJEU Notice
4	Evaluation of SQ responses	Suggest 2 working weeks
5	Issue of Regulation 55 letters to successful and unsuccessful Applicants/Tenderers invited to respond to Initial Tender or Participate in Dialogue	
6	Briefing Session (Optional)	
7	Submission of Outline Solutions	Suggest 3-4 working weeks
8	Evaluation of Outline Solutions and shortlisting of Participants to be invited to Dialogue	Suggest 2 working weeks
9	Issue of Regulation 55 letters to successful and unsuccessful tenders/Despatch agenda and final timetable for Dialogue sessions to successful Participants	
10	Dialogue sessions with each Participant to discuss and identify preferred proposals	Suggest 3-6 weeks (assuming a minimum of 3 Dialogue sessions with each Participant)
11	Conclusion of Dialogue/Issue of Invitation to Best and Final Offers	
12	Deadline for submission of Best and Final Offers	Suggest 3-4 working weeks
13	Evaluation of Detailed Solutions	Suggest 2 working weeks
14	Seeking Board/Cabinet decision for conditional award to preferred tenderer	
15	[Section 20 Notice of Landlord's Proposals]	[Minimum of 30 calendar days to allow leaseholders to submit observations]
16	Issue of Regulation 86 letters to successful and unsuccessful tenderers with feedback	
17	Mandatory standstill period	Minimum of [10] days from date of letters (provided that the letters were issued electronically; must end on a working day.
18	Finalisation of contracts	
19	Contract Award Notice despatched to Official Journal/Award Notice placed on Contracts Finder website.	Within 30 days of award decision