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| Meeting:             | Cabinet  |
| Date:                | 12 November 2009   |
| Subject:             | Council Insurance Contracts Tender   |
| Key Decision:        | No   |
| Responsible Officer: | Myfanwy Barrett, Corporate Director of Finance   |
| Portfolio Holder:    | Cllr David Ashton, Councillor Leader, Portfolio Holder for Strategy, Partnership and Finance |
| Exempt:              | No   |
| Enclosures:          | None   |

## Section 1 – Summary and Recommendations

This report outlines recent developments regarding the cessation of operation by the London Authorities Mutual Limited following the outcome of litigation along with progress in respect of the placing of alternative insurance arrangements via a consortium purchasing arrangement.

### **Recommendations:**

Cabinet is requested to :

1. Note the effect of the outcome of the legal challenge to the London Authorities Mutual Limited (LAML)
2. Note the consortium approach to securing long-term insurance cover
3. Delegate the authority to agree the award of the contract(s) to the Leader of the Council.

## **Reason: (For recommendation)**

To enable a timely decision to enter into new insurance contracts to be made as soon as the tender results are available. This is likely to be before the December Cabinet meeting.

## **Section 2 – Report**

### **2.1 Introduction**

- 2.1.1 Brent and Harrow were the first authorities to become insured members of the London Authorities Mutual Limited (LAML) in April 2007 but LAML was subsequently subject to a successful legal challenge brought by commercial insurer Risk Management Partners (RMP).
- 2.1.2 This challenge rendered all authorities' participation in LAML *ultra vires* (i.e. beyond their powers) and this report sets out the actions taken by ex-LAML members to arrange alternative cover on a short and longer term basis.

### **2.2 Background**

- 2.2.1 During 2006/07 Harrow, along with 9 other London authorities, participated in the set up of the London Authorities Mutual Ltd (LAML). Croydon was the lead borough.
- 2.2.2 A number of legal opinions were sought on the legality of the setting up of LAML including providing financial guarantees along with placing insurance with the mutual. Croydon, Brent and the LAML itself all received leading advice that supported the view that the set up of and participation in LAML, including the giving of financial guarantees, was lawful.
- 2.2.3 EU public procurement law generally requires that contracts are awarded by way of a competitive tender process. Local authorities are not required to procure via a tender process where contracts are placed with internal departments. The so-called "Teckal" exemption means that where contracts are placed with an external organisation where the same degree of control is exerted by an authority as that over an internal department, they are not required to procure via a tender process.
- 2.2.4 The council placed its main corporate insurance program with LAML from 1 April 2007 for a long term agreement period of three years. Whereas Brent relied upon the Teckal exemption, Harrow had undertaken a full insurance tender exercise the previous year and in anticipation of the LAML start up in April 2007, had pre-negotiated early release of its insurance contracts with the successful tender, which, crucially, was RMP.

## The Legal Case

- 2.2.5 A challenge was brought by Risk Management Partners (RMP), a local authority insurer, against the London Borough of Brent regarding their participation in LAML after Brent abandoned a tender exercise in which RMP was participating.
- 2.2.6 This challenge was brought in two areas. Firstly that Brent's participation in LAML was ultra vires (i.e. that it did not have the power to do this), and secondly that Brent had breached EU procurement rules in placing their insurance with LAML without undergoing a competitive tender exercise.
- 2.2.7 Brent relied upon powers primarily under section 111 of the Local Government Act (1972). Harrow and the other participants relied upon the broad well being powers under section 2 of the Local Government Act (2000)
- 2.2.8 The case was first heard in the High Court in 2008, when the court ruled that Brent's (and local authorities) participation in LAML was ultra vires on the basis that they did not have sufficient powers under section 111 LGA (1972). In relation to section 2 LGA (2000), the court found that Brent's facts had not established that participation in the mutual was likely to achieve the promotion or improvement of the economic, social or environmental well being of its area. The court also found that Brent was in breach of EU procurement rules because it could not rely on the Teckal exemption because it did not exercise the required degree of control over LAML.
- 2.2.9 On appeal by Brent, LAML and Harrow (with judgment being handed down in June 2009) the Court of Appeal decided that the setting up of, and participation in a mutual (in this case LAML) by local authorities to insure themselves, was not permissible under section 2 Local Government Act (2000) or section 111 Local Government Act (1972). The Court of Appeal also held that local authorities could not rely on the exemption to avoid having to publicly procure for insurance. The impact of this decision is that all participation in the LAML is ultra vires.
- 2.2.10 The Court of Appeal refused permission to appeal to the House of Lords (n.b. the appellate court is now the Supreme Court) but permission can be sought directly from the appellate court instead. Brent and Harrow have both now made applications directly to the Supreme Court seeking permission to appeal, and a decision from the court is awaited.
- 2.2.11 As a result of the Court of Appeal decision, LAML ceased underwriting with effect from 8 June 2009 and is being wound up via a scheme of arrangement to be negotiated with the Financial Services Authority. It is expected that a solvent run-off will be achieved and that Harrow will recoup its investment.
- 2.2.12 In the meantime the Government has recently amended a draft Bill - the Local Democracy Economic Development and Construction Bill (LDEC Bill) which recently passed its third reading. The amendments

to this Bill would permit mutuals such as LAML existing. The Bill is not retrospective and therefore will not impact on the Court of Appeal's decision, or the standing of section 2 Local Government Act 2000, or LAML and its members. It is not clear when the Bill may become law but at present the advice given is to continue with the appeal and review this once there is more certainty about the Bill becoming law.

## **2.3 Current situation**

- 2.3.1 As LAML ceased underwriting as of 8 June 2009, temporary insurance cover has been arranged for the ex-LAML authorities for an interim period from 9 June 2009 to any period of time up to 31 March 2010.
- 2.3.2 Essentially the temporary insurance entailed the LAML re-insurers picking up an extra layer of cover, to underwrite the layer of cover previously underwritten by LAML. This action was pre-agreed as a contingency plan in the event of an adverse court judgement.
- 2.3.3 In order to secure more long term cover, a number of boroughs have formed a consortium for the purchasing of insurance from the commercial market. The core of the consortium is made up of former LAML members, however there has been interest from several other boroughs that were not involved in LAML.
- 2.3.4 The formation of a consortium is consistent with the Government's focus on shared services and reduction of costs. The formation of the consortium will also enable those boroughs who take part to continue to work together collaboratively to progress risk management initiatives and agendas and to share knowledge and best practise.
- 2.3.5 The experience of a group of Fire and Rescue authorities in 2008 was that by forming a Consortium they were able to appeal to a wider selection of insurers and achieved a better response than had they procured separately. The improved response resulted in a greater number of insurers responding, as well as additional savings.
- 2.3.6 It is therefore considered likely that a better response will be received from the insurance market to local authority procurement on a consortium basis rather than each authority procuring insurance cover separately.
- 2.3.7 The insurance market for local authority risks has historically had a limited number of competitors, which has resulted in reduced competition and higher rates.
- 2.3.8 The credit crunch has resulted in falling investment returns for insurers and a resulting reduction in capacity to underwrite risk. The market is expected to harden which could result in higher premiums.
- 2.3.9 The local authority market is increasingly being seen as a more attractive proposition due to its stability. Those authorities who have good understanding of their risks along with robust management processes in place to manage risk are increasingly being seen as an attractive proposition.

- 2.3.10 The London Borough of Croydon is acting as the lead authority for the consortium on behalf of all of the consortium members.
- 2.3.11 Via the consortium, tenders for insurance cover are obtained for a two year long-term agreement contract with the option of extending the cover for a further one year plus one year.
- 2.3.12 In the main, this will be to provide appropriate levels of insurance cover, whilst ensuring required levels of service, a competitive price and continuous improvement.
- 2.3.13 All procurement activities are being undertaken in compliance with the Public Contracts Regulations 2006 in order to comply with EU public procurement law and to secure best value for money.
- 2.3.14 The procurement exercise is currently on target to secure insurance proposals from the markets in time for a 1<sup>st</sup> January 2010 start date. This will be for a minimum term of two years with options to extend for a further two years.
- 2.3.15 The consortium currently involves 12 boroughs, therefore it is important that decisions regarding contract award can be taken quickly.
- 2.3.16 Delegation of contract award powers to the Leader of the Council is considered the most efficient way to ensure that decisions are made in a timely manner to ensure that the Consortium is able to function while still ensuring that procurement decisions are subject to a suitable level of scrutiny. The decision when taken by the Leader will be a key decision.

## **2.4 Why a change is needed**

- 2.4.1 In order to obtain longer term insurance arrangements within procurement regulations, a tender was required.
- 2.4.2 The consortium approach was considered the most viable option for obtaining the best value for money within the knowledge that participation in an insurance mutual is currently ultra vires (subject to the possible appeal).

## **2.5 Financial Implications**

- 2.5.1 The additional cost of the temporary insurance cover (from 9 June 2009 to any period of time up to 31 March 2010) is expected to be in the region of £150k-£170k. This can be contained within the existing budget due to successful recoveries from third parties this year.
- 2.5.2 It is in the interests of all members of the consortium to enter into the new insurance contracts as soon as possible in order to mitigate these costs.

- 2.5.3 It is anticipated that the premium for 2010-11 will be within budget. However, this cannot be confirmed until the tender process is complete.

## 2.6 Performance Issues

- 2.6.1 Within the annual Use of Resources assessment, KLOE 2.4 (Internal Control) requires evidence to determine the answer to the question "Does the organisation manage its risks and maintain a sound system of internal control?"
- 2.6.2 Ironically, the formation of and participation in an insurance mutual was cited as an excellent example of evidence of the Use of Resources.

## 2.7 Environmental Impact

- 2.7.1 None.

## 2.8 Risk Management Implications

- 2.8.1 Insurable risks are the subject matter of this report and directly contribute to the prudent transfer of financial risks across all council services.

## Section 3 - Statutory Officer Clearance

|                                     |                                     |   |
|-------------------------------------|-------------------------------------|---|
| Name: Myfanwy Barrett               | <input checked="" type="checkbox"/> | Chief Financial Officer                 |
| Date: 15 <sup>th</sup> October 2009 |                                     |   |
| Name: Paresh Mehta                  | <input checked="" type="checkbox"/> | on behalf of the*<br>Monitoring Officer |
| Date: 20 <sup>th</sup> October 2009 |                                     |   |

## Section 4 – Performance Officer Clearance

|                                     |                                     |   |
|-------------------------------------|-------------------------------------|---|
| Name: Alex Dewsnap                  | <input checked="" type="checkbox"/> | Divisional Director<br>Partnership,<br>Development and<br>Performance |
| Date: 19 <sup>th</sup> October 2009 |                                     |   |

## **Section 5 – Environmental Impact Officer Clearance**

Name: John Edwards



Divisional Director  
(Environmental  
Services)

Date: 19<sup>th</sup> October 2009

## **Section 6 - Contact Details and Background Papers**

Contact: David Ward, Divisional Director – Risk, Audit & Fraud

Tel: 020 8424 1781

Background Papers: None