



**CHIEF OFFICER IN CONSULTATION
WITH COMMITTEE CHAIRMAN
DELEGATED POWERS REPORT
28 April 2021**

Title	Brent Cross: Brent Cross West – Entrance Box to Station and East-West Over bridge.
Report of	Chief Executive
Wards	Childs Hill, Golders Green and West Hendon
Status	Public report (With accompanying Exempt report not for publication by virtue of paragraphs 3 and 5 of Schedule 12A of the Local Government Act 1972 as amended as this relates to information of a financial nature and information in respect of which a claim to legal professional privilege could be maintained in legal proceedings).
Urgent	Yes
Key	Yes
Enclosures	None
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Summary

This report authorises completion of legal documents required for the council to deliver the Eastern Entrance Box which will serve the new station and to the new overbridge east – west over the railway that will improve pedestrian and cycle connections in the local area. Upon completion of the legal documents the council will instruct Mace to issue the Project Manager's Instruction to Volker Fitzpatrick to undertake the works as delegated by the Housing and Growth Committee on 6 July 2020 which confirmed that the Deputy Chief Executive in consultation with the Chair of this Committee be authorised to agree the revised delivery arrangements for the Station Eastern Entrance Box and authorise on behalf of the council that it enters into the required legal agreement with Brent Cross South

Limited Partnership (BXS) to allow the council to deliver the Eastern Entrance Box and make the necessary amendments to the Station Contract with Volker Fitzpatrick (VFL).

Decision

Completion of 1) the Station Contract Side letter between the council and Volker Fitzpatrick 2) the SEEB Side Agreement between the council and Brent Cross South JVLP and 3) required amendments to the Asset Protection Agreement with Network Rail so that the council can deliver the Eastern Entrance Box and issue the Project Manager's Instruction to Volker Fitzpatrick to undertake the works in the relevant timescale (and it is noted that not all documents will be completed at the same time).

1. WHY THIS REPORT IS NEEDED

- 1.1 This report authorises completion of legal documents required for the council to deliver the Eastern Entrance Box which will serve the new station and to the new overbridge east – west over the railway that will improve pedestrian and cycle connections in the local area. Following completion, the council will instruct Mace to issue the Project Managers Instruction to Volker Fitzpatrick to undertake the works referred to at 1, 2 and 3 of the Decision.

Background

- 1.2 On 6 July 2020, the Housing and Growth Committee confirmed that the Deputy Chief Executive in consultation with the Chair of this Committee be authorised to agree the revised delivery arrangements for the Entrance Box and authorise on behalf of the Council that it enters into the required legal agreement with Brent Cross South Limited Partnership (BXS) to allow the Council to deliver the Eastern Entrance Box and make the necessary amendments to the Station Contract with Volker Fitzpatrick (VFL) as set out in paragraphs 1.19-1.26 of this report. The link to the report is here:

[Brent Cross Cricklewood Report.pdf \(modern.gov.co.uk\)](#)

- 1.3 On 2 December 2020, VFL was instructed to proceed with the design for the SEEB works. This was instructed to VFL under Project Manager's Instruction PMI039 on 3 December 2020. A further instruction (PMI043) was issued to VFL on 18 January 2021 to cover costs up to the point of the full build instruction being issued.
- 1.4 A further instruction was provided on 12 March 2021 for the inclusion of passive provision within the station design for the West London Orbital.
- 1.5 The documentation between the council and Brent Cross Town (BXT) (referred to elsewhere in this report as Brent Cross South JVLP and BXSLP) and between the council and VFL referred to at 1 and 2 of the Decision are now agreed and ready for completion.

This report summarises the key points in the documents relating to the funding and delivery of the SEEB and authorises completion of the documents (referred to at 1, 2 and 3 of the decision) and to confirm that the council officers instruct Mace to issue the Project Manager's Instruction to VFL. A separate legal summary has been prepared by GWLG in respect of the documents referred to at 1 and 2 of the Decision and is attached to the Exempt report. Changes referred to at 3 of the Decision fall within allowed variations to the Asset Protection Agreement already entered into by the council

Key points of the funding and delivery documents.

- 1.6 In March 2020, Barnet council (LBB) and BXS Limited Partnership (BXSLP (also known as JVLP and BXT)) entered into a variation of the Project Agreement (the PA).
- 1.7 Schedule 25 of the Project Agreement relates to the Thameslink Station and LBB and BXSLP agreed to comply with the terms of the Station Strategy (paragraph 2.1 of Schedule 25 of PA). The Station Strategy, in March 2020, contemplated two different routes for the delivery of the SEEB (paragraph 16.3 of Station Strategy).
- 1.8 LBB and BXSLP have agreed that the route known as Option 2 - whereby LBB delivers the SEEB pursuant to the Station Contract with BXSLP funding up to the Station East Entrance Building Base Cost - is to be selected and delivered pursuant to the documents summarised in this report ensuring a one design one contractor approach.

CONSTRUCTION CONTRACT AND VOLKER FITZPATRICK SIDE LETTER

- 1.9 The Thameslink station is being constructed by Volker Fitzpatrick Limited (the Contractor) under an NEC3 Engineering and Construction Contract – Option C – Target Cost with Activity Schedule (as amended) dated 23 December 2019 (the Station Contract).
- 1.10 LBB and BXSLP, have agreed that the SEEB Works will be added to the Station Contract pursuant to a Project Manager's Instruction and delivered under the terms of that contract, as amended by a side letter (VF Side Letter) entered into between LBB and the Contractor.
- 1.11 The Station Contract was procured via OJEU.

SEEB SIDE AGREEMENT.

- 1.12 LBB and BXSLP will enter into a Side Agreement to the Station Strategy (the SEEB Side Agreement). The parties have agreed a Working Arrangements Protocols document (which will be updated from time to time) and agree to engage with each other in accordance with the protocols. GWLG have advised

that, in the event of a conflict between the terms of the SEEB Side Agreement and the terms of the protocols, the SEEB Side Agreement will take precedence (clause 3.2).

- 1.13 Planning and other approvals (clause 5) Planning consent has been granted for the SEEB Works and BXSLP will use reasonable endeavours to satisfy certain of the planning pre commencement conditions and will also use reasonable endeavours to procure that the Contractor satisfies the remainder. In the event that there is a delay, LBB can:
- (i) in the case of the BXSLP conditions, take over responsibility for satisfying these at BXSLP's cost; and
 - (ii) in the case of the Contractor conditions, use the position under the Contract to seek performance by the Contractor.
- 1.14 As per Schedule 25 of the PA, LBB shall use all reasonable endeavours to obtain all other consents reasonably required to permit the construction and operation of the SEEB Works as soon as reasonably practicable.
- 1.15 Warranties (clause 7) - LBB must procure warranties from the Contractor and the Project Manager in favour of BXSLP and Homes England (and use reasonable endeavours to procure collateral warranties in favour of the same parties from certain key sub-contractors).
- 1.16 Station Strategy (clause 8) - BXSLP and LBB agree that the Station Strategy shall be deemed to have been amended to reflect that Option 2 has been selected and will be delivered pursuant to the terms of the SEEB Side Agreement.
- 1.17 BXS Development Manager (clause 8) - the SEEB Side Agreement acknowledges that a variation of the DMIDA and Collateral Warranty will be entered into within one month of completion of the SEEB Side Agreement. The variation will allow BXSLP to delegate the SEEB Services to BXS Development Manager (DM) under the terms of the documents referred to at point 3 of the Decision. The provision of the SEEB Services will attract a 4% fee for the DM. However, this does not relate to 'internal' costs.
- 1.18 Disputes (clause 11) – disputes under the SEEB Side Agreement which cannot be resolved between the parties are to be referred to an expert.
- 1.19 Delay (clause 12) – in the event that Completion has not occurred by 10 September 2022 (as that date may be adjusted under the terms of the Station Contract), the parties will seek to agree the next steps.
- 1.20 Delivery of the SEEB Works (Schedule 1). The Project Manager's Instruction (paragraph 1) – LBB is to issue the PMI as soon as practicable after the date of the SEEB Side Agreement..
- 1.21 Approved Plans and Variations (paragraph 2) - LBB is permitted to make variations to the SEEB Works in certain circumstances or otherwise as agreed with BXSLP.

- 1.22 Necessary Other Consents (paragraph 3) – LBB is to use reasonable endeavours to obtain all Necessary Other Consents (i.e., non-planning consents) and is to appeal against a refusal where appropriate.
- 1.23 LBB's Obligations (paragraph 4) – LBB's obligations in relation to SEEB mirror, as far as possible, the commitments given by LBB to BXLP in Schedule 25 of the PA in respect of the rest of the Thameslink Station. In summary:
- (i) LBB will instruct the Contractor to carry out the SEEB Works under the terms of the Station Contract (as varied by the Side Letter);
 - (ii) subject to LBB's funding not being withdrawn and subject to the planning consents being obtained, LBB will use all reasonable endeavours to enforce performance by the Contractor of the Station Contract with the object of completing the works by the date in the Station Contract but subject to force majeure, Network Rail requirements and the performance by BXSLP of its obligations in the SEEB Side Agreement and Schedule 25 of the PA; and
 - (iii) there is a limited indemnity for BXSLP.
- 1.24 CDM (paragraph 5) – LBB shall be the client in relation to the SEEB Works for the purposes of CDM.
- 1.25 Insurance (paragraph 6) – LBB is to procure the insurance of the SEEB Works under the terms of the Station Contract and BXSLP has been added as a named party on the Contractor's insurance policy.
- 1.26 Site Visits (paragraph 7) – As well as being invited to attend monthly inspections, the BXSLP Representative may enter the site at all reasonable times (but always in compliance with the Working Protocols) to view the SEEB Works. The Project Manager must have due regard to any representations made by BXSLP following such a visit.
- 1.27 Completion (paragraph 8) – The BXSLP Representative must be given notice of any Completion Inspection. The Project Manager shall have due regard to any representations made by the BXSLP Representative concerning the issuing of the Certificate of Completion. However, the decision to issue the Certificate of Completion shall be in the sole professional discretion of the Project Manager.
- 1.28 Developer Changes (Schedule 5) – BXSLP may request changes to the SEEB Works. LBB has the right to refuse such a request in certain circumstances (e.g. the change will cause Completion to be delayed). Otherwise LBB gives BXSLP a cost and time estimate for carrying out the change or notifies BXSLP that there is no time to do so if the Station Works are not to be delayed. LBB then proceeds with the change if instructed to do so by BXSLP.

RELATED CONSENT LETTER

- 1.29 Related will consent to the variation of the Station Strategy and the entry into of the SEEB Side Agreement in accordance with the process set out in the 2016 deed of variation to the PA.

2. REASONS FOR DECISION

2.1 To ensure a “one designer, one contractor” approach thereby reducing risk to the council and programme.

3. ALTERNATIVE OPTIONS CONSIDERED AND NOT RECOMMENDED

3.1 To proceed with option 1, which was for BXT to deliver. This is not recommended as it adds unnecessary complexity and increases risks to the programme particularly in respect of design integration and completion of the station.

3.2 The council has not elected to proceed with a different supplier due to the difficulties this would cause in terms of integration, construction and interface co-ordination / management alongside duplication of cost and resultant increased programme risks.

4. POST DECISION IMPLEMENTATION

4.1 To complete the legal documentation referred to at 1, 2 and 3 of the Decision and to issue the Project Managers Instruction, and to finalise the legal documentation relating to the variation of DMIDA which will be subject to a separate delegated powers report.

5. IMPLICATIONS OF DECISION

5.1 Corporate Priorities and Performance

5.1.1 Previous reports describe in detail the ways in which the regeneration of Brent Cross Cricklewood supports the Council’s Corporate Plan Barnet 2024.

5.2 Resources (Finance & Value for Money, Procurement, Staffing, IT, Property, Sustainability)

5.2.1 The current approved budget in the capital programme for the delivery of the Brent Cross West Station is £364m. This forms part of the MHCLG Grant of £419m which is also inclusive of Critical Infrastructure works of £55m.

5.3 Social Value

5.3.1 As indicated in the reports to HAG committee, the Brent Cross Cricklewood programme will secure wider social, economic and environmental benefits.

5.3.2 Legal and Constitutional References

5.3.3 As outlined in the Council’s Constitution Article 7, the Housing and Growth Committee has responsibility for major regeneration schemes, which includes the Brent Cross Cricklewood programme.

5.3.4 Chief Officers have delegated authority to make decisions in accordance with the

powers delegated (see Article 9) and other Officers under the Schemes of Delegation maintained by Chief Officers and published on the council's website.

- 5.3.5 The Council has a range of powers to enter into the legal agreements envisaged by this report, including the general power of competence under Section 1 of Chapter 1 of the Localism Act 2011 to do anything that individuals can do subject to any specific restrictions contained in legislation and Section 111 of the Local Government Act 1972 which provides that a local authority has power to do anything which is calculated to facilitate, or is conducive or is incidental to, the discharge of its functions.
- 5.3.6 Procurement of public works and services contracts over the relevant value thresholds must observe the requirements of the Public Contracts Regulations 2015, to include the placing of notices in Find a Tender where such contracts are not drawn down from a compliant framework. The Public Services (Social Value) Act 2012 requires the Council to consider whether it can achieve an improvement to the economic, social and environmental well-being of an area as part of the procurement of these services. If so, the social value objectives identified must be written into the procurement process. All of this must be achieved with regard to value for money and in a way that is compliant with existing public procurement law. "Social value" objectives can include the creation of employment, apprenticeship and training opportunities for local people, trading opportunities for local businesses and the third sector; and the promotion of equality and diversity through contract delivery.

5.4 Risk Management

- 5.4.1 Risk management has been applied across all levels of the programme. As reported to the Housing and Growth Committee, owners and mitigation plans are identified and risks are measured against impact and likelihood to give an overall rating. High rating risks are escalated and reported through the defined reporting procedure with top risks reported to BXC Governance Board. Currently the key risks and mitigations are summarised below:
- 5.4.2 Station Delivery Date – there is the risk that the 2022 station opening date cannot be achieved. The current programme maintains a 2022 opening date albeit December rather than May. There is a risk that this could be later depending on other works on the railway. The council has worked with DfT and Network Rail alongside the Train and Freight Operators to develop a revised industry integrated programme, underpinned by the signed Memorandum of Understanding. This programme has been agreed and a workable possession programme is in place subject to final testing by Network Rail. A QRSA has also been undertaken. While the possession risk has been mitigated, railway possessions can, whilst unlikely, be cancelled as a result of unforeseen circumstances. There is also the additional programme risks as a result of COVID 19. The project team and Network Rail have therefore developed a contingency strategy in the event of a further loss of possessions.

5.4.3 BXW delivery costs – as with all major programmes there is the risk that costs will increase during programme delivery. The BXW budget is under pressure and this risk is being actively managed with public sector partners and contractors. The contract between the council and NR is an Emerging Cost contract. As indicated in previous reports, all emerging cost contracts entered into will require strong contract management to ensure all costs incurred are reasonable. As part of the signed Implementation Agreement the council has open book access to all of Network Rail’s financial information relating to invoiced costs incurred on the programme. This extends to Network Rail contractors where an emerging cost contract is in place. As referred to in the report to ARG in November 2018, the council also has the right (subject to notice and personal safety) to access the site and attend meetings. In this regard, the regular senior level meetings between Network Rail and the council/Re delivery are continuing to review the costs each month. Similarly, there is an on-site presence by the council/Macedelivery team to be monitoring programme and work achieved, particularly during track possessions.

5.4.4 The most important control mechanism for the council is to employ experienced staff who will provide diligent review and challenge of the NR/contractor cost base and reject any costs which are not reasonably and properly incurred. The council’s Client and BXW delivery team comprises professionals used to working on the railway within Network Rail and rail contractors and are experienced in delivering large railway projects. The challenge operates at several levels, including:

A full-time site presence that stays abreast of issues that arise on site, and monitors the detail and impact of any events, or failure to meet programme milestones, quality standards etc. The site team/person will also systematically log these events/issues and share this information with NR/VFL.

Whilst it will always be difficult to isolate costs associated with NR/Contractor failure, from genuine cost, it is important that NR are discouraged from passing on contractor valuations without themselves challenging whether a deduction should be made to take account of notified failures.

Attendance at key meetings.

A strong commercial challenge that scrutinises and interrogates any unexpected costs which emerge during the pre-invoice (valuation) process and repeats this when the main invoices are submitted.

5.5 Equalities and Diversity

5.5.1 As set out in the report to the Housing and Growth Committee

5.6 Corporate Parenting

5.6.1 None in the context of this report.

5.7 Consultation and Engagement

5.7.1 As set out in the report to the Housing and Growth Committee,

6.0 BACKGROUND PAPERS

6.1 [Brent Cross Cricklewood Report.pdf \(modern.gov.co.uk\)](#)

DECISION TAKER'S STATEMENT

7.1 I have the required powers to make the decision documented in this report. I am responsible for the report's content and am satisfied that all relevant advice has been sought in the preparation of this report and that it is compliant with the decision-making framework of the organisation which includes Constitution, Scheme of Delegation, Budget and Policy Framework and Legal issues including Equalities obligations.

8. OFFICER'S DECISION

I authorise the following action

Completion of 1) the Station Contract Side letter between the council and Volker Fitzpatrick 2) the SEEB Side Agreement between the council and Brent Cross South JVLP and 3) the required amendments to the Asset Protection Agreement with Network Rail so that the council can deliver the Eastern Entrance Box and issue the Project Managers Instruction to Volker Fitzpatrick to undertake the works.

Signed



Date

29.4.2021
