

January 2019

**LIFE SCIENCE AND WELLNESS VILLAGE
AT DELTA LAKES**

GOVERNANCE AND PUBLIC PROCUREMENT REVIEW

PART ONE: TERMS OF REFERENCE

1. Acuity Legal has been asked by Carmarthenshire County Council (the Council), to undertake a Governance and Public Procurement review in relation to the Llanelli Wellness Village Project at Delta Lakes (the Project).

2. The terms of reference for the review involve a legal appraisal of the key mechanisms through which the Council is protected in relation to the Project including:
 - 2.1 the Council's decision-making processes in the public procurement process in the light of the advice received
 - 2.2 the terms of the Collaboration Agreement with Sterling and Swansea University
 - 2.3 the Council's actions since July 2018 under the processes established through the terms of the Collaboration Agreement
 - 2.4 papers relating to the Project since the establishment of the Collaboration Board including the minutes of recent Collaboration Board meetings
 - 2.5 whether the Council followed robust governance processes in relation to the decision to terminate the Collaboration Agreement; and
 - 2.6 potential future options for financing the Project.

The review excludes consideration of appropriate mechanisms to engage in future with private sector participants in a manner which is compliant with Public Procurement rules.

3. Acuity has been asked to conduct the review on the basis that it is a panel adviser to local authorities in Wales under the National Procurement Service for Wales Legal Framework, covering governance work. Acuity did not advise on the procurement process or on the preparation of the Collaboration Agreement which form the bulk of the subject matter of the review. This firm does have knowledge of the direction of the Project having recently been asked by the Council to consider funding options and how best to regulate the future engagement of the Council with third parties in the period following the signing of the Collaboration Agreement between the Council, Swansea University (the University) and Sterling Health Securities Holdings Limited (Sterling)

4. In conducting the review, representatives of Acuity have spoken to senior officers at the Council concerning the factual background. Our review incorporates information provided as a result of those discussions and our conclusions are, in part, based on discussions with Council's officers and in part based on our review of the relevant material, in particular:
 - a. The Collaboration Agreement
 - b. The first draft Shareholders Agreement for the proposed property holding company at Delta Lakes
 - c. The minutes of the three Collaboration Board meetings and one Shadow Board meeting
 - d. Our initial Advice Note of August 2018; and
 - e. Procurement material referred to in the Appendixeach of which is described in more detail in this Report.
5. The report is prepared for the sole use by Council representatives and is not intended to be relied on by any party other than the Council. It should remain confidential and not be disclosed without our consent.

PART TWO: EXECUTIVE SUMMARY

6. The Council engaged and ultimately selected the University and Sterling as preferred partners following a competitive dialogue process, which is a thorough and robust method of selecting partners for projects of the nature and complexity of the Project.
7. The documentation provided by the Council demonstrates that it followed due legal process in the procurement and the award of the Collaboration Agreement to Sterling and the University as a collective party.
8. The Project records show good governance and regard by the Council to risk management
9. The documentation provided shows that the Council has not given any binding legal commitments to Sterling or the University which lock those parties into the Project, nor has it transferred any land, made loans, offered cash consideration or formed any company or formal joint venture, with either party.
10. The Council's actions since the establishment of the Collaboration Agreement, as recorded in minutes of Collaboration Board meetings and in the document itself, also reflect an approach which incorporated many levels of Council control into the draft legal arrangements, including appropriate veto rights and the creation of new corporate policies to ensure value for money and compliance with local authority governance rules. This was done in keeping with external legal advice.
11. The Council had several options available to it in relation to the Collaboration Agreement in response to the recent suspensions of University staff. In order to protect the integrity of the Project and the Council's assets it chose to terminate the Collaboration Agreement in accordance with clause 53, having sought legal advice on its options. The Council took account of a range of relevant considerations when electing to terminate. This is addressed in detail in Part Six below (paragraphs 37 to 46).
12. Termination of the Collaboration Agreement does not prevent the Council from engaging with third party participants (including Swansea University) in the future nor does the absence of Sterling Health, in our opinion, have a material adverse effect on funding structures for the Project. Indeed, it gives the Council a greater deal of control to structure finance in a way which best fits its aspirations for the Project as referred to in more detail in Part Seven of this Report.
13. Through the period we have reviewed, the Council's officers have, in our view, taken prudent steps to manage the Project in a safe and well considered legal and financial environment.

14. in our view, there has been no misuse of, and no risk posed to, public funds.

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PART THREE: REVIEW OF PUBLIC PROCUREMENT EXERCISE

15. Acuity has undertaken a detailed analysis of the procurement process undertaken by the Council which led to the Council entering into the Collaboration Agreement with Sterling and the University.
16. Our analysis is contained in the **Appendix** to this report and it should be read in conjunction with this remainder of the report.
17. In summary, the Council's project records are in good order and demonstrate that at all times the Council acted in accordance with the Public Contracts Regulations 2015 (**PCR**) and followed appropriate processes, including the recognised competitive dialogue procedure. The Council acted with the benefit of advice provided by its experienced external lawyers, Blake Morgan as well as senior officers, including specifically the Council's Head of Law and Administration (who is also the Council's Monitoring Officer) and the Council's Director of Corporate Services (who is the Council's Section 151 Officer).
18. The Council's in-house team and external lawyers played a central role in the procurement, including attending meetings and workshops with Sterling and the University. The Council's external lawyers chaired the dialogue meetings.
19. While it is not within the scope of this review to assess the merits of the bid by Sterling and the University it is worth noting that the Council considered that their bid had the following benefits:
 - a. Sterling brought with it the University as a co-partner which, in turn, brought significant financial strength, expertise, innovation and leverage from within the University's resource and knowledge base
 - b. The concept of a wellness village ie co-locating various assisted living, wellness, rehabilitation and medical facilities, training facilities, housing and care accommodation is a concept which is attracting interest internationally and offers the potential for significant wellbeing benefits and cross border partnerships which could benefit the Council and derive many spin off benefits such as data analytics and better health outcomes
 - c. Sterling and the University had carried out preliminary work to engage with significant third party commercial entities eg Siemens, Pfizer, Fujitsu and other international companies who had the potential to bring added value

- d. The bid was informally supported by expressions of interest from private sector funding institutions. Such funding, if formally locked in, could assist in satisfying the conditions for attracting City Deal funding for the benefit of the local area.
20. In the light of these apparent benefits it does not appear unreasonable that the Council would wish to engage with Sterling and the University under the terms of a well drafted legal arrangement which preserved options for the Council, or indeed the ability to detach itself, wholly or partly, from those parties if it wished to do so. The Council therefore took the decision to proceed in a considered manner to an interim stage and an arrangement was drafted by the Council's external lawyers and signed in July 2018 as the "Collaboration Agreement".

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PART FOUR: TERMS OF THE COLLABORATION AGREEMENT

21. The Council has confirmed to us that the Collaboration Agreement represents the only legal agreement in place between the Council, Sterling and the University. It has formed the background to the engagement between the parties from July 2018 to December 2018.
22. In our view, the Collaboration Agreement weighted Project risks in the Council's favour and did not expose the Council. In particular, the document:
 - a. reserved rights for the Council to progress alone with key phases of the Project if it so wished
 - b. placed the onus on Sterling and the University to bring forward further detail in relation to other components of the Project for the Council's approval before concrete commitments were made .
 - c. permitted the creation of a steering group to discuss development proposals in a streamlined and orderly fashion
 - d. incorporated the right to trigger a notice forcing the parties to provide particulars of their offering or else face termination.
 - e. inserted termination provisions which could be (and indeed were) activated at the Councils sole discretion and without liability to the Council.
23. In so doing, the Council took sensible precautions against the risk of the other parties being unable to satisfy financial and development tests or bring forward robust proposals which satisfied the Council's obligations to deliver best value from its assets and meet the requirements of its public procurement.
24. The Collaboration Agreement did not contain any legally binding commitments on the Council to transfer assets or value, or create formal joint venture commitments which could tie up public assets. In reality, the University and Sterling obtained little more than a right of first refusal right to bring forward proposals for certain phases of the Project for detailed consideration by the Council. It also provided for the creation of a joint steering group to look at the formation of joint arrangements, financing options and masterplanning work The agreement was capable of termination by the Council at any time.

PART FIVE: COUNCIL DECISION MAKING FOLLOWING THE COLLABORATION AGREEMENT

25. A steering group was established under the Collaboration Agreement. Monthly meetings took place, the meetings of which were chaired, well attended and minuted. Minutes were subsequently circulated and settled at the following meeting. Conflicts of interest were asked to be declared.
26. Copies of the minutes of the meetings to date (a Shadow Board meeting dated 29 June and then Collaboration Board Meetings of 3 September, 17 October and 15 November 2018) show that good governance of the Project was a key consideration.
27. Significant activity took place around those meetings to formulate a detailed Project strategy. Discussions also took place with prospective occupiers of elements of the Wellness Village (principally the University Human Health department and Medical School and Hywel Dda University Health Board)
28. Work was also undertaken by the Council, both internally and reviewed by an external advisor, 1971 Limited, to undertake high level financial modelling for each phase of the Project to form part of a comprehensive business plan. Detailed spreadsheets were prepared which took account of likely funding options and revenue streams. Such work was commissioned directly by the Council in response to concerns that Sterling were not undertaking such work within the required timescales and in order to ensure that the Council's position would be protected in any subsequent funding discussions.
29. Work also began to define the architectural and engineering inputs into the planning phase of the Project. Arup was appointed in relation to this work pursuant to a framework agreement that the Council was able to use. The Council was described in the documentation as the commissioning body, thereby retaining full control of the intellectual property rights in design and planning work (with such rights not being transferred to Sterling or the University). The appointment of Arup was prepared by this firm in accordance with the documentation requirements of the procurement framework which the Council had selected. The Council took on responsibility for bearing the costs of the Arup engagement on the basis that it retained all rights to the benefit of such work and retained full ownership of the land at that point.
30. Although design and planning work has been undertaken by Arup, no construction contracts have been awarded in relation to the Project.

31. A key intention of the Collaboration Agreement was to progress work towards the formation of a “Wellness Company” and “Project Vehicles” into which the Council could potentially transfer land to enable the Project to be developed through special purpose vehicles without direct legal exposure to the Council. These legal entities would also have enabled the wider development of the concept of a “wellness village” in other localities outside of Wales, from which the Council could have, and hoped to, retain an equity financial interest without the need for direct involvement.
32. Discussions at Board level took place under the Collaboration Agreement to start to prepare legal documentation for the formation of an asset holding Project Vehicle in October 2018 in accordance with legal advice. However:
- a. No land transfers have taken place and therefore the site remains in the ownership of the Council under the terms of a joint venture with Welsh Ministers, with no legal commitment to make any transfers;
 - b. No Project Vehicles were established as the proposals were in draft stage in the period prior to termination of the Collaboration Agreement and therefore the Council has not issued shares to a third party and is not obliged to do so;
 - c. The draft agreement was prepared and circulated for the creation of a property development vehicle, this did not get beyond first draft stage and therefore it is not legally binding.
 - d. The draft agreement incorporated provisions that:
 - i. New companies would have to be established (ie not adopting any existing Sterling companies) (see definition of “Company) with only a limited number of directors from each representative entity (two each)
 - ii. Veto mechanisms for the Council and University would be incorporated into the documentation to guard against any concerns that the private sector participant could take decisions which were not in the interests of the Council
 - iii. Processes were built into the documents to enable the Council to take security over the project company if it were ever asked to contribute value (eg land, funding or guarantees) which was disproportionate to its shareholding (to be treated as loans on which market rates of interest would accrue)

- iv. The draft contained protections against fraud and anti-corruption, requirements of transparency together with significant warranties and undertakings from the Sterling and the University in favour of the Council
- 33. It should be emphasised that the draft agreement would have been further refined through discussion and negotiation between the three shareholders and their respective legal advisers and additional protections incorporated if necessary
- 34. The minutes of Collaboration Board meetings show that the Council were also anticipating the following documents to accompany the formation of a Project Vehicle:
 - a. Detailed Business Plans and financial models were to be prepared to define the parameters of the Project
 - b. A “procurement strategy” was to be documented (which this firm has been instructed to prepare following the November Collaboration Board meeting) so as to govern engagement with third parties in a manner which satisfied governance requirements of the Council (as a local authority) and University (as a charity) – and which was intended also to ensure Sterling’s dialogue with third parties was carried out in a regulated and transparent manner;
 - c. Risk register, insurances and quality assurance policies were to be established in conjunction with the proposed Business Plan, in each case to mirror examples of good governance in other local authority- controlled trading companies
- 35. It is noted from the Minutes that the Council expected both the University and Sterling to seek independent legal advice on the terms of any agreement. Such advice would have included the identity of shareholders and directors proposed by the University and Sterling which would have to be negotiated and agreed by all parties transparently. Accordingly, all parties were intending to have the opportunity to have independent scrutiny of the documents and make their proposals as to how shareholding structures would be set up. The Council also reserved its position to seek separate approvals from its Executive Board prior to concluding any legally binding commitments.
- 36. Our recent discussions with Council officers have disclosed that during the course of its engagement with Sterling under the Collaboration Agreement, it became apparent to officers that Sterling developed unrealistic expectations concerning the Project outcomes and funding structures. It also relied excessively on the Council and University to drive key elements of the Project (notably the preparation of financial models and procurement strategies for each phase

and the adaptation and refinement of elements such as rehabilitation and extra care. In our view, the mechanisms introduced into the process by the Council (and referred to above) showed an appreciation of these issues and were designed to protect the Council (and University) from associated risks and ensure their behaviour was properly regulated from a governance perspective.

37. Therefore, the Council had taken steps throughout the process to ensure high standards of governance and risk management were incorporated into the documentation which was being prepared so as to manage all future legal arrangements. The Council's implementation of the Collaboration Agreement in our view protected the Council from foreseeable economic risks of the Project. The next phase of documentation (specifically shareholder relationships) were intended also to guard the Council against failure of other parties to perform adequately in relation to the Project.

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PART SIX: DECISIONS CONCERNING TERMINATION

38. At the stage of considering whether or not to terminate the Council had not received any detail concerning staff suspensions at the University. This report does not intend to comment on those suspensions or speculate as to the outcome of the University's internal review as the review is still incomplete as far as we are aware.
39. As the suspensions involved individuals with links to the Project, the Council considered that it needed to take swift and appropriate action to protect itself and the Project. It considered a range of options, principally:
- a. Await the outcome of the University investigation and take a view on the impact when it concluded (**Wait and See Option**)
 - b. Serve an interim notice under the Collaboration Agreement indicating an intention to progress the core elements of the scheme alone (particularly the Community Health Hub and Wellness Centre) and put on hold the remaining elements until further details were known (**Partial Pause Option**)
 - c. Serve 6 months' notice to terminate the Collaboration Agreement and cease discussions with Sterling, but leave open the potential of dialogue with the University in its capacity as occupier of the Community Health Hub (**Interim Termination Option**)
 - d. Serve an immediate notice ending the agreement "forthwith" alleging breach of the Agreement (**Breach Termination Option**)
40. The drafting of the Collaboration Agreement did not permit the Council to terminate the relationship with respect to one party only (Sterling or the University) and leave the other in place. Any notice to terminate therefore had the effect of ending the entire agreement.
41. When considering termination options, the Council were aware that termination of the Collaboration Agreement did not necessarily preclude the Council from continuing its dialogue with the University, both as a prospective occupier of the Community Health Hub and potentially more widely following proper re-engagement. Indeed, the competitive dialogue documentation issued by the Council made it clear that the University had a key contributory role which logically can apply whether or not the Collaboration Agreement was in place.

42. In making any decision from available options, the key factors which were relevant and available to the Council for consideration were:
- a. giving assurance to Council members that a robust stance was being taken which protected the Council;
 - b. Preserving the ability to attract City Deal funding from Welsh Government/UK Treasury and complying with the conditions attached to that funding;
 - c. retaining the valuable support that had been offered to that point by Swansea University in relation to matters such as human health, medical school, training and digital platforms as occupier of the Community Health Hub;
 - d. The Council being confident that it could obtain finance for the wider Project from private sector sources so as to match fund City Deal contributions appropriately;
 - e. project timeframes, particularly as work on master-planning had already been commissioned and was underway and there was a requirement from Hywel Dda University Health Board that any elements of the Project which they were contributing to within the Community Health Hub were delivered in a timely and transparent fashion so that care packages could be commissioned at the right time; and
 - f. Whether the University would conclude its internal reviews quickly.
43. The Council discounted the Breach Termination Option having taken legal advice. Without full and proper information regarding the outcome of the investigation by the University it could have risked disputes with the other parties if it were to allege a breach. Risking such a dispute would have been unnecessary given the alternative options available to the Council.
44. The Council also considered that it could not adopt the Wait and See Option. The timeframes for conclusion of the University review were uncertain as the suspensions were being contested publicly the fact that a full investigation was frequently a time-consuming exercise in the light of the University's charter, policies and Charities Act obligations Therefore a Wait and See Option would deprive the Council of the ability to reassure its members and the public that it was acting swiftly and responsibly.
45. The Partial Pause Option would, in effect, have kept the Collaboration Agreement alive but extracted from it two core phases, the Community Health Hub and Wellness Centre. These phases were so integral to the overall success of the Project that they would have deprived the

other parties of any real input in the Project for years. It would also have been difficult to engage partially with the University without also dealing with Sterling (or vice versa) while the Steering Group was intact for remaining phases. The uncertainty would also possibly be perceived as insufficient action to reassure the Council and other stakeholders such as Welsh Government and UK Government.

46. The Interim Termination Option was selected for the following reasons:
- a. It allowed the Council to take swift and decisive action to preserve the integrity of the Project and try to ensure City Deal funding remained in tact;
 - b. it offered a much cleaner method of terminating as it explicitly allows termination “without liability”;
 - c. it did not, in the view of the Council, prejudice private sector funding as the Council had commissioned its own financial modelling and this indicated that the funding would be primarily based around the Council’s involvement and commitment;
 - d. it enabled the Council to keep on track with the work already undertaken to satisfy Hywel Dda and planning application timeframes; and
 - e. it did not necessarily preclude re-engagement with the University (and indeed we understand that the Council has already indicated to the University that it wishes to re-engage at an appropriate time and in an appropriate manner).
47. Our view is that the above were relevant factors and the Council gave appropriate weight to those factors in reaching its decision to serve an Interim Termination Notice.

PART SEVEN: FUTURE FUNDING ARRANGEMENTS

48. The Report does not consider precisely how future funding will be structured and the appropriate procurement methodologies and this will be the subject of more detailed work in future. However, there are certain observations we are able to make within the confines of the terms of reference for this Report.
49. The potential to establish a corporate vehicle (which may be wholly owned by the Council) still remains and has advantages in terms of offering security for funders and removing certain contractual risks from the Council. This is commonly adopted by local authorities when embarking on development projects.
50. Our understanding of the financial status of the Project and the modelling work undertaken to date by the Council is that its fundability does not depend to any significant degree on Sterling. While Sterling had made initial enquiries of institutional funders, it is commonly accepted that institutional funders such as banks and pension funds will look to the Council (and any other major public sector participants such as the University) as counterparties rather than Sterling, whose balance sheet would be irrelevant to asset and/or covenant backed finance methods. In contrast, the participation of an entity of the strength of the University and Hywel Dda, and also a firm commitment to funding from the City Deal would be major positive factors in attracting institutional private sector finance as well as additional support from corporate private sector bodies in the healthcare sector
51. The modelling work which the Council has commissioned from 1971 Limited is consistent with the work we have seen elsewhere in attracting institutional funding and should place the Council in a strong position to determine the optimum funding structure and the types of funders, and their terms, for most phases of the Project. This will be subject to future detailed scrutiny by the Council's finance team but in the presence of strong public sector support provides a solid foundation to attract private sector funding.
52. It is possible that the Council may have to adopt multiple funding strategies for different components of the Project. For example:
 - a. Seek new private sector investment alongside the Council in the form of risk capital and then jointly appoint contractors following applicable procurement rules;
 - b. Seek debt finance from a bank on commercially competitive terms. This is likely to be assisted by the injection of equity committed by the Council and City Deal;

- c. consider “forward funding arrangements” with a pension fund to deliver 100% finance as has been successfully delivered elsewhere in Wales for the core elements of the Project;
 - d. Consider the issue of a bond to finance the Project (or parts of it) with an institutional investor;
 - e. Consider funding with an overseas fund. We believe there is appetite for this given the international interest in wellness led schemes and investment into the UK (irrespective of Brexit outcomes) and a partnering approach with similar international schemes may yield cost efficiencies or scaling opportunities as well as a better overall scheme; and
 - f. Consider disposal to an appropriate and highly experienced partner for those elements of the scheme which are considered non-core (eg housing to a Registered Social Landlord)
53. We will be reviewing these options in more detail with the Council. In our view, when assessing such options, it will be important to determine the status of University and City Deal support and best value in relation to the terms of the funding on offer.
54. Additionally, a key factor in determining funding strategy will be the interconnectivity of its various elements, which work best when developed as part of an overall strategy rather than in isolation. This will have an impact on the phasing of funding as well as in the creation of linked elements such as public realm treatment. The fact that the Council has already, through its work with Arup, secured an initial planning permission will assist with future private sector funding as well as add to the value of the Delta Lakes site.

APPENDIX

Public Procurement Review

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