

PART 2 – CONFIDENTIAL FACTS AND ADVICE

MD2086

**Title: 2014 -20 European Regional Development Fund (ERDF) programme:
London SME Fund**

Information may have to be disclosed in the event of a request under the Freedom of Information Act 2000. In the event of a request for confidential facts and advice, please consult the Information Governance team for advice.

This information is not for publication because:

This paper contains information which is commercially sensitive. Its disclosure may be considered to prejudice the commercial interests of the GLA and SMEWFL and the ability of the GLA to consider fully the related legal advice and risks.

Date at which Part 2 will cease to be confidential or when confidentiality should be reviewed: to be reviewed once the acquisition of SMEWFL has concluded and by the latest 31 December 2017.

Legal recommendation on the grounds of keeping the information confidential:

In the event of any request for access to the information contained in this document under section 1 of the Freedom of Information Act 2000 ("the Act"), it is considered that access can be denied on the basis that the disclosure of such information would prejudice GLA's and SMEWFL's commercial interests. This is therefore covered by the exemption under section 43 of the Act. The information could also be viewed as information which is in part subject to legal professional privilege which is exempt under Section 42 of the Act, legal advice having been obtained by the GLA from external advisors in respect of the related procurement law risks and mitigating actions.

Section 1 of the Act creates the general right of access, which provides that any person making a request for information to a public authority is entitled:

- to be informed in writing by the public authority whether it holds information of the description specified in the request; and
- if that is the case, to have that information communicated to him/her.

Part II of the Act contains a number of exemptions from disclosure for certain classes of information. In particular, section 42 covers information which is the subject of legal professional privilege and section 43 of the Act provides that information is exempt information if disclosure under the Act would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).

Here information is considered commercially sensitive as its release could detrimentally affect the ability of the parties to effectively negotiate the proposed acquisition and is in part subject to legal professional privilege.

The section 43 exemptions are qualified exemptions and its use is therefore, subject to a public interest assessment.

Public Interest Assessment

At present, on balance, it is considered that the public interest is best served if the information is not disclosed at this point. Disclosure by the GLA would be likely to have a detrimental effect;

- on SMEWFL and GLA's commercial interests as the information is commercially confidential; and
- and for the parties to effectively negotiate the acquisition.

The eligibility of these exemptions should be reassessed in the event of an FOI request for this information as the level of sensitivity will change over time and different circumstances may alter the arguments in favour of non-disclosure.

Legal Adviser - I make the above recommendations that this information should be considered confidential at this time

Name: Rachael Dunn

Date: 24.05.17

Once this form is fully authorised, it should be circulated with Part 1.

Confidential advice:

Due Diligence summary findings

a) Legal Due Diligence

The report produced by Eversheds Sutherland LLP raised no issues which would lead to a conclusion that the acquisition of SMEWFL should not proceed. A number of administrative issues have already been addressed; and some outstanding issues are also in the process of being addressed, as follows:

Pensions: SMEWFL are required to auto enrol its employees on to a workplace pension scheme by the 1 April 2017, the GLA is not currently aware of SMEWFL's preparations undertaken to date. SMEWFL will be in breach of the Pensions Legislation if it fails to automatically enrol its employees by the given date. The GLA will need to understand what preparations SMEWFL are making because if the GLA does acquire SMEWFL this will ultimately be a GLA concern.

Employment concerns: the report has highlighted a number of matters the GLA may wish to consider reviewing upon acquisition including employees' status and employment contracts.

- *Premises:* SMEWFL have office space under a licence agreement. A third party currently occupies space within SMEWFL's office under an informal agreement. SMEWFL's licence agreement does not permit SMEWFL to allow third parties to use its space. This means SMEWFL is in breach of its licence agreement and it could be terminated. It is recommended the third party put in place its own licence arrangements before any acquisition.
- *Review LCIF Membership position:* SMEWFL advised that the GLA could not be a member of the London Co-Investment Fund (a limited liability partnership - LLP). As the GLA is looking to take control of SMEWFL, the GLA will also control the London Co-Investment Fund (LCIF). The GLA received advice

from Counsel last year in relation to Mayor's Energy Efficiency Fund which confirmed that the GLA *could* enter into a Limited Partnership or LLP.

- *Non-executive directors*: there are no agreements in place confirming the non-executive director's roles. To the extent any of these remain in post following the acquisition, it is suggested such letters of appointment are put in place.

b) Finance Due Diligence

- *Liquidity* – the cashflow position is well monitored and managed, but liquidity is only currently assured to March 2018 and therefore the risk remains relatively high. Tight budgetary control will be necessary to ensure the costs base is managed to an appropriate level given the projected loss for the year. As sole member the GLA could be exposed to having to provide cashflow support in future.
- *Loss of private sector expertise from the existing Board* – there may be a reduced appetite of the private sector to work with a wholly owned public company.
- *Articles of Association* – issues have been highlighted for consideration over the detail of wording in the event of an acquisition.
- *Insurance cover* – a number of issues have been highlighted for action before there is change of control.

The following matters, related to SMEWFL's activities as a company, were raised through the financial due diligence and are for general consideration:

- *Financial risk on active funds* – this arises from the nature of SMEWFL's activities with high risk SMEs. The outlook for future performance is the more relevant factor, especially LCIF which is only partially invested. Existing close monitoring should be maintained, but there is assurance from the performance of closed funds.
- *Best practice International Private Equity and Venture Capital Valuation (IPEV) methodology* – GLA should confirm that this is being applied to the latest fund valuations.

Procurement Law Advice

- Consideration has been given to the legal basis on which the GLA may engage directly with SMEWFL ie without a competition for their services as required by the Public Contracts Regulations 2015. As an entity wholly controlled by the GLA, this will be possible. But under its current governance arrangements, with other owners (members) who are private entities, that would not be possible.
- For the direct award approach to continue it will be necessary to ensure the following conditions are met;
 - more than 80% of SMEWFL's activities must be carried out in performance of tasks entrusted to it by the contracting authority;
 - the GLA must exercise control over SMEWFL in a manner similar to control over its own departments; and
 - there must be no direct private participation in SMEWFL, although public body capital participation may be permitted.

The first of these bullets is already the case, the second and third will be addressed by reforming the membership of SMEWFL such that the GLA becomes the sole member. Other public sector bodies could also be given membership in due course.

