

# Birmingham City Council

## Report to Cabinet

25 June 2019



**Subject:** Highway Maintenance and Management PFI Contract

**Report of:** Director, Inclusive Growth and Chief Finance Officer

**Relevant Cabinet Members:** Councillor Waseem Zaffar,  
Cabinet Member for Transport and Environment  
Councillor Tristan Chatfield,  
Cabinet Member for Finance and Resources

**Relevant O&S Chairs:** Councillor Liz Clements,  
Chair, Sustainability and Transport Overview and Scrutiny Committee  
Councillor Sir Albert Bore  
Chair, Resources Overview and Scrutiny Committee

**Report author:** Kevin Hicks, Assistant Director, Highways and Infrastructure, Telephone No: 0121 303 7939  
Email Address: kevin.hicks@birmingham.gov.uk

Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s): N/A		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference: 006640/2019		
Is the decision eligible for call-in?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
See paragraph 2.4 below.		
Does the report contain confidential or exempt information?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Appendix B: Private Appendix		
Exempt information paragraph 3. Information relating to the financial or business affairs of any particular person (including the council).		

## **1 Executive Summary**

- 1.1 Further to Cabinet's decisions of 22 May 2019, negotiation to resolve disputes relating to the Council's Highway Maintenance and Management PFI contract with Amey Birmingham Highways Limited (ABHL), project lenders and Amey LG (ALG) has continued. A heads of terms (which is not legally binding) has been agreed, which sets out the intentions of the parties with regard to a Settlement Agreement.
- 1.2 The Settlement Agreement will agree a commercial settlement of the Council's disputes and will enable ALG to be replaced in a managed exit from the contract.
- 1.3 This report sets out the content of the heads of terms in comparison to the criteria for acceptable settlement approved by Cabinet on 22 May 2019 and seeks authorisation to finalise the terms of the Settlement Agreement.

## **2 Recommendations**

That cabinet:

- 2.1 Approves the Council entering into a Settlement Agreement in respect of disputes under the Highway Maintenance and Management PFI contract in accordance with the agreed heads of terms (the key terms of which are summarised in Appendix B (Private Appendix – Appendix B1);
- 2.2 Delegates authority to the Director, Inclusive Growth and Chief Finance Officer in consultation with the Cabinet Members for Transport and Environment and Finance and Resources, to finalise the terms of the Settlement Agreement (including all necessary agreements to facilitate this) materially in line with the Heads of Terms;
- 2.3 Delegates authority as follows:
  - 2.3.1 To the Assistant Director, Highways and Infrastructure to:
    - undertake the actions in paragraphs 2.1, 2.2 and 2.4 of Appendix B (Private Appendix);and
    - put in place the sources of assurance set out in Appendix B (Private Appendix – B5);
  - 2.3.2 To the Chief Finance Officer to take the actions described in paragraph 2.3 of Appendix B (Private Appendix); and
  - 2.3.3 To the City Solicitor to execute, seal and complete all necessary agreements and documentation to give effect to the above recommendations;
- 2.4 Notes and approves that as per the Constitution (*Section 3: Meetings Administration, paragraph 3.7, Immediate Decision Implementation*) for the reasons stated in paragraph 1.4 of Appendix B (Private Appendix) the interests of the Council will be jeopardised unless an executive decision is implemented immediately on this matter. The Chief Executive, in consultation with the Leader,

has designated the executive decisions in this report as so urgent that their implementation cannot wait until the expiry of the call-in period.

- 2.5 Notes the information contained within the Private Appendix regarding the Council's commercial position to support the above decisions.

### **3 Background**

- 3.1 Background to the current position regarding the Council's Highway Maintenance and Management PFI contract is contained within section 3 of the 22 May 2019 report of the Director, Inclusive Growth to Cabinet. On 22 May 2019 Cabinet approved that:
  - 3.1.1 The Director, Inclusive Growth and Chief Finance Officer would continue to negotiate a settlement to resolve all disputes relating to the contract in accordance with specified settlement criteria; and
  - 3.1.2 Required that a further report be brought to Cabinet no later than 25 June 2019 setting out the proposed final terms of a settlement agreement.
- 3.2 Since that report, negotiations have continued with ALG, the Special Purpose Vehicle (SPV - ABHL) and project lenders. The complexity of this matter should not be underestimated. This is an extremely complex negotiation, involving multiple parties with often conflicting commercial and organisational objectives relating to a very high value contract. Nonetheless, these negotiations have agreed heads of terms with an intention to agree a legally-binding settlement before the end of June 2019. As described in Appendix B (Private Appendix), those heads of terms broadly meet the requirements specified by Cabinet for an acceptable settlement.
- 3.3 The heads of terms are not legally binding in themselves and set out the intentions of the parties regarding the content and commercial structure of the settlement. A summary of the heads of terms is contained in Appendix B (Private Appendix).
- 3.4 A settlement will enable matters to move forward with regard to replacing ALG as subcontractor and improving performance and realising investment in respect of highway services.

### **4 Options considered and recommended proposal**

- 4.1 The options at this stage are either to progress an agreement to settle disputes in accordance with the heads of terms, or not.
- 4.2 Based on an assessment of the negotiated heads of terms and the Council's commercial position the recommended proposal is to enter a settlement agreement in line with the heads of terms that have been agreed. The assessment of the options and potential consequences is contained in section 4 of Appendix B (Private Appendix).

## **5 Consultation**

- 5.1 Officers from Legal and Governance Services, City Finance and Procurement have been involved in the preparation of this report. External legal advice has been obtained from DLA Piper.
- 5.2 Department for Transport (as the Council's sponsoring Government department for the project) has been consulted throughout discussions and is supportive of the Council's approach. The Department is supportive of the Council's approach and has given commitments to work with the Council in addressing the problems arising from performance under the contract.

## **6 Risk Management**

- 6.1 Analysis of risks is contained within Appendix B (Private Appendix – section 5 and Appendix B4).

## **7 Compliance Issues:**

### **7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?**

- 7.1.1 The Council has adopted the *Council Plan 2018 to 2022*. This identifies five outcomes for the city, the first of which is "*Birmingham is an entrepreneurial city to learn, work and invest in.*" Priority 4 under this outcome is that "*We will develop our transport infrastructure, keep the city moving through walking, cycling and improved public transport.*"
- 7.1.2 This decision directly affects investment in and maintenance of the Council's 2,500km highway network and Council-owned infrastructure on it. Such investment will directly reduce the percentage of carriageways that should be considered for structural maintenance; this is a measure for Outcome 1 / Priority 4 of the Council Plan.
- 7.1.3 Citizens' priorities also reflect that road and pavement repairs are the fourth highest priority in the city for citizens.

### **7.2 Legal Implications**

- 7.2.1 The Council has a statutory duty to maintain highway infrastructure, primarily under the Highways Act 1980 and the New Roads and Street Works Act 1991.
- 7.2.2 Under s.111 of the Local Government Act 1972 the Council has power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.
- 7.2.3 The information contained within Appendix B (Private Appendix) is considered exempt under Schedule 12A of the Local Government Act 1972, as it relates to the financial / business affairs of parties to the

Highway Maintenance and Management PFI contract, including the Council.

- 7.2.4 Disclosure of the information within Appendix B would adversely affect the council's ability to negotiate the best value outcome in relation to the contract and disputes by disclosing its strategy to those with whom it is negotiating. It is therefore not in the public interest to make this information available publicly.

### **7.3 Financial Implications**

- 7.3.1 The Council presently receives a PFI grant from government of £51.9m per annum in relation to this contract and funding mechanism. In addition, as part of its Full Business Case, it has agreed to ring fence and index its revenue budget prior to the contract for the provision of these services. In addition to the PFI grant, the Council's budget for 2019-20 (including indexation) is £46.0m.
- 7.3.2 Any financial implications will be maintained within existing HMMPFI resources. Further details are provided in Appendix B (Private Appendix – B3).
- 7.3.3 Legal costs to finalise and progress such matters have been approved under the Council's Procurement Governance Arrangements process (2 February 2017).

### **7.4 Procurement Implications**

- 7.4.1 There are no procurement implications arising directly from this report. The Council's contract with ABHL remains and the replacement of ALG is a matter for ABHL to conclude.

### **7.5 Human Resources Implications**

- 7.5.1 Staff performing the services under the contract will have rights under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). This is anticipated to involve the transfer of staff from ALG to another provider as an interim arrangement and then potentially to a replacement Operating Subcontractor on appointment thereafter.

### **7.6 Public Sector Equality Duty**

- 7.6.1 A copy of the initial equality assessment screening (reference EQUA314) is shown in Appendix A.

## **8 Appendices**

- 8.1 Appendix A: Equality Assessment
- 8.2 Appendix B: Private Appendix

## **9 Background Documents**

9.1 Report of the Director, Inclusive Growth to Cabinet, 22 May 2019.

## **Appendix A**

### **Equality Assessment**

#### ***Equality Act 2010***

The Executive must have due regard to the public sector equality duty when considering Council reports for decision.

The public sector equality duty is as follows:

- 1 The Council must, in the exercise of its functions, have due regard to the need to:
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 2 Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
  - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- 3 The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- 4 Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
  - (a) tackle prejudice, and
  - (b) promote understanding.
- 5 The relevant protected characteristics are:
  - (a) marriage & civil partnership
  - (b) age
  - (c) disability
  - (d) gender reassignment
  - (e) pregnancy and maternity
  - (f) race
  - (g) religion or belief
  - (h) sex
  - (i) sexual orientation

#### ***Equality Screening***

The equality screening (reference EQUA314) follows.

**Appendix B**

**Private Appendix**



Title of proposed EIA	Highway Maintenance and Management PFI Contract
Reference No	EQUA314
EA is in support of	New Function
Review Frequency	Annually
Date of first review	12/06/2020
Directorate	Inclusive Growth
Division	Highways and Infrastructure
Service Area	Street Services Division
Responsible Officer(s)	<input type="checkbox"/> Jenny Bent
Quality Control Officer(s)	<input type="checkbox"/> Jamie Davies
Accountable Officer(s)	<input type="checkbox"/> Kevin Hicks
Purpose of proposal	The Highway Maintenance and Management PFI contract delivers investment and maintenance of highway infrastructure to June 2035. This is a proposed decision regarding the commercial management of the contract.
Data sources	relevant research
Please include any other sources of data	
ASSESS THE POTENTIAL IMPACT AGAINST THE PROTECTED CHARACTERISTICS	
Protected characteristic: Age	Not Applicable
Age details:	There is no adverse impact on any of the protected groups and therefore this will not be applicable.
Protected characteristic: Disability	Not Applicable
Disability details:	There is no adverse impact on any of the protected groups and therefore this will not be applicable.
Protected characteristic: Gender	Not Applicable
Gender details:	There is no adverse impact on any of the protected groups and therefore this will not be applicable.
Protected characteristics: Gender Reassignment	Not Applicable
Gender reassignment details:	There is no adverse impact on any of the protected groups and therefore this will not be applicable.

Protected characteristics: Marriage and Civil Partnership

Not Applicable

Marriage and civil partnership details:

There is no adverse impact on any of the protected groups and therefore this will not be applicable.

Protected characteristics: Pregnancy and Maternity

Not Applicable

Pregnancy and maternity details:

There is no adverse impact on any of the protected groups and therefore this will not be applicable.

Protected characteristics: Race

Not Applicable

Race details:

There is no adverse impact on any of the protected groups and therefore this will not be applicable.

Protected characteristics: Religion or Beliefs

Not Applicable

Religion or beliefs details:

There is no adverse impact on any of the protected groups and therefore this will not be applicable.

Protected characteristics: Sexual Orientation

Not Applicable

Sexual orientation details:

There is no adverse impact on any of the protected groups and therefore this will not be applicable.

Please indicate any actions arising from completing this screening exercise.

Please indicate whether a full impact assessment is recommended

NO

What data has been collected to facilitate the assessment of this policy/proposal?

Consultation analysis

Adverse impact on any people with protected characteristics.

Could the policy/proposal be modified to reduce or eliminate any adverse impact?

How will the effect(s) of this policy/proposal on equality be monitored?

What data is required in the future?

Are there any adverse impacts on any particular group(s)

No

If yes, please explain your reasons for going ahead.

Initial equality impact assessment of your proposal

Consulted People or Groups

Informed People or Groups

Summary and evidence of findings from your EIA

There is no adverse impact on any of the protected groups and therefore this will not be applicable.

QUALITY CONTORL SECTION

Submit to the Quality Control Officer for reviewing?	No
Quality Control Officer comments	
Decision by Quality Control Officer	Proceed for final approval
Submit draft to Accountable Officer?	Yes
Decision by Accountable Officer	Approve
Date approved / rejected by the Accountable Officer	17/06/2019
Reasons for approval or rejection	
Please print and save a PDF copy for your records	Yes

Content Type: Item

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