

Birmingham City Council

Report to Cabinet

22nd May 2019



Subject: HOME TO SCHOOL TRANSPORT – MEDIUM-TERM SERVICE PROVISION ARRANGEMENTS

Report of: Director of Education and Skills

Relevant Cabinet Member: Cllr Jayne Francis – Education, Skills and Culture
Cllr Kate Booth- Children`s Wellbeing
Cllr Paulette Hamilton – Health and Social Care
Cllr Tristan Chatfield – Finance and Resources

Relevant O &S Chair(s): Cllr Mariam Khan - Learning, Culture & Physical Activity
Cllr Mohammed Aikhlaq - Children`s Social Care
Cllr Rob Pocock - Health and Social Care
Cllr Sir Albert Bore - Resources

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	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference: 005068/2018		
Is the decision eligible for call-in?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

1 Executive Summary

- 1.1 The purpose of this report is to ask Cabinet to approve an extension to the Temporary Transition Services Agreement (TTSA), put in place following the

insolvency of Accessible Transport Group (ATG) and to allow the Council to enter into Single Contractor Negotiations with the purchaser of ATG Ltd or with any other satisfactory provider.

- 1.2 The report provides details of the current position and an overview of the proposed plan to stabilise and maintain home to school transport service provision. The aim is to ensure that there is no interruption in the delivery of the Council's statutory services for education transport provision.
- 1.3 The situation continues to be extremely dynamic with discussions continuing to take place on a daily basis. Consequently, this is a late report, as Officers have wanted to ensure that Cabinet have the most up to date information possible and the report contains planning assumptions based on best information available to officers from the Administrators as of 13 May 2019. The current situation is that officers understand there are three organisations who have presented workable offers, but the Council has not received full information pertaining to the nature of the offers and the indicative cost of the service. The Council will carry out a full due diligence check once further information is supplied by the Administrator.

2 Recommendations

That Cabinet:

- 2.1 Approves the extension of the Temporary Transition Services Agreement (TTSA) for a sum of up to £800k for a maximum period of eight weeks, which represents the usual costs for the original ATG Contract.
- 2.2 Authorises the City Solicitor (or their delegate) to execute and complete all necessary legal documents to give effect to above.
- 2.3 Delegates authority to the Interim Director of Commissioning (Education and Skills) to enter single contractor negotiations (SCN) in consultation with the Cabinet Members for Children's Wellbeing and for Finance and Resources under Standing Order 10.2 with the purchaser of Accessible Transport Group Limited or, if the sale of ATG is not completed for any reason or not completed to the satisfaction of the Council, with any other satisfactory provider (see paragraph 4.11), for the provision of home to school transport for a period of up to two years, commencing in June 2019.

- 2.4 Delegates approval of the procurement strategy for the remaining Home to School Transport routes to the Cabinet Members for Education, Skills and Culture; for Children`s Wellbeing; for Health and Social Care and for Finance and Resources jointly with the Director for Education and Skills.
- 2.5 Cabinet notes and approves that as the Council is jeopardised unless an executive decision is implemented immediately, the Chief Executive in consultation with the Leader has designated this executive decision as so urgent that its implementation cannot wait until the expiry of the call-in period.

3 Background

- 3.1 ATG was a major provider of statutory home to school transport services to the Council, Transport for West Midlands (West Midlands Combined Authority) and other neighbouring Local Authorities and charities. ATG is made up of Accessible Transport Group Limited (parent company), Accessible Transport Group Contract Services Limited (ATGCSL - subsidiary), Ring and Ride West Midlands Limited (subsidiary) and WMSNT (dormant subsidiary company).
- 3.2 ATG subcontracted service delivery of home to school service provision for the Council to Accessible Transport Group Contract Services Limited (ATGCSL). Pursuant to the contract with the Council, ATG holds 48% of the contract including 210 routes, transporting approximately 2,000 children per day and valued at £5M per annum. When the Council was initially made aware that ATG were in administration, 15 routes were reallocated to existing providers within the T023 framework, the value of this was £400k per annum.
- 3.3 The Council has a statutory duty to maintain service delivery for eligible children and young people. Any interruptions in service can have a negative impact on the wellbeing of service users and place a risk of potential legal challenge against the Council for failing to fulfil its statutory duties.
- 3.4 On 15 March 2019, the Council was informed that ATGCSL were insolvent. Subsequently the entire ATG Group has gone into administration. The appointed Administrator for the ATG Group, agreed to continue to trade ATGCSL in administration until sale of the ATG Group or alternative service provision is put in place by the Council. Paramount importance has been placed on maintaining statutory service delivery, therefore the Council entered into the TTSA to secure

service continuity (to expire on 31 May 2019); this is documented in a report to Cabinet on 28 March 2019.

- 3.5 The TTSA will automatically terminate (unless extended in writing) on the 31 May 2019, giving the Council only four weeks to secure service continuity post TTSA. The TTSA can be terminated with five days' notice by either party, leaving the service operating at high risk.
- 3.6 The Administrator has noted that the sale of ATG is a transaction with aspects which differentiate it from a more standard insolvency transaction and as such has agreed to work with the Council and West Midlands Combined Authority (WMCA) throughout the sale process. ATG Holdings operates separately and is separately funded however the prior running of ATG make a sale more complex and the Council's ability to provide a contract length of up to two years will encourage interested parties to pursue a transaction.
- 3.7 Whilst the Administrator's ultimate duty is to act in the best interest of creditors of ATG Group, officers have nonetheless built a strong working relationship with the Administrators and WMCA. Given the nature of the services, the Administrator has recognised that the sale is not simply a commercial offering. Therefore, it is in the best interest of the Administrator to ensure the Council and other public bodies are included in the process. However the Council's ability to make decisions will need to continue to be swift and commensurate to achieve a successful outcome whereby services are maintained with no disruption.
- 3.8 The structure of the transaction is a sale and purchase agreement ("SPA") to acquire the business and assets of the three entities of ATG. Following receipt of offers, the Administrator will assess and compare the offers, based on (at least) the following criteria:
- The total consideration and therefore expected returns to creditors from each offer (bearing in mind there are three separate insolvent estates, with individual creditor pools, to be assessed);
 - The structure of the consideration e.g. if any consideration is deferred, the timing and conditions attached to that and therefore the risks of deferred consideration not being paid;

- The deliverability of each offer, the further due diligence required and with consultation with the Council and WMCA.

3.9 The SPA is relatively straightforward from the Administrator's perspective however the length of time to negotiate is likely to be dependent on:

- The bidders' familiarity with purchase of business and assets from insolvency processes;
- Whether the purchaser is bidding for the business and assets of Ring & Ride and Education Services together or if there are separate transactions;
- Whether the purchaser is bidding for the freehold property, namely the depot in Aston;
- The separate negotiations required directly with WMCA, for the Ring & Ride grant, and the Council (and other councils) for the Education Services contracts.

3.10 The sale process in respect of ATG is currently underway and the Administrator has received three bids, who are all interested in enquiring the entire group. The Administrator has also received a number of bids for the only significant asset held by ATG, namely the Aston transport depot. The Administrator is considering all its options and as part of that process, will assess each offer, and consult with the Council and the WMCA. Should the Administrator decide to proceed with the sale of the entire ATG Group, it will select a preferred bidder from the three submitted bids and negotiate the sale with that bidder. Authority is sought for the Council to enter into a SCN for the provision of statutory home to school transport services with the Administrator's selected purchaser of ATG as per paragraph 2.3.

3.11 The sale of ATG has been further complicated as ATG operated using Section 19 Permits rather than a Public Service Vehicle (PSV) operator's licence. Section 19 of Transport Act 1985 allow organisations that operate in Great Britain without a view to profit to have a permit which exempts them from the need to hold a PSV operator's licence when providing transport for a charge. The Council has been informed that ATG is the largest user of these permits in the UK and as such an insolvency of this scale is unprecedented from the Traffic Commissioner's perspective. Additionally, this causes transactional complexities for interested

parties as bidders would need to be able to operate under full PSV licences, at significant additional cost.

- 3.12 Further capital investment costs to bidders are added by the introduction of the Clean Air Zone and thus the potential replacement of ATG's current fleet. The Council needs to be able to offer a contract in length that will ensure interested parties have the ability to accept the above risks and to secure an acceptable resolution to the permit issue.
- 3.13 After a joint inspection by Ofsted and CQC there are major improvements to be made across the system in supporting children and young people with SEND. As a result a written statement of action has been produced; this has outlined a range of improvements that need to be made across the City over the next two to four years, which include a focus on independence and transitions, and which will positively affect the range of transport options available to families.
- 3.14 There is an overwhelming and immovable requirement to maintain statutory service provision for vulnerable service users. Therefore condition 10.2 of Council's Standing Order are met as the collapse of the ATG group was not foreseen by the Council and failure to make a direct award to the entity that acquires ATG could leave the Council without vital service provision and in breach of its statutory duty. Thus the direct award of contract up to a two year period, to the purchaser of the ATG group is necessary. There is now insufficient time to follow a competitive procurement. The adverse consequences of delaying the award of the contract significantly outweigh the consequences of not securing effective competition.

4 Proposal

- 4.1 As set out at section 3 above, the Administrator intends to consult with the Council prior to selecting its preferred purchaser of the ATG Group. To ensure the Council is able to better understand the offers and subsequently enable it to make a recommendation to the Administrator, it is the intention to issue the three bidders with a due diligence questionnaire. This will form the Council's recommendation to the Administrator as to who the Council would wish to negotiate a direct award with.

- 4.2 It is envisaged that the contract will start in June 2019. However, due to the unprecedented and extremely complicated nature of the sale, should the Administrator and the Council need additional time both parties can agree to extend the TTSA.
- 4.3 Direct award of a contract for a period of up to two years is considered a realistic 'medium term' arrangement in order to meet our objective of maintaining service delivery to vulnerable service users, given the risk and complexity of the transition of services to a new provider. The contract will include a six-month break clause (if both parties agree). It will also be a contractual requirement that the service specification and outputs are reviewed at six months to ensure the contract is fit for purpose, given the uncertainty and liabilities a new provider would be faced with when purchasing ATG. The contract will be based on the Council's standard terms and conditions, with improvements where necessary.
- 4.4 The process will be documented and standardised for fairness and transparency. The Assistant Director of Commissioning, Education and Skills will be leading the process and will be joined by the Travel Assist Team Manager and representatives from Finance and Legal.
- 4.5 The due diligence process will ask the three potential purchasers of ATG to present the Council with a high-level mobilisation plan to ensure the smooth transition of services and to ensure minimal disruption. The three potential purchasers will also be asked to specifically address the permit issue and the Clean Air Zone compliance in detail. Responses to these enquiries will inform the Council's recommendation to the Administrator, see paragraph 4.1.
- 4.6 Currently officers from Education and Skills, Legal, Finance, Communications and Corporate Procurement are meeting on a regular basis to manage the insolvency of ATG Group and service delivery under the TTSA. These meetings will continue until a suitable Intelligent Client Function is in place to ensure the contract is appropriately managed from mobilisation. A contract management plan will be put in place and submitted to the Assistant Director of Commissioning (Education and Skills) before the contract goes live in June 2019.
- 4.7 The purchaser of ATG will be required to commit to the Birmingham Business Charter for Social Responsibility and be required to pay the Birmingham Living

Wage. Negotiations will also include what opportunities will be available specifically for young people with SEND and care leavers.

- 4.8 This service is a statutory service and the Council has a duty to provide home to school transport to eligible children and young people, many of whom are vulnerable. In addition, the impact of not entering into negotiations with the purchaser of ATG will have a significant adverse effect on children and young people's schooling and independence.
- 4.9 Currently the service is operating at high-risk as the TTSA could be terminated with five days' notice and in any event the TTSA is due to expire on the 31 May 2019. Entering into a SCN provides, as far as possible, a secure option for the future of home to school transport.
- 4.10 Given the complexities of the sale, the Administrator has indicated that it is willing to extend the TTSA for a short period of up to two months until 31 July 2019. Authority is sought for this short extension as whilst operating risk would continue to sit with the Council during this period (see Cabinet report of 28 March 2019 and option 6 of appendix 1), failure to extend the TTSA could result in immediate cessation of service provision without alternative service delivery arrangements being in place. The consequences of this are detailed in the report of 28 March 2019 and summarised in option 1 of Appendix 1.
- 4.11 There is a risk that the sale of the ATG Group may fall through (for example if the Administrator does not find a satisfactory buyer; does not achieve a sufficient sale price, etc.). There is also a risk that the Administrator does not accept the Council's recommendation as to a preferred purchaser from the three offers it has received and instead selects a buyer that is unacceptable to the Council. In such circumstances, authority is sought to negotiate directly with the remaining two bidders or an alternative satisfactory provider identified by the Council.
- 4.12 The existing T023 framework (for the provision of transport to educational settings) will terminate on 30 October 2019; work has begun on developing a procurement strategy to replace this framework. Before the collapse of ATG, it was proposed that the procurement approach would allow the council to purchase all transport provision required. However, what the Council now needs to manage is two processes – one that provides continuity in the medium-term for the transport provided by ATG (potentially around 48% of routes); and one that

addresses the need to continue with the procurement of all other transport provision (potentially around 52% of routes). Both approaches will be shaped by the learning and outcomes of the public consultation on the proposed Transport Assistance 0-25 Policy. The outcome of the consultation was presented to Cabinet on the 16 April 2019 however it is subject to call-in and will return to Cabinet on 22 May 2019.

- 4.13 A Dynamic Purchasing System (DPS) is currently used by the surrounding Local Authorities in West Midlands to procure their education-related transport needs and it is the intention that the Council implement a DPS. A DPS allows the Council to procure services that are available in the market quickly and efficiently. Unlike a framework agreement (which is currently in place), a DPS remains open to new suppliers, giving the Council access to large pool of providers. From previous market engagement the planned DPS (which will contain all other routes apart from those provided by ATG) would need to run for a minimum of five years in length due to the level of investment required from potential providers in conjunction with the Clean Air Zone. The DPS will only contain routes that would not be covered by the direct award to the purchaser of ATG.
- 4.14 A direct award to the purchaser of ATG for up to 2 years, will allow officers to complete a full commissioning review of the whole Travel Assist service and when the direct award to ATG expires, officers could either run a full procurement to end concurrently with the DPS (dependent upon the length of direct award, possibility for another 3 years,) or the ATG routes could be added to the DPS system. All future options will be procured in accordance with the Council's Standing Orders and EU Regulations.
- 4.15 Officers have sought advice from Steer Group, an independent consultancy on home to school transport, who is currently working with the Council to provide subject matter expert advice on the upcoming procurement. Steer Group's feedback on the future commissioning plan for home to school was that it balanced value for money with the fluidity and flexibility required to deliver services for children with high levels of need.

Options Appraisal

- 4.16 Appendix 1 is an option appraisal of all options considered by officers.

5 Consultation

- 5.1 The Cabinet Members for Children's Wellbeing and Finance and Resource, along with the Director Education and Skills and the Director of Finance and Governance have been consulted and agree with the content of the report and the decisions recommended.
- 5.2 Officers from City Finance, Procurement and Legal and Governance have been involved in the preparation of this report.
- 5.3 Due to the urgency and sensitivity of this matter it has not been possible to consult with service users in relation to this matter, or their potential changes in transport.

6 Risk Management

- 6.1 In these extreme circumstances, option 4 as set out in Appendix 1, is seen to offer the best solution to provide a continued service for the delivery of home to school transport. There are risks associated with this option. Appendix 2 seeks to provide some mitigating suggestions.
- 6.2 Due to the impact of this situation a due diligence review has been undertaken on the T023 framework currently used by the Council to deliver statutory home to school transport services.

7 Compliance Issues:

- 7.1 The recommended option is consistent with the Council policies, plans and strategies.
- 7.2 The Council has a statutory duty to make transport arrangements for eligible children including those with SEND and to provide free transport to eligible children based on distance, safe walking routes and low income. The Council also has a statutory duty to make transport arrangements that it considers necessary to facilitate the attendance of young people of sixth form age and some young adults at their educational establishments. Some children and adults have needs that require specialist vehicles and guides; this can be provided under the proposed contract. Failure to provide this transport could mean a significant number of children with SEND are unable to access their educational provision and the Council would be in breach of its statutory duties.

7.3 Supporting educational attainment and independence helps to tackle the causes of deprivation and inequality through improving educational performance and confidence and therefore contributing towards the Council Priority to ensure that Birmingham is an aspirational city to grow up in.

7.4 **Legal implications**

7.4.1 The Council has a duty under Section 508A of the Education Act 1996 to promote sustainable modes of travel.

7.4.2 The Council has a duty under Section 508B of the Education Act 1996 to make suitable home to school travel arrangements for eligible children.

7.4.3 The Council has a duty under section 509AA of the Education Act 1996 to provide young people of sixth-form age with the transport or otherwise that the Council considers necessary to facilitate their attendance at their place of education or training.

7.4.4 The Council has a duty under section 508F of the Education Act 1996 to make such arrangements for the provision of transport and otherwise as it considers necessary for facilitating the attendance of young adults at their place of further or higher education.

7.4.5 The Council is under a duty to have regard to statutory guidance issued by the Department for Education when carrying out its duties in relation to home to school travel and transport.

7.4.6 As per paragraph 4.10 of the report, a short term extension of the TTSA will mean the operating risk of trading the company in administration will continue to sit with the Council during this period. The detailed risks associated with the TTSA are set out in the Cabinet report of 28 March 2019. However, not extending the TTSA could result in immediate cessation of service provision without alternative service delivery arrangements in place (implications of which are also set out in the 28 March 2019 report to Cabinet)

7.4.7 The proposed direct award of a contract for up to two years is made pursuant to Regulation 32 (C) Public Contract Regulations 2015 (please see paragraph 7 of this report (procurement implications) and appendix 1 (i) for a summary of risk).

7.5 **Financial implications**

- 7.5.1 The value of extending the TTSA will cost £800k, the extension cost will be accommodated within the current budget provision for Travel Assist; however it is envisaged that this period will not need to be fully utilised, in which case the budget will be reduced proportionately, but is required as a contingency.
- 7.5.2 The cost of the current service is £4.6M per annum (based on previous spend minus routes that have since been reallocated). Clarification of costs has not yet been received by the Council however the estimated cost of the service to be procured from the new provider, to the best knowledge of officers, is likely to be significantly higher. This is due to expected additional costs relating to the licensing issue, compliance with the Clean Air Zone, replacing fleet vehicles etc.
- 7.5.3 The outcomes of the negotiations and the associated costs will be reported back to Cabinet within the Award Report and will be funded from the approved budget for Travel Assist in 2019/20 of £20.7M within Education and Skills Directorate. Due to the fluidity and nature of this transaction it is difficult to fully consider the financial implication at this point.

7.6 Procurement Implications

- 7.6.1 The estimated value of the proposed direct award is over the OJEU threshold pursuant to the Public Contract Regulations 2015 (as amended) ("PCR 2015").
- 7.6.2 Regulation 32 (2) (c) of the Public Contract Regulations 2015 ("PCR 2015") permits the direct award of a contract, where for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive with negotiation cannot be complied with.
- 7.6.3 The requirements of Regulation 32 (c) are met as the administration of the ATG group of companies was not foreseen and there is now insufficient time to run a procurement exercise (as set out in section 4 above). A direct award of the contract to the selected purchaser of the ATG group is the only way the Council can maintain service provision of a vital statutory service.
- 7.6.4 The direct award of a contract for a period of up to two years is considered to be proportionate, transparent and a fair response to the collapse of the ATG Group:

- (a) Home to school transport is a vital and statutory service that provides transport to some of the most vulnerable children and young people in the City.
- (b) A full service review is required to ensure the correct provision is put in place for service users going forwards. As identified at paragraph 3.13, a joint inspection by Ofsted and CQC identified major improvements to be made across the system in supporting children and young people with SEND. As a result a written statement of action has been produced and this has outlined a range of improvements that need to be made across the City in the coming years.
- (c) The level of investment required, giving consideration to how ATG has been operated in the past, TUPE, the licensing issue and the Clean Air Zone, means any organisation interested in purchasing ATG requires at least two years to stabilise and then develop the service.
- (d) A contract for a period of up to two years is also considered a proportionate response to the Section 19 permit issue given the risk, resource and time required to resolve the issue.
- (e) In the absence of availability of short term service provision and the risk of fragmentation of the service (see Appendix 1), a direct award of up to two years is the only possible response to the unforeseen and immediate requirement to maintain and stabilise service delivery for vulnerable users.

7.7 Human Resources Implications

- 7.8.1 The Council will continue to work with the Administrator to ensure the full understanding of any TUPE considerations.

8 Public Sector Equality Duty

- 8.1 The requirements Council's Equality Policy and the Equality Act 2010 policy will be specifically included as part of any implementation of any decision.
- 8.2 Many of the service users have a disability, and could be adversely affected by any changes to the service. The aim will be to minimise disruption as much as possible, and to improve the services received where possible.

9 Appendices

- 9.1 Appendix 1 – Options Appraisal
- 9.2 Appendix 2 – Risk Mitigation
- 9.3 Appendix 3 – Equality Impact Assessment

10 Background Documents

Cabinet Report on Home to School Transport – Interim Service Provision, 28 03 2019